

CHAPTER 2

OVERVIEW OF THE BILL

Background to the Bill

2.1 The Bill seeks to extend the operation of the *National Security Information (Criminal Proceedings) Act 2004* (the Act) to include certain civil proceedings. The National Security Information (Criminal Proceedings) Bill 2004 (Criminal Proceedings Bill) was the subject of inquiry and report by this Committee in August 2004.¹

2.2 In that inquiry, the Committee outlined the background to the proposed national security regime set out in the Criminal Proceedings Bill. This included a discussion of the Australian Law Reform Commission's (ALRC) inquiry into the protection of classified and security sensitive information. The ALRC's report was titled *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC report).² A discussion of the ALRC's inquiry and report is contained in the Committee's report in relation to the Criminal Proceedings Bill.³ Essentially, the ALRC supported the introduction of a 'National Security Information Procedures Act to govern the use of classified and security sensitive information in all stages or proceedings in all courts and tribunals in Australia.'⁴ The ALRC report gave consideration to civil proceedings as part of its inquiry. However, as with the regime relating to criminal proceedings, there are significant points of departure between the ALRC's legislative proposal and this Bill.⁵ Key departures will be considered further in the next chapter.

Key provisions of the Bill

2.3 The Bill broadly adopts the process for federal criminal proceedings under the Act. A broad outline of the key provisions of the Bill follows.⁶

2.4 The Bill applies to civil proceedings in any Australian court. Under clause 15A, a civil proceeding is defined to mean 'any proceeding in a court of the

1 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (Criminal Proceedings Bill report), 19 August 2004.

2 ALRC 98, May 2004.

3 Criminal Proceedings Bill report, especially pp. 4-7.

4 ALRC, *Submission 6*, p. 3.

5 ALRC, *Submission 6*, p. 1.

6 For a further detailed explanation see the Explanatory Memorandum to the Bill.

Commonwealth, State or Territory, other than a criminal proceeding'. It includes all stages of the civil process, including discovery and interlocutory proceedings.

2.5 The Bill's operation is triggered once the Attorney-General has issued a notice to the parties and to the court under clause 6A. Such a notice can be given at any time during the proceeding.

2.6 Item 13 amends the general powers of a court in section 19 of the Act to extend to the powers of a court in relation to civil proceedings. In particular, the court retains its power to determine that the proceedings should be stayed. A 'stay' is an order made by a court suspending all or part of a proceeding. For example, a court may order that a proceeding be stayed where there is no other procedural step that can be taken by the court to ensure a fair trial.⁷

2.7 The Bill then inserts a new Part 3A into the Act to provide for the protection of national security information in relation to civil proceedings.

2.8 Clause 38D imposes an obligation on a party in a civil proceeding to notify the Attorney-General if he or she expects to introduce into those proceedings information that relates to, or the disclosure of which may affect, national security. This includes information that may be introduced through a document, a witness's answer to a question or the presence of a witness.

2.9 Under clause 38F, upon notification, the Attorney-General will consider the information and determine whether disclosure of the information is likely to prejudice national security. If so, the Attorney-General may issue a certificate which either prevents the disclosure of the information or allows the information to be disclosed in a summarised or redacted form. The certificate will remain in force until it is revoked by the Attorney-General; or until the court makes an order in relation to the disclosure of information.

2.10 The Bill then provides for certificates to be considered at a closed hearing of the court before the substantive hearing commences. If the Attorney-General issues a certificate after the substantive hearing has begun, the court must adjourn the hearing and hold a closed hearing. Clause 38I sets out the procedures and requirements for closed hearings.

2.11 Clause 38L then provides for the court to make orders in relation to the disclosure of information the subject of the certificate. Under subclause 38L(7), the court considers whether there would be a risk of prejudice to national security if the information were disclosed or disclosed otherwise than in accordance with the Attorney-General's certificate. The court must also consider whether the making of the order for the exclusion of information or a witness would have a substantial adverse effect on the fairness of the hearing. The court may also consider other

7 See *Butterworths Encyclopaedic Australian Legal Dictionary*, 2004; see also *Jago v District Court of New South Wales* (1989) 168 CLR 23.

relevant matters. However, under subclause 38L(8), the court must give greatest weight to the national security considerations.

2.12 Clause 38M provides for the court to give reasons to the parties and their legal representatives for its decision to make an order for admitting, excluding or redacting the information or excluding a witness. The Attorney General, if he or she was represented at the closed hearing, can challenge the proposed publication of the statement of reasons to ensure that it does not disclose information which is prejudicial to national security.

2.13 Subclause 38I(5) provides that the court must make a record of the closed hearing. Under subclause 38I(I), this record can be disclosed to self-represented parties or legal representatives that have been security cleared to the level considered appropriate by the Secretary of the Attorney-General's Department. Subclause 38I(7) allows the Attorney General, if he or she was represented at the closed hearing, to request that the record be varied to ensure that it does not disclose information which is prejudicial to national security to security cleared parties or their legal representatives.

2.14 The Bill also requires certain parties to the proceedings to be security cleared in certain circumstances. Clause 39A of the Bill sets out security clearance requirements in relation to civil proceedings.

2.15 The Bill would insert a number of offences into the Act in relation to disclosure of national security information in civil proceedings (clauses 38F to 38G). These offences are similar to those provided for under the Act in relation to criminal proceedings.

2.16 Part 2 of the Bill contains amendments to the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) and the *Judiciary Act 1903*. Among other things, the amendments to the ADJR Act limit the jurisdiction of courts to review a decision of the Attorney-General (or appointed Minister) to issue a notice that the Act applies or a decision to issue a certificate. The Bill also amends section 39B of the *Judiciary Act 1903* to ensure that the court that is conducting the substantive hearing in a civil proceeding is also able to deal with any judicial review of the certificate or the notice decision.⁸

Key differences compared to criminal proceedings regime

2.17 As noted earlier, the Bill broadly adopts the process for federal criminal proceedings under the Act. However, the Bill also departs from that process in some ways, due to the different nature of civil proceedings. The key departures are summarised below.

8 Explanatory Memorandum, pp. 4-5.

- The Attorney-General may appoint a Minister to perform the Attorney-General's functions under the Act where the Attorney-General is a party to the proceeding. Provisions for the appointment of alternative Ministers do not apply to federal criminal proceedings because the Director of Public Prosecutions will invariably be a party to the proceedings (clause 6A).⁹
- The Attorney-General or an appointed Minister (rather than the prosecutor) gives written notice to the parties and court that the Act applies to a civil proceeding (subclause 6A(1)).
- The permitted circumstances for the disclosure of information have been extended (item 12 - proposed amendments to section 16).
- The Attorney-General (or appointed Minister) must be given notice of a pre-hearing conference and may attend the conference. This reflects the fact that the Attorney-General may not necessarily be a party to the proceeding and may not be otherwise aware of it (clause 38A).
- At any time during a civil proceeding, the Attorney-General (or appointed Minister) may agree with the parties to an 'arrangement' about any disclosure and the court can give effect to such an arrangement by means of a court order (clause 38B).
- The security clearance provisions extend to the parties as well as their legal representatives and the assistants of the legal representatives (clause 39A).
- When advised that a witness may disclose security sensitive information in giving evidence, the court must order a witness to provide a written answer to the question. Upon receiving the answer, the court must adjourn the proceeding and give the answer to the Attorney-General (clause 38E).¹⁰

9 Explanatory Memorandum, p. 8.

10 Explanatory Memorandum, p. 1.