CHAPTER 3

KEY ISSUES

3.1 This chapter discusses the key issues raised in the course of the Committee's inquiry.

General response to the Bill

3.2 In accord with submissions to the ALRC's inquiry, some witnesses noted that existing laws already provide for the protection of sensitive national security information during criminal proceedings. The Australian Lawyers for Human Rights asserted that 'proceedings that unavoidably have to reveal matters of national security should and can be conducted in camera.'[1] Some submissions rejected the proposed legislation outright.[2] The main, but not the only, objection was that the legislation would undermine the right to a fair trial.[3]

3.3 A number of submissions, however, acknowledged that the Bill attempts to address a significant issue in reconciling the desire to protect Australia's national security while at the same time upholding the rights of an individual to a fair trial. The Commonwealth Director of Public Prosecutions submitted that:

> Our experience in prosecuting cases involving sensitive information has demonstrated the potential for difficult issues to arise in protecting the very information that is the subject of the prosecution. The DPP supports legislative measures to provide a procedure in cases involving issues surrounding the disclosure of information that may affect national security.[4]

3.4 The Australian Press Council (APC) submitted that 'the bill makes a genuine endeavour to address a significant risk to the security of sensitive information without unduly hampering judicial discretion to hear and determine prosecutions in a fair and effective manner'.[5] The Tasmanian Police Department of Justice and Public Safety supported the Bill.[6]

3.5 The Law Council believed that the current regime for the protection of security sensitive information is satisfactory and noted the adequacy of the existing mechanisms that involve:

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1 *Submission 10*, p. 3.

2 For example, Amnesty International Australia, *Submission 11*, p. 4.

3 See, for example, Mr Patrick Emerton, *Submission 13*, p. 11.

4 *Submission 5*, p. 1.

5 *Submission 3*, p. 2.

6 *Submission 21*.

- the criminalisation of unlawful disclosure;
- rules of evidence and procedure allowing for restrictive orders including in camera hearings in special circumstances; and
- well established common law and statutory rules relating to public interest immunity.[7]

3.6 Even so, the Law Council was prepared to support 'reasonable and proportionate measures' which would 'positively impact upon Australia's national security and the overall interests of justice'.[8] It recognised that situations would arise 'which demand that access to sensitive national security information be prohibited or restricted in courts and tribunals',[9] but was strongly of the view that any such limitations remain the responsibility of the courts, that the onus be always upon those seeking to limit access, and that any permitted limitations upon access always remain consistent with the principles of fair trial.

3.7 In particular, the Law Council argued that in a criminal trial an accused should retain access before the trial to any information which may be tendered in evidence by the prosecution or which may assist the accused in representation of the defence. Further, all evidence presented against an accused should be tendered in the presence of the accused and the lawyer of his choice.[10] The Law Council informed the Committee that it is:

> … generally supportive of proposals to create new procedures for dealing expeditiously with the use and management of security sensitive information in hearings as soon as a trial begins, or if already commenced, as soon as possible after the relevant information comes to the court's attention.[11]

3.8 Indeed, in assessing the overall merits of the proposed legislation, Mr Bret Walker SC, former President of the Law Council, told the Committee:

> The trade-offs have gone too far and have created dangers … Ultimately, day by day, our 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' … 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 …

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7 *Submission 8*, p. 5 and submission to the ALRC inquiry.

8 *Submission 8*, p. 5.

9 Submission to the ALRC inquiry, 16 April 2004, p. 3.

10 ibid.

11 *Submission 8*, p. 5.

> 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.[12]

3.9 The ALRC noted that the Bill accords with one of the central recommendations in its report 'that the Commonwealth enact a 'National Security Information Procedures Act to deal specifically and solely with the protection of classified and security sensitive information in legal proceedings'.[13] It acknowledged that the Bill largely incorporates the framework and terminology it developed in its proposed statutory scheme, as well as adopting a number of principles and processes consistent with those expressed by the ALRC.

3.10 The Bill and the ALRC's proposed legislation cover common ground and in most instances agree on the overall procedures that would govern the use of sensitive national security information. Nonetheless, the ALRC noted significant points of departure in the Bill from its recommendations. In its view, the Bill represents somewhat different ways of achieving the same aims and outcomes, rather than a direct rejection of the ALRC's recommended approach or the application of a fundamentally different philosophy.[14]

Definition of national security

3.11 The definition of national security is central to the proposed legislation. The Bill requires both the prosecutor and the defendant to notify other parties and the court if he or she is aware that evidence to be presented during proceedings is likely to affect national security. It is on the grounds of national security that the Attorney-General in issuing a certificate will determine whether information may or must not be disclosed during criminal proceedings. Finally, it is a matter that the courts must have regard to in deciding to make an order regarding the Attorney-General's certificate. Indeed, the Bill requires the court to give greatest weight to this matter.

3.12 Thus, in criminal proceedings involving sensitive information, much depends on the interpretation given to national security. The meaning of this term, however, is strongly contested. One of the main challenges is to capture the meaning of a condition or state of affairs that is constantly changing.

3.13 The definition of 'national security' in the Bill is expressed in comprehensive terms to include defence, security, international relations, law enforcement interests and national interests.[15]

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12 *Committee Hansard*, 5 July 2004, pp. 14-15.

13 *Submission 1*, p. 4.

14 ibid.

15 Clause 8.

3.14 The Committee received a considerable amount of evidence expressing concern about the definition. APC, supported by John Fairfax Holdings Limited and FreeTV Australia, was concerned about its breadth, arguing that it is 'ridiculously wide'.[16] It stated that:

> The sweeping nature of this definition has the potential to include within its scope a broad range of types of information which not only relate to matters of public interest but which are appropriate matters for public debate. Just a few examples would be contracts for government tenders, analysis or forecasts of the Australian economy, proposed trade agreements with foreign governments, planned changes to Australia's telecommunications infrastructure, or reports of mismanagement within Australia's immigration detention centres.[17]

3.15 Amnesty International Australia (Amnesty International), Mr Joo-Cheong Tham from the School of Legal Studies at La Trobe University, and Mr Patrick Emerton also drew attention to the very broad definition of national security and called for a more stringent test of what constitutes national security.[18] The Australian Muslim Civil Rights Advocacy Network (AMCRAN) stated that 'almost any matter involving a non-Australian citizen could be covered by the definition of 'international relations', namely 'political, military and relations with foreign governments and international organisations'.[19]

3.16 However, the implications stemming from the breadth of the meaning of national security go beyond the Attorney-General's certificate of non-disclosure which is to be taken as conclusive evidence that the material, if disclosed, would prejudice national security. It is of significance to the prosecutor and defendant who are required to notify the Attorney-General if they know or believe that they will disclose information that relates to or may affect national security. The same obligation applies if they know or believe that a witness will disclose national security information or that the presence of the witness may affect national security. Failure to do so is an offence which carries a maximum penalty of two years imprisonment.[20]

3.17 Amnesty International expressed concern that:

> …the definition of 'national security' is so broad as to make it virtually impossible to know if information is going to relate to national security or

16 *Committee Hansard*, 5 July 2004, p. 16. See also *Submission 2* and *Submission 17*.

17 *Submission 3*, p. 1.

18 *Submission 9*, p. 1; *Submission 11*, pp. 11-12; *Submission 13*, p. 19. While Amnesty International accepted that there may be cases where the public's access to the proceedings may be restricted for reasons of national security, it argued that it is important to ensure that national security is clearly defined and limited. In its view the definition was 'unacceptably broad'.

19 *Submission 12*, p. 2.

20 Clauses 35, 36 and 37.

> affect national security and therefore it is virtually impossible to know if one is committing an offence.[21]

3.18 The Attorney-General's Department agreed that the definition was very broad. At the public hearing, a representative of the Department informed the Committee that, in seeking to narrow the definition, it had considered identifying offences to which the legislation would apply. It found, however, that activities such as fraud may have been excluded. The representative explained that, for example, fraud in a defence contract involving the purchase of sensitive equipment may give rise to national security issues.[22] The Department did not elaborate on other approaches that might be taken to narrow the definition and participants in the inquiry did not offer alternative definitions.

The Committee's view

3.19 The Bill does not specify or even indicate what would be prejudicial to national security—this is a matter for the Attorney-General to decide. The Committee accepts that the term 'prejudice national security' is inherently difficult to define and interpret, relying on a highly subjective assessment. Further, any interpretation of the term assumes significance in light of the political and security environment which changes over time depending on perceived threats and developments in international relations.

3.20 Even so, the Committee believes that the definition contained in the Bill is broad in the extreme, especially considering it is being used as the basis for the non-disclosure of information in criminal proceedings. The defendant is required to notify the Attorney-General and the court if he or she knows or believes that information to be presented during the proceedings relates to, or if disclosed is likely to affect, national security. The Committee notes that the definition of national security incorporates such broad areas of national activities which in effect may make the definition unhelpful or unworkable for the defendant.[23]

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

Appropriate use of the definition

3.22 Susceptibility to abuse is one of the main concerns with legislation that allows an agency or a person the discretion to determine whether the disclosure of information would prejudice national security in order to restrict the disclosure of

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21 *Submission 11*, pp. 12-13.

22 *Committee Hansard*, 5 July 2004, p. 24.

23 Clause 37 makes it an offence if the person intentionally contravenes Subclauses 22(1) and (2), 23(2) and 6 and the disclosure of information is likely to prejudice national security.

information in criminal proceedings. A number of submissions expressed concerns that the Attorney-General may use his or her authority to protect interests that are not related to national security. They underlined the importance of having in place sufficient safeguards to ensure procedural fairness.

3.23 For example, APC noted that there is no requirement that the information that may be disclosed in a Federal criminal proceeding 'must be soundly based.'[24] It proposed that the definition of national security be narrowed so as to exclude information relating to matters which ought 'rightfully to be the subject of public debate'.[25]

3.24 APC suggested further that a provision be inserted into the proposed legislation which would make it an offence 'to issue a certificate for an inappropriate purpose'.[26] It added '(s)uch inappropriate purposes would include the concealing of incompetence, misconduct or corruption'.[27] Furthermore, APC argued that the Attorney-General should be prohibited from making a determination on the issuing of a certificate 'if he or she has a conflict of interest'.[28] Ms Inez Ryan from APC told the Committee that:

> 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.[29]

3.25 Ms Ryan acknowledged that such a measure may not necessarily prevent the Attorney-General from issuing certificates improperly but would set a 'tone of responsibility and would make an Attorney-General think twice before issuing a certificate purely for political purposes'.[30]

3.26 APC also suggested that:

> If the information concerns the policies or actions of a current government the decision as to whether to issue a certificate should be made by an independent officer, not by a member of the cabinet.[31]

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24 *Submission 3*, p. 1.

25 ibid.

26 ibid.

27 ibid.

28 ibid.

29 *Committee Hansard*, 5 July 2004, pp. 16–17.

30 ibid, p. 17.

31 *Submission 3*, p. 1.

The Committee's view

3.27 The Committee agrees that the Bill should not be used to prevent disclosures that would expose incompetency or wrongdoing. It believes that any restriction placed on the disclosure of information in criminal proceedings on the grounds of national security should ensure that the limitation is reasonable, justifiable and necessary. Accountability must therefore be a central feature of such legislation.

3.28 In taking this view, the Committee sees merit in the suggestion by APC that the Attorney-General publish written reasons to justify the classification of information as prejudicial to national security.

3.29 Recommendations are made along these lines later in the report where the Committee examines the provisions governing the Attorney-General's non-disclosure or witness exclusion certificates.

The right to a fair and public trial

3.30 The main concerns raised in submissions received by the Committee cover a range of issues dealing with the right of the defendant to a fair trial. Generally participants in this inquiry acknowledged the importance of the right to a public trial but also accepted the need for this right to be abridged in certain circumstances. Even so, a number of submissions and witnesses raised concerns about the reliance in the Bill on in-camera proceedings.

3.31 Clauses 23, 25 and 26 of the Bill require the court to hold a closed hearing in certain circumstances. Under clauses 25 and 26, the court must convene a hearing after the Attorney-General has issued a non-disclosure or witness exclusion certificate to consider the certificate and decide whether to make an order.

3.32 The Law Council accepted that in the interests of national security it may be necessary, in exceptional cases, for a court to restrict public access to a hearing. It stated:

> …if sensitive national security information is to be protected and the interests of justice achieved, there must be exceptions to the general principle that it is in the interests of open justice that courts remain open to the public. However, any exceptions must be to the minimum extent necessary to protect national security, reasons for restricting access must be given and transcripts of proceedings which are not public need to be maintained.[32]

3.33 It also noted that the Bill does not address the issue of providing reasons for restricting public access.[33]

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32 *Submission 8*, p. 6.

33 ibid.

3.34 To the same effect, the Human Rights and Equal Opportunity Commission (HREOC) argued that the discretion to hold part or all of a hearing in camera should be left to the courts. It suggested that, in considering whether to have a closed hearing, there should be safeguards in place that:

- reflect the requirement that the exclusion of the public may be 'necessary in a democratic society';
- reflect the requirement of proportionality; and
- ensure that clear reasons for not providing a public trial are given and recorded.[34]

3.35 APC also recognised that in specific cases involving the protection of sensitive national security information in-camera proceedings may be necessary. Even so, it believed that the decision to hold a closed court should not be taken lightly and the court should be 'required to weigh the risk of prejudice to national security against the public interest in having the proceedings heard in public.'[35]

3.36 Amnesty International has also acknowledged the right not only of the parties involved in the case to be present during the proceedings but the general public as well. It argued that:

> The public has a right to know how justice is administered, and what decisions are reached by the judicial system.[36]

3.37 The ALRC in its report concluded that:

> … whenever there is any restriction on the basic principles of open courts and the right to a public hearing, the court's judgment on those issues should be set out in a statement of reasons. This would mean that whenever a court makes an order for an in-camera hearing or a suppression order—such as an order restricting publication of proceedings or restricting access to documents on the court file—to protect classified or security sensitive information, it should provide reasons for doing so.[37]

3.38 The ALRC also maintained that in all cases where a hearing is conducted in secret, a transcript or full record of the proceedings should be made. It suggested that these would 'normally be sealed in line with the secrecy attaching to these proceedings'.[38] It recommended, however, that:

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34 *Submission 14*, p. 6.

35 *Submission 3*, p. 2.

36 Amnesty International Fair Trials Manual, p. 15 of 57.

37 ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information,* Report 98, May 2004, p. 471.

38 ibid, p. 497.

- the court may determine to what extent (if at all) a transcript of a closed proceeding should be sealed or distributed to the public, the parties or their legal representatives; and
- to the greatest extent reasonably possible—consistent with the determination of the need to protect classified or sensitive national security information used in proceedings—the court should ensure that *all parties* receive a copy of the transcript that allows them to pursue any avenue of appeal that may be open to them.[39]

3.39 It should be noted that Subclause 27(4) of the Bill requires the court to make and keep a sealed record of the hearing and make the records available to, and only to, a court that hears an appeal against, or reviews, its decisions in the hearing.

The Committee's view

3.40 The Committee believes that trials should be held in public to prevent injustice, to inform the public, to promote public confidence in the administration of justice and to maintain the appearance and actuality of the court's impartiality. The Committee accepts that in some cases evidence that supports conviction is properly kept from the public where its disclosure would pose a threat to national security. Nonetheless, it believes that the decision to hold a closed hearing should be based on clear and convincing grounds that secrecy is required and that the defendant's rights to a fair trial are not compromised.

3.41 Of concern to the Committee is the requirement placed on courts to hold certain hearings in-camera. In such cases the court has no discretion to determine whether these proceedings should be opened or closed. The Committee is of the view that courts should retain the discretion in relation to whether or not to make an order for in-camera hearings when considering the Attorney-General's certificate. In addition, the Bill should require the court to provide a statement of reasons for holding the closed hearing.

3.42 With regard to the transcript of a closed hearing, the Committee believes that the Bill should allow the court greater flexibility in determining how evidence taken in-camera should be made available, such as allowing the court the discretion to release the transcript or parts of it that, in its view, would not prejudice national security. In particular, the Committee believes that the defendant and his or her legal representative should have access to the transcript except in the most extraordinary of circumstances. Again, in keeping with the object of maintaining an open and transparent justice system, the Committee believes that the court must make public a statement of reasons for any restriction placed on access to court transcripts.

Recommendation 1

39 See for example, Recommendation 11–22, ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information,* Report 98, May 2004, p. 505.

3.43 The Committee recommends that Subclauses 23(4), 25(5) and 26(5) of the Bill, which require the court to hold closed hearings, be removed so that the court retains its discretion to determine whether its proceedings are open or closed.

Recommendation 2

3.44 The Committee recommends that the Bill be amended to include a provision requiring the court to provide a written statement of reasons outlining the reasons for holding proceedings in-camera.

Recommendation 3

3.45 If Recommendations 1 and 2 are not supported, the Committee recommends that, as a commitment to the right of a defendant to a fair, public trial, the Bill should be amended to include a provision requiring the Attorney-General to publish a statement of reasons for any decision to hold a closed hearing.

Recommendation 4

3.46 The Committee recommends that Subclause 27(4) of the Bill be amended to allow the courts the discretion to determine to what extent a court transcript or parts of it should be sealed or distributed more widely and any undertakings required for people to have access to the transcript.

Recommendation 5

3.47 The Committee recommends that the Bill be amended to include a provision requiring a court to provide a statement of reasons for any restriction placed on the distribution of all or part of a court transcript.

The right to be tried in own presence and to defend in person

3.48 Clause 27 allows the court to make an order that the defendant or the legal representative, or both, are not entitled to be present during particular parts of the closed hearing if the court considers the presence of the defendant or any legal representative of the defendant is likely to prejudice national security. This applies to any part of the hearing in which the prosecutor gives details of the information concerned or argues why the information should not be disclosed or why the witness should not be called.[40]

3.49 In relation to this issue, the ALRC's report recommended that 'on the application of any party or of the Attorney-General of Australia intervening, or on its motion, the court or tribunal may order that the whole or any part of a proceeding be heard in the absence of any one or more specified people, or the public. Its recommendation did not apply to the parties to the proceedings or their legal

40 Clause 28.

representatives, except in relation to the court or tribunal's power to remove any person by reason of his or her misconduct during proceedings.[41]

3.50 Professor Weisbrot noted that the ALRC's proposal 'would not permit a situation where there were criminal proceedings without the presence of the accused'.[42] He told the Committee:

> 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.[43]

3.51 A number of submissions and witnesses endorsed this view. They generally accepted that, under certain circumstances, it may be appropriate for the court to hold a closed hearing but rejected the proposal that the defendant or his or her legal representatives should be excluded from a closed hearing as contemplated in the Bill.

3.52 The Law Council objected strongly to any restrictions placed upon a party or their legal representatives from 'examining and making representations to the court about the prosecution's attempts to restrict access to certain information pursuant to a ministerial certificate of non-disclosure.'[44] It referred specifically to the ALRC's recommendation that 'the fact that a hearing is taking place should never be kept from the party whose rights are being determined or affected by the hearing'.[45] It noted that Clause 27 contains no such requirement of notice.[46]

3.53 Mr Brett Walker SC, Law Council of Australia, told the Committee that:

> 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.[47]

3.54 Mr Patrick Emerton, Faculty of Law, Monash University, took the same approach. He argued that:

> It is impossible for the defendant, or his or her lawyer, to make an effective case for disclosure of information, or for the calling of a witness, if they are

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41 ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information,* Report 98, May 2004, Recommendation 11–18, pp. 503-4.

42 *Committee Hansard*, 5 July 2004, p. 5.

43 ibid.

44 *Submission 8*, p. 6.

45 ibid.

46 ibid.

47 *Committee Hansard*, 5 July 2004, p. 11.

> prevented from hearing the details of the information concerned, or from hearing the prosecution arguments to the contrary.[48]

3.55 Likewise, AMCRAN contended that under the Bill a defendant's right to a fair trial would be limited because under Clause 27 they 'would not be given the opportunity to respond to or argue against the disclosure or otherwise of the disputed information'.[49]

3.56 The New South Wales Council for Civil Liberties (NSWCCL) argued that an essential feature of Australia's adversarial system of criminal justice is that 'a defendant should be present at all times'. It explained further:

> At the very least, a defendant's legal representatives should be present in court to represent his or her interests. This is important because the court might not realise the significance for the defence case of the information or witness being examined during the closed hearing. That is why it is paramount that a defendant be represented at all times.[50]

3.57 NSWCCL recommended that Subclause 27(3) be amended to ensure that a defendant is 'not left unrepresented as a result of a court's ruling to exclude a defendant and/or his or her legal representatives from any part of a closed hearing'.[51]

3.58 To the same effect, Amnesty International observed that the Bill may breach the right of the accused to be present at trial and appeal. It argued that under such circumstances the defendant is not in a position to rebut the evidence or to provide appropriate instructions to their legal representative. According to Amnesty International, the defendant would be prevented from knowing the full details of the case against him or her which would 'limit their defence in breach of international law'.[52]

3.59 APC maintained that, while Clause 27 would grant the court the power to exclude the defendant or the defendant's counsel from the proceedings while the prosecutor addresses the court, no such provision is made for the exclusion of the prosecution. It stated that:

> The implied assumption is that the prosecution can always be trusted but that defence counsel cannot, and that fairness to the accused should be as a rule be sacrificed to the aim of protecting security sensitive information. This apparent bias against defendants would pose a significant threat to the ability of defence counsel to adequately defend their clients.[53]

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48 *Submission 13*, p. 16.

49 *Submission 12*, p. 4.

50 *Submission 7*, p. 8.

51 ibid.

52 *Submission 11*, p. 11.

53 *Submission 3*, p. 3.

3.60 HREOC concluded:

> The possibility of restrictions on material disclosed to a party and denying a party access to the hearing undermines the right to a fair trial.[54]

3.61 The Attorney-General's Department acknowledged the closed court hearing as a source of major concern. A representative of the Department told the Committee:

> 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.[55]

3.62 Subsequently, the Department notified the Committee that the Office of General Counsel had been consulted and, on close examination of the current version of the Bill, had recommended that:

> … the intention of the Bill, that the courts will only exclude defendants and their legal representatives from hearings in limited circumstances, and will retain the power to stay proceedings if the defendant cannot be assured of a fair trial, is not entirely clear from the Bill in its present form and that this should be clarified to avoid any doubt.[56]

The Committee's view

3.63 The Committee holds strongly to the view that defendants, as guaranteed under the International Covenant on Civil and Political Rights (ICCPR), are entitled to be present at trial and to defend themselves in person or through legal representation. It also notes the comments by the Attorney-General's Department that the court retains the discretion to decide whether or not to exclude the defendant and or his legal representative from a closed hearing on the grounds that their presence is likely to prejudice national security.

Recommendation 6

3.64 The Committee recommends that Clause 27 of the Bill be amended to provide that defendants and their legal representatives can only be excluded from hearings in limited specified circumstances, and courts will retain the power to stay proceedings if the defendant cannot be assured of a fair trial.

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54 *Submission 14*, p. 6.

55 *Committee Hansard*, 5 July 2004, p. 24.

56 *Submission 20*, p. 2.

The right to know the evidence supporting the conviction

3.65 Aligned with the right to be tried in his or her presence and to defend him or herself in person or through legal representation, an accused has the right to know the evidence so that he or she may answer the case against them. In commenting on the Bill, a number of submissions underlined the importance of this principle but feared that the Bill as currently drafted undermines it.

3.66 For example, Clauses 22, 23 and 24 of the Bill allow the Attorney-General, for national security reasons, to issue a non-disclosure or witness exclusion certificate which may prevent the defence from gaining access to documents, parts of documents or from calling and questioning witnesses.

3.67 Amnesty International expressed concern about restriction of provision of information under the Bill. It argued that, if the information is in the possession of the prosecution, it may not be disclosed to the defendant and his or her counsel and thus may affect his or her ability to prepare a defence. On the other hand, if the information subject to the certificate were in the possession of the defendant or his or her counsel, the defendant would not be able to build and develop their case 'as they will be unable to rely on the information pre-trial and will be uncertain of its status at trial until the court has held a hearing on the certificate'.[57]

3.68 Amnesty International also argued that the Bill would circumvent safeguards by allowing 'a trial to be conducted and for possible conviction of the defendant on the basis of information that the defendant and the defendant's legal representative may not ever see or hear'.[58]

3.69 AMCRAN highlighted the importance of ensuring that 'the defendant has the opportunity to see evidence that is being used against them and has a right to respond to that evidence.'[59] Likewise, the Australian Lawyers for Human Rights asserted:

> It is a basic and fundamental rule of procedural fairness that any evidence put before a court by one party must be made available to the other party. The rationale for the principle is that the other side must be allowed to test the evidence and make submissions upon it. If one side is able to adduce evidence which the other side has not seen the evidence will be untested. The parties will be in unequal positions before the court and the process will be unfair.[60]

3.70 The Law Council held a similar view. As a general principle, it did not support the use of material for any purpose that 'is not freely available to all parties

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57 *Submission 11*, p. 10.

58 ibid, p. 4.

59 *Submission 12*, p. 5.

60 *Submission 10*, p. 2.

against a party, even in this limited context'.[61] It argued that such a practice is 'very dangerous'.[62]

3.71 Mr Patrick Emerton was highly critical of the court's role under the Bill in allowing the tendering of evidence in a form other than the source document, such as a copy of the document with sensitive information deleted, or a statement of facts that the deleted information would prove or likely prove. In his view such a provision 'undermines the impartiality of the judiciary'.[63] He stated further:

> By inviting the court to summarise the information deleted from a document, or to issue a statement of the facts that the deleted information would prove, or be likely to prove, the Regime invites the court to become a participant in the proceedings before it, and to substitute its own judgement on matters of fact for the judgement of the jury. This aspect of the Regime in fact raises the possibility of unconstitutionality under section 80 of the *Constitution,* which provides that trial on indictable offences shall be by jury.[64]

3.72 Mr Emerton also cited the example of where a defendant at a bail hearing may wish to produce, as evidence of his or her lack of intent, documents or witnesses which would demonstrate that he or she acted at the request of, or with the acquiescence of an Australian intelligence agency, or of an intelligence agency of a country allied with Australia. He explained further:

> Under the Regime, it is likely that the defendant would be obliged to give notice prior to producing such evidence, and the Attorney-General would then be able to issue a certificate which precluded the evidence from being produced, with the consequence that the accused is not able to make out his or her case for bail.
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> The likelihood of such adverse implications for the fairness of pre-trial proceedings would be even greater for any individual charged with an espionage or similar offence, for it is likely that a great many of the relevant witnesses and documents which the defendant might want to produce or gain access to at the pre-trial stage would be apt to be barred by a certificate from the Attorney-General.[65]

3.73 Along similar lines, Mr Bret Walker SC, former President of the Law Council, told the Committee:

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61 *Submission 8*, p. 6.

62 ibid.

63 *Submission 13*, p. 16.

64 ibid. Graham Fricke QC, has written an interesting paper on trial by jury and section 80 of the Constitution, *Trial by Jury,* Parliament of Australia, Parliamentary Library, Research Paper 11, 1996–97.

65 *Submission 13*, pp. 14–15.

> 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.[66]

The Committee's view

3.74 The Committee shares the concerns raised by participants in the inquiry that the defendant and/or his legal representatives may be denied full access to information relating to their case. It notes that the Attorney-General must give the court a copy of the source document as well as a copy with the material deleted and in some cases a summary or statement of facts with the non-disclosure certificate. This certainly is an important safeguard in ensuring that the court is able to assess whether the copy of the document or substitute documents provides an appropriate and accurate representation of the information contained in the original document. However, the Committee considers that a further safeguard should be included in the Bill to offer additional protection in cases where source documents are amended through the deletion of material or where summaries or statements of facts are used as a substitute for sensitive information.

Recommendation 7

3.75 The Committee recommends that the Bill be amended to include a provision that requires the court, when making an order allowing information to be disclosed as being subject to the Attorney-General's non-disclosure certificate, to be satisfied that the amended document and/or substitution documentation to be adduced as evidence would provide the defendant with substantially the same ability to make his or her defence as would disclosure of the source document.

The right to prepare a defence including the right to call and question witnesses

3.76 Amnesty International suggested that the Bill may breach the right to call and examine witnesses. It noted that this right ensures that 'the defence has an opportunity

66 *Committee Hansard*, 5 July 2004, p. 8.

to question witnesses who will give evidence on behalf of the accused and to challenge evidence against the accused'.[67]

3.77 Mr Bret Walker SC elaborated on this matter:

> 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 … 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 …
>
> 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.[68]

3.78 Mr Patrick Emerton argued that the unfairness of the provisions of the Bill does not stop there. He suggested that Clause 23 of the Bill establishes another opportunity for denying defendants access to evidence. He explained:

> The unfairness to the accused of the obligation to give notice is even greater in the circumstances where it is the defendant who gives notice that a witness's answer will disclose information of the relevant character. In such circumstances, the Regime ensures that the prosecutor gains access to a written answer to the relevant question, although the defendant does not. This is not consistent with the right of the accused to have access to witnesses against him or her, and to have access to those witnesses able to testify in his or her defence.
>
> This undermining, by the Regime, of the rights of the accused is only compounded by the fact that, once notice of the possibility of disclosure has been given to the Attorney-General, it is an offence for the defendant to disclose the information, but not for the prosecutor, who may disclose the information in the course of his or her duties. Such a disparity in the rights accorded to prosecution and defence is manifestly unfair. Combined with the provision for a witness's answer being available to the prosecutor, but not the defendant, it is doubly so.[69]

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67 *Submission 11*, p. 11.

68 *Committee Hansard*, 5 July 2004, p. 8.

69 *Submission 13*, p. 12.

3.79 He concluded that if the object of the Bill were achieved, it would mean 'the possibility of prosecution upon the basis of evidence that is not disclosed in full to, and hence is unable to be properly tested by, the defence'. In his view this would 'constitute a radical change to Australian criminal procedure'.[70] He believed that the proposed legislation had 'grave potential for injustice'.[71]

3.80 HREOC was also concerned about the possibility of breaches of Article 14 of the ICCPR. It cited the European Court of Human Rights which recognises that 'the right of a defendant to call witnesses and to confront and cross-examine witnesses against him are not absolute rights where there is a compelling reason for encroaching on these rights'.[72] It noted, however, the requirement for appropriate measures 'to assess the necessity for doing so, in which the defence can take part (to the extent that the purpose of the protective measures is not undermined).[73]

The Committee's view

3.81 The Committee holds the view that a defendant is entitled to call and examine witnesses and that any limitation on this right should only be permitted in the most exceptional circumstances. It believes that the court must ensure that, not only is the defence's ability to prepare his or her case not prejudiced by the exclusion of a witness, but that the proceedings are seen to be fair and impartial to the defendant.

Recommendation 8

3.82 The Committee recommends that the Bill be amended to include a provision that requires the court, when making an order to exclude a witness from the proceedings, to be satisfied that the exclusion of the witness would not impair the ability of the defendant to make his or her defence.

Adequate time to prepare defence

3.83 Article 14 of the ICCPR sets down as a minimum guarantee for a defendant facing any criminal charge the entitlement to 'have adequate time and facilities for the preparation of his defence'.

3.84 Amnesty International suggested that the Bill may breach the right to prepare a defence. It quoted from *Principle 21 of the Basic Principles on the Role of Lawyers* which states:

> It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to

70 ibid, p. 3.

71 ibid.

72 *Submission 14*, p. 6.

73 ibid.

> their clients. Such access should be provided at the earliest appropriate time'.[74]

3.85 NSWCCL argued that a defendant in a criminal proceeding should be aware of all the evidence against him or her at trial and have time to prepare his or her case. It was concerned with paragraph 25(3)(a) of the Bill which deals with a case where the Attorney-General's certificate is given to the court before the trial begins. It would require the court as soon as the trial begins to hold a hearing to decide whether to make an order in relation to the disclosure of the information. NSWCCL noted that a court could, contrary to the Attorney-General's certificate, rule that the information be tendered or a witness called. In its view such an overruling could present the defence team with new evidence when the trial had already commenced. It was concerned that in such circumstances the defendant may not have sufficient time to prepare his or her defence at variance with the fundamental principles underpinning a fair trial.[75] It suggested that:

> To avoid unnecessary delay in proceedings the NSI Bill should provide for pre-trial interlocutory closed hearings to allow for the challenge of certificates issued by the Attorney-General. In a criminal proceeding, where the liberty of the accused is often at stake, it is a fundamental tenet that the Crown must inform the defence of all the evidence against the defendant *before* trial. Full pre-trial disclosure can only occur if closed hearings are available before a trial begins.[76]

3.86 NSWCCL recommended that the Bill be amended to expressly require pre-trial interlocutory proceedings at least four weeks prior to the hearing date relating to all certificates issued by the Attorney-General.[77]

3.87 The legislation proposed in the ALRC report and the Bill require a party to give notice as soon as practicable after he or she becomes aware that sensitive national security information is likely to be disclosed. The ALRC's approach allows the court on its own motion to give notice regarding the use of classified information and, further, that the court must hold a directions hearing to determine the future conduct of the proceedings in relation to the classified information. One of the essential purposes of the proposal was 'to identify and bring forward as early in the proceedings as practicable—and preferably before the trial—the issues associated with the admission, use and protection of any classified and security sensitive information.'[78] The Bill makes no provision for the court to give notice and, as noted above, if the Attorney-General issues a non-disclosure certificate before the trial commences, the court must hold a hearing as soon as the trial begins.

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74 *Submission 11*, p.10.

75 *Submission 7*, p. 7.

76 ibid.

77 ibid.

78 *Submission 1*, p. 3.

The Committee's view

3.88 The Committee is mindful of the importance of allowing the defendant ample time to prepare his or her defence. It notes that both the proposals in the ALRC's report seek to expedite proceedings by providing for pre-trial court proceedings to resolve matters about the use of information during the trial.

Recommendation 9

3.89 The Committee recommends that the Bill be amended to allow the court to make decisions about the use of information before the commencement of the trial.

Right to a fair hearing in a reasonable time

3.90 Mr Patrick Emerton noted that the proposed legislation does not place time limits on the Attorney-General in which to consider and make a decision on a matter. In his view, this could result in extending the time under which the defendant 's future is uncertain and, if innocent, the time in which his or her liberty is restricted. He also envisaged potential for abuse by intentionally delaying proceedings:

> …during this time it is not an offence for the prosecution to disclose any information in question in the course of his or her duties. This creates the possibility of deliberate delay on the part of the Attorney-General, in order to give the prosecution the time to develop its case in response to information it believes is going to be disclosed, or in response to the written answer of a witness to which the prosecutor, but not the defence, has had access.[79]

3.91 NSWCCL shared the concern that the Bill does not specify time frames in which the Attorney-General must make a decision following notification. It was of the view that the proposed legislation should impose a time limit within which to make a decision on the issuing of a certificate. It argued that otherwise the Attorney-General 'might be able to delay issuing a certificate until *after* a trial has commenced—-or even finished'.[80] Further:

> This gives the Executive an effective veto over the information or witnesses in a criminal proceeding. The information or witness might be vital to an accused's defence and its exclusion would be prejudicial to his or her case. Alternatively, the information or witness might be embarrassing to the government. Either way, this loophole is open to abuse by the government of the day.[81]

3.92 NSWCCL submitted that the Bill be amended to:

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79 *Submission 13*, p. 13.

80 *Submission 7*, p. 5.

81 ibid.

- oblige the Attorney-General to inform the parties and the court of his or her decision to issue (or not issue) a certificate within a reasonable time;
- provide a defence to these indictable offences that the Attorney-General failed to make a decision within a reasonable time; and
- provide the court with the express power to stay proceedings until the Attorney-General makes a decision to the issuing of a certificate.[82]

The Committee's view

3.93 The Committee is mindful of a defendant's right to be tried within a reasonable time and notes criticisms that the Bill may allow for unnecessary delay.

Certificate to be considered as conclusive evidence

3.94 Clause 25 of the Bill stipulates that, if the Attorney-General issues a certificate pursuant to Clause 24, the certificate is to be taken as conclusive evidence that the disclosure of the information in the proceedings is likely to prejudice national security. The Australian Lawyers for Human Rights argued that this provision means that 'the Attorney has made a finding of fact in the case (29(8),(9)), without any opportunity for the defendant to be heard'.[83] In its view the finding may lead the court to exclude the evidence when considering the matters in Clause 29 which would be 'fundamentally unfair'.[84] Mr Simon Rice, President of the Australian Lawyers for Human Rights stated further in evidence that 'the Attorney-General will issue the definitive certificate but as far as we can see it may well be an unreviewable decision'.[85]

3.95 The Law Council was of the view that this clause, together with the provisions of Subclause 27(3), which expressly allows for a lawyer and defendant to be excluded from a closed hearing, means that there are insufficient safeguards 'to ensure a defendant's interests are protected throughout this process.'[86] It, together with the Law Institute of Victoria, also noted that Item 1 of Schedule 1 of the Consequential Amendments Bill means that decisions regarding whether to issue a certificate are exempt from judicial review.[87] Mr Joo-Cheong Tham also cited Clause 25 including the lack of judicial review as a provision that would undermine the right to a fair trial.[88] AMCRAN was similarly critical that the decision is not reviewable under the

82 ibid, p. 6.

83 *Submission 10*, p. 2.

84 ibid.

85 *Committee Hansard*, 5 July 2004, p. 23.

86 *Submission 8*, p. 6.

87 ibid; *Submission 20*, p. 6.

88 *Submission 9*, p. 2.

ADJR Act and recommended that the Attorney-General's decisions and certificates should be open to judicial review.[89]

3.96 The Commonwealth Ombudsman, in observing that the Attorney-General has a key role in the administration of the proposed legislation, also commented on the issuing of an Attorney-General's certificate under Clauses 24 and 25 and the lack of review of such a measure. He stated:

> Judicial review of decisions by the Attorney-General is restricted by the Consequential Provisions Bill. Nor can action taken by a Minister be the subject of investigation by the Ombudsman, under s 5(2)(a) of the Ombudsman Act (although the Ombudsman can investigate the advice given to the Attorney-General and action taken by Commonwealth officials to implement decisions of the Attorney-General).[90]

3.97 The Ombudsman also noted:

> Essentially, the only method of accountability of action taken by the Attorney-General that is preserved by the bills is the requirement imposed by clause 42 for the Attorney-General to make an annual report to the Parliament.[91]

The Committee view

3.98 The Committee notes that the Consequential Amendments Bill will exempt the Attorney-General's decision in relation to a certificate from review under the ADJR Act and will limit review under section 39B of the *Judiciary Act 1903* to the High Court.

The right to legal assistance of own choosing

3.99 The Bill imposes a restriction on this right for a defendant to choose and freely communicate with counsel of his or her own choice by requiring in some cases that information can only be disclosed to those with an appropriate security clearance. The requirement for a security clearance arises in circumstances where the Attorney-General's Department gives written notice to a legal representative of the defendant that an issue is likely to arise in proceedings relating to a disclosure of information likely to prejudice national security.

3.100 A person who receives such a notice may apply to the Secretary of the Attorney-General's Department for a security clearance at the level considered appropriate by the Secretary. The defendant may apply to the court for a deferral or adjournment of the proceedings until the legal representative has obtained the clearance. If the representative is not given such a clearance, the defendant may apply

89 *Submission 12*, pp. 4 & 6.

90 *Submission 19*, p. 4.

91 ibid.

for a deferral or adjournment until another legal representative is given the required security clearance.

3.101 The Explanatory Memorandum makes clear that 'uncleared counsel cannot receive access to information that relates to, or the disclosure of which may affect, national security.[92]

3.102 During the course of its inquiry, the ALRC received a number of submissions expressing strong reservations about requiring lawyers to have a security clearance. Having considered this matter in some depth, the ALRC informed the Committee about its findings:

> The ALRC felt uncomfortable about making a recommendation to the effect that a court or tribunal could order a lawyer to submit to the security clearance process. However, the ALRC noted that if important material is not available to counsel in the proceedings, they run a risk of failing to provide their client with effective assistance, and consequently should consider seeking a security clearance or withdrawing from the proceedings. The ALRC suggested that the proper focus should not be on the dignity or convenience of the lawyer, but rather on the *client* receiving the best possible representation in circumstances in which highly classified information must be protected. The central involvement of the court would guard against any unfairness, including any suggestion that the Government or the prosecutors were improperly seeking to interfere in the ability of the other party to retain their counsel of choice.[93]

3.103 In its report, the ALRC used a recommendation to enunciate the principle that 'an accused person and his or her legal representatives should have access to all evidence tendered against him or her'. Another recommendation, however, would allow the courts to order that specified material not be disclosed to a lawyer unless he or she holds a security clearance at a specified level; in which case the affected person has the option of retaining a lawyer with the requisite security clearance.[94] Under the ALRC proposal, the court may also require undertakings from legal representatives on such terms as the court sees fit as to the confidentiality and limits on use to be attached to any classified or sensitive national security information.[95]

3.104 The ALRC was of the view that its scheme would leave courts with a measure of discretion to grant lawyers participating in proceedings without a security clearance access to classified material. They would be subject to conditions and undertakings

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92 Explanatory Memorandum, p. 2.

93 *Submission 1,* p. 4.

94 ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information,* Report 98, May 2004, Recommendations 11–40 and 11–43(d), pp. 508-509.

95 ibid, Recommendation 11–24, p. 505. See also ALRC, Media Release, *Justice system must adapt to meet terror challenges: ALRC,* 23 June 2004.

considered by the court to be necessary.[96] It noted, however, that in many cases, the court would conclude that access to the information must be restricted to lawyers who hold an appropriate security clearance.[97]

3.105 The same arguments raised against the requirement for a security clearance during the ALRC's inquiry were placed before the Committee in this inquiry. Many held that this proposal would significantly undermine the right to legal representation of defendants in cases involving national security matters.[98] The Committee has also considered these issues in inquiries on earlier bills. NSWCCL restated its opposition to the requirement for security clearances, asserting that it was unnecessary for a lawyer to undertake a security check before viewing the material. It submitted that:

> A lawyer is an officer of the court. His or her highest duty is to obey the court. Any lawyer who contravenes a curial order not to disclose information relating to national security risks proceedings for professional misconduct.
>
> Furthermore, it is sufficient that the Bill creates an offence for contravening a certificate of the Attorney-General or an order of the court. Any lawyer convicted of such an offence would be subject to the discipline of the court and risks being struck off. [99]

3.106 Furthermore, it saw scope for the Commonwealth Government 'to manipulate who can represent a defendant and who cannot'. It maintained that:

> Such a power could be used to harass or oppress individual defendants and/or lawyers. Every defendant has the right to chose who will represent them. This is a *minimum* element of a fair trial. Parliament should not interfere with that right by deeming some lawyers 'inappropriate' or a 'national security risk'.[100]

3.107 The Law Council also objected to a proposed security clearance system governing the legal profession. It asserted that such a regime 'involves a very direct and serious prejudice to lawyers and clients'[101] and was of the view that the existence of a pool of security-cleared lawyers would not actually promote security—indeed, there are serious practical and legal problems with the proposed system. Further, the system would not reduce the likelihood that sensitive information would leak into the community. There would be practical difficulties, such as the unexpected emergence

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96 *Submission 1*, p. 4.

97 ibid.

98 See for example, *Submission 9*, p. 2; HREOC, *Submission 14*, p. 5.

99 *Submission 7*, p. 12.

100 ibid.

101 *Submission 8*, p. 3.

of classified information in the course of a trial which would result in delays while the appropriate clearance is obtained.[102]

3.108 Moreover, the Law Council contended that lawyers in criminal proceedings are well-used to dealing with confidential information in a variety of situations and that court-controlled processes are adequate. It argued that the Commonwealth Government has not produced any evidence which 'indicates that the experience of courts or disciplinary tribunals shows that lawyers frequently or infrequently breach requirements of confidentiality imposed either by agreement or by the Courts'.[103] In rejecting the proposal, it told the Committee that:

> The protection of democracy based on the rule of law requires a legal profession that is independent of, and not beholden to, the Executive.[104]

3.109 The Law Council also queried whether, in circumstances where there might be relevant and sufficient grounds for objecting to a particular lawyer participating in a case dealing with national security information, the onus should be on the Commonwealth Government 'to demonstrate the factual basis of such an objection'. It suggested that the 'conventional court approach of ensuring a significant period in active practice without either previous criminal convictions or adverse findings in disciplinary matters sufficient to demonstrate both good character and reliability should be retained'.[105]

3.110 The Criminal Bar Association supported this argument. It believed that the present disciplinary and court controlled processes are adequate for the purposes and there was no evidence to suggest otherwise. It stated:

> … the problem is able to be solved by the Court simply requiring that at a point where a disclosure is necessary in the course of the case which effects national security, counsel then engaged would be entitled to be appraised of the information simply after making a formal undertaking of confidentiality to the court and potentially to relevant government departments. A breach of those undertakings would of course be punishable either as a contempt or by some other aspect of the criminal law which protected that information.[106]

3.111 HREOC similarly noted that the courts and litigants 'already have a range of mechanisms at their disposal to protect national security information'.[107] It preferred the scheme proposed by the ALRC which leaves the courts with the discretion 'to grant lawyers without a security clearance participating in the proceedings access to

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102 ibid.

103 ibid.

104 ibid, p. 4.

105 ibid.

106 *Submission 16*, pp. 2-3.

107 *Submission 14*, p. 5.

classified material, albeit subject to such conditions and undertakings that the court considers necessary.'[108]

3.112 As well as being unnecessary, the Law Council argued that the proposal contravened Article 14 of the ICCPR and concluded that:

> … the interests of justice are not served by excluding an accused person's right to choose their own legal representative on the basis of a security clearance.[109]

3.113 Amnesty International, AMCRAN and HREOC shared the concern that the requirement for a security clearance 'may limit the ability of the defendant to choose their own lawyer'.[110]

3.114 Aside from a possible infringement of the rights of the defendant, a number of witnesses were worried about the effect of the proposal on the lawyers. The Law Council was of the view that the system was open to abuse. It maintained:

> The prospect of the Government holding detailed private information about lawyers who regularly defend in contentious cases always creates the appearance, if not the actual risk, of a misuse of that information. Such a prospect exists no matter how secure and how separate the relevant sections within Government are from each other.[111]

3.115 Mr Joo-Cheong Tham expressed concern that the security clearance procedures alone would expose the defendant's legal representatives to a subjective and invasive process.[112] He explained further:

> This process is all the more subjective and invasive because of the criteria listed in the *Protective Security Manual*. This manual lists the following as attributes that might indicate a person is suitable to obtain a security clearance: maturity, responsibility, tolerance, honesty and loyalty. The application of such vague criteria would clearly depend upon the value judgments.[113]

3.116 He went on to state:

> What makes this proposal even more egregious is that it will confer extraordinary power on the executive…the prosecution is in a position to determine whether or not this process applies. If the process applies, it is

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108 ibid.

109 *Submission 8*, p. 5.

110 *Submission 11*, p. 13–14; *Submission 12*, p. 5.

111 *Submission 8*, p. 4.

112 *Submission 9*, p. 2.

113 ibid.

> then controlled by the Attorney-General's Department, a body that is intimately connected with the prosecution.[114]

3.117 To further discredit the process, he noted that the *Commonwealth Protective Security Manual* (PSM), which is available to government departments, agencies and contractors working to government, is not a statutory instrument and can be changed at the will of the Commonwealth Government. In his view the security clearance process would be 'controlled by the executive branch of government on the basis of a secret document promulgating indeterminate and invasive criteria'.[115] In effect, the ability of defendants in criminal proceedings involving national security would be 'severely hampered' by this proposed imposition on their legal representatives.

3.118 On similar grounds, AMCRAN and Mr Patrick Emerton were concerned about the subjective nature of the criteria used to satisfy the requirements for a security clearance and called for a more carefully considered definition. They objected to the use of the PSM as the security clearance criteria on the following grounds:

- the unavailability of the document to the general public (although not security classified, its availability is limited to government departments, agencies and contractors working to government);
- evidence to suggest the PSM is constantly being reviewed and changed and is not subject to any legislative, judicial or public review; and
- the descriptions used seem vague and subjective—maturity, responsibility, tolerance, honesty and loyalty.[116]

The Committee's view

3.119 The Committee shares the ALRC's sense of unease about supporting a proposal whereby a court could order a lawyer to submit to a security clearance. Such a measure clearly infringes the right of a defendant to legal counsel of his or her own choosing. These feelings are sharpened when considering the Bill's proposal. Firstly, the Attorney-General has stepped into the court's role in determining who cannot have access to specific information in criminal proceedings. Secondly, there are problems with the appropriateness of the procedures surrounding the security clearance procedures. A number of witnesses noted:

- the security clearance assessment is based on vague and subjective criteria which are subject to change; and

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114 ibid., pp. 2-3.

115 ibid, p. 3.

116 *Submission 12*, p. 3; *Submission 13*, p. 23. The Law Institute of Victoria also objected to the requirement that defence legal representatives obtain a security clearance. It submitted that the requirement will expose representatives to a 'subjective and invasive process' and that the criteria are 'vague and subjective'.

- the apparent conflict of interest in having the department involved in the prosecution of the case as well as in determining the appropriate level of clearance, vetting the defendant's legal representative and possibly denying him or her a clearance.

Recommendation 10

3.120 The Committee recommends that the court assume a more active role in determining whether a defendant's legal representative requires a security clearance before he or she can access information. The Committee recommends that the Bill adopt the recommendation by the ALRC that 'the court may order that specified material not be disclosed to a lawyer unless he or she holds a security clearance at a specified level'.

Admissibility of evidence

3.121 Concerns were also expressed about Subclause 29(6) which requires the court, in considering whether to make an order in relation to a certificate issued by the Attorney-General, to decide first whether the information concerned is admissible as evidence in the proceeding. NSWCCL argued that:

> While a judicial officer might be able to make an advance ruling on the relevance or exclusionary rules of evidence, it is highly controversial whether a judge in a criminal trial may exercise his or her *discretion* under Part 3.11 of the *Evidence Act* to exclude, or limit the use of, evidence before that discretion is invoked.[117]

3.122 NSWCCL explained further:

> This is so because in our adversarial system a judge is not, at the beginning of the trial, in possession of all the facts. The facts emerge at trial from the evidence adduced by both parties. So it is plainly wrong to expect a judicial officer to make an advance ruling on the admissibility of evidence when he or she does not know, for example, whether it will be prejudicial to the defendant or should be excluded because it was improperly or illegally obtained. Evidence should be excluded at the appropriate point in a trial and not before.[118]

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117 *Submission 7*, p. 10. This part of the Evidence Act deals with discretions to exclude evidence. It allows the court to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party or be misleading or confusing; or cause or result in undue waste of time. The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or be misleading or confusing. In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. There are also provisions governing the courts discretion to exclude improperly or illegally obtained evidence.

118 *Submission 7*, p. 10.

3.123 NSWCCL also recommended that Subclause 29(6) be removed from the proposed legislation because it 'interferes with the discretion of a judicial officer to exclude evidence'.[119]

3.124 In its report, the ALRC recommended that the court should retain the flexibility to deal with evidence revealing classified or sensitive national security information previously found to be inadmissible or which is raised unexpectedly at the hearing. [120] The Attorney-General's Department accepted that the Bill does not directly provide flexibility for dealing with evidence previously found to be inadmissible. However, the Department noted that the Bill 'does provide that orders remain in force until further order of the court'.[121] It was of the view that 'where the inadmissibility is due solely to the sensitive nature of the material the court could make further orders'.[122]

3.125 Even so, the Committee notes that Subclause 29(6) requires the court to decide whether the information is admissible before deciding whether to make an order. Rather than directing the court to make such a decision, the Committee believes that the wording of the provision should be changed to allow the court the discretion to make any such decision at the time its judges to be most appropriate.

Recommendation 11

3.126 The Committee recommends that Subclause 29(6) be amended to allow the court the discretion to make decisions in relation to the admissibility of evidence containing classified or sensitive national security information at such time as the court considers appropriate.

Weighing national security against the right to a fair trial

3.127 A number of participants in the inquiry were concerned about Subclause 29(8) which deals with the matters the court must consider before deciding to make an order or the form that order should take regarding the Attorney-General's certificate. The provision directs the court to take account of:

- whether there would be a risk of prejudice to national security if the information were disclosed or the witness called in contravention of the certificate;
- whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing;

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119 ibid.

120 ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information,* Report 98, May 2004, Recommendation 11–12, p. 502.

121 Table comparing the National Security Information (Criminal Proceedings) Bill 2004 with recommendations in the ALRC's report relating to a National Security Information Procedures Act, provided to the Committee by the Attorney-General's Department.

122 ibid.

- any other matter the court considers relevant.

3.128 It should be noted that Subclause 29(9) requires the court to give 'greatest weight' to whether there would be a risk of prejudice to national security.

3.129 Mr Patrick Emerton stated that:

> The weighting of considerations mandated by the Regime puts the Attorney-General's certificate at the top, and renders the questions of a *substantial adverse effect* on the defendant's right to a fair trial, and of *serious interference with the administration of justice*, lesser matters. It is thus apparent that the method of court response to a certificate that is mandated by the Regime risks compromising the right of the accused to a fair trial.[123]

3.130 A number of submissions were concerned that Subclause 29(9) of the Bill effectively undermines this principle of a fair trial. This clause expressly directs the court to give greatest weight to the risk of prejudice to national security in deciding whether to make an order and the order to make. For example, APC stated that 'the notion that an accused may be subjected to an unfair trial in order to protect national security is extremely disturbing'.[124] APC also expressed the view that the provision should be removed or reworded to require the court 'to give equal weight to both national security and to fairness to the accused'.[125]

3.131 NSWCCL viewed this provision as 'a blatant legislative usurpation of judicial power and undoubtedly violates the doctrine of the separation of powers'.[126] It stated further:

> It is permissible for Parliament to list relevant considerations for a court to consider when making a decision. But it [is] the exclusive role of a judge to weigh and balance those considerations on a case-by-case basis. Parliament interferes in the judicial power of the Commonwealth by ordering a Ch III court to give more weight to one consideration than another.[127]

3.132 It suggested that Subclause 29(9) be removed from the Bill as it violates the principle of separation of powers.[128]

3.133 In a written answer to a question on notice to the Committee, the Attorney-General's Department informed the Committee that it had sought advice on the application of Clause 29. It offered the following explanation to the Committee:

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123 *Submission 13*, pp. 9 and 15.

124 *Submission 3*, p. 2.

125 ibid.

126 *Submission 7*, p. 11.

127 ibid.

128 ibid.

> That advice identifies that the intention of the Bill, that the courts will only exclude defendants and their legal representatives from hearings in limited circumstances, and will retain the power to stay proceedings if the defendant cannot be assured of a fair trial, is not entirely clear from the Bill in its present form. Some amendments to clauses 27 and 29 could be made to the Bill to clarify the intention and remove any doubt about its meeting the requirements of chapter III of the Constitution.[129]

3.134 NSWCCL was also concerned about the use of the word 'substantial'. It noted that the court, in making a decision about an order, must consider whether 'any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing. It asserted that '(a) defendant's right to a fair trial should not be diminished by the requirement that any prejudice be *substantial* before it should be considered worthy of consideration.'[130] Accordingly, it recommended that the word 'substantial' be removed from paragraph 29(8)(b).[131]

The Committee's view

3.135 The Committee takes note of the additional information provided by the Attorney-General's Department in regard to the intention of Clause 29 and agrees that amendments are required to clarify the intention of the Bill.

3.136 The Committee endorses the view that the term 'substantial' should be deleted from paragraph 29(8)(b) and that Subclause 29(9) should be removed from the Bill.

Recommendation 12

3.137 The Committee recommends that the term 'substantial' be removed from paragraph 29(8)(b) of the Bill.

Recommendation 13

3.138 The Committee recommends that Subclause 29(9) of the Bill be removed from the Bill, or at the least, amended to reflect the response received from the Attorney-General's Department.

Intervention of the Attorney-General

3.139 AMCRAN was concerned by what it perceived to be the unprecedented ability of the Attorney-General to intervene in proceedings as though 'he or she is a party to the hearing' under Clause 28 of the Bill, and also his or her power to appeal against any order of the court made, as authorised by Clause 33. AMCRAN argued that they 'allow someone from the executive and representative arms of government to interfere directly with the judicial proceedings of an individual case, and indeed grant

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129 *Submission 20*, p. 2.

130 *Submission 7*, p. 10.

131 ibid.

him the right to lodge appeals separately and additionally to the right of the prosecution to lodge appeals'.[132]

3.140 Mr Patrick Emerton was also troubled by the extent of influence allowed to the Attorney-General during the proceedings. In his view:

> … there is a general unfairness in the executive government, acting through the Attorney-General, being empowered to exercise a significant degree of interference in the conduct of a criminal trial, by issuing non-disclosure and witness exclusion certificates. This unfairness is only increased by the vesting in the Attorney-General, by clauses 24 and 26, of the power to issue a certificate even in the absence of notice being given by either the prosecutor or defendant.[133]

3.141 Professor David Weisbrot argued that:

> 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.[134]

3.142 In addressing some of the concerns about Clause 29 raised by participants in the inquiry, a representative from the Attorney-General's Department stated:

> 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.[135]

The Committee's view

3.143 The Committee notes the objections raised about the level of intervention allowed in court proceedings by the Attorney-General. It has made a number of

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132 *Submission 12*, p. 4.

133 *Submission 13*, p. 13.

134 *Committee Hansard*, 5 July 2004, p. 2.

135 ibid, p. 24.

recommendations that are intended to give courts greater discretion in the conduct of their proceedings.

Omissions from the Bill

3.144 The Law Council expressed disappointment that the Bill does not address a number of matters raised by the ALRC in its report. The Law Council specifically mentioned that, to date, the Commonwealth Government has given no indication of his intention to:

- legislate to introduce a comprehensive public disclosures scheme to cover all Australian Governments, including enhanced protections of whistleblowers;
- review, update and enhance measures contained within the PSM; and
- amend sections 70 and 79 of the *Crimes Act 1914* (Cth) and section 91.1 of the *Criminal Code Act 1995* (Cth) to provide for injunctive relief to restrain disclosure of classified or security information in contravention of the criminal law.[136]

3.145 In its report, the ALRC recommended that 'in any proceeding in which classified and security sensitive information may be used, the court should have the assistance of a specially trained security officer to advise on the technical aspects of managing and protecting such information'.[137] In this inquiry, Professor Weisbrot told the Committee that there is no court security officer mechanism to provide that basic type of assistance. He explained:

> There is nothing that tells them when or whether redacted information is appropriate for use.[138]

Conclusion

3.146 The Committee recognises that the Bill attempts to reconcile two important objectives that in some cases may conflict—promoting and upholding the right of a defendant to a fair trial and maintaining national security by protecting sensitive information during criminal proceedings. The Committee has made a number of recommendations intended to ensure that there are adequate safeguards in the proposed legislation that will protect this right. The Committee further notes advice from the Attorney-General's Department in relation to identified areas where the intention of the Bill needs to be clarified. On balance, the Committee is of the view that the Bill should proceed, subject to the Committee's suggested recommendations.

Recommendation 14

136 *Submission 8*, p. 7.

137 *Submission 1*, p. 6.

138 *Committee Hansard*, 5 July 2004, p. 6.

3.147 The Committee recommends that, subject to Recommendations 1-13, the Bill proceed.

Senator Marise Payne

Chair