CHAPTER 3

ISSUES RAISED BY THE BILL

3.1 This chapter examines key issues and concerns raised in relation to the Bill, including:

- the purpose and application of the Bill;
- the effect of the court's power to stay proceedings in the context of civil proceedings;
- restrictions on the court's discretion;
- security clearance requirements; and
- other issues.

3.2 Many similar issues were raised and considered during the committee's inquiry into the Criminal Proceedings Bill. These will be considered and noted where appropriate in this chapter. However, as outlined in the previous chapter, a number of adjustments have been made for the regime for civil proceedings. Again, this will be considered and noted in this chapter where relevant.

Purpose and application of the Bill

Purpose of the Bill

3.3 Several submissions queried the need for, and the purpose of, the Bill.[1] For example, Mr Peter Webb from the Law Council of Australia (the Law Council) believed that:

> Australian courts have a long history of being able to manage sensitive evidence in all kinds of situations and there is no reason to believe that security sensitive information could not be handled by the courts and by the legal representatives of parties to best effect consistent with the proper administration of justice.[2]

3.4 On the other hand, the Australian Security Intelligence Organisation (ASIO) was strongly supportive of the Bill, submitting that:

> … the purpose of the Bill is to prevent the disclosure of national security information in certain civil proceedings where disclosure is likely to prejudice national security. It is ASIO's submission that such protection is not currently available in present mechanisms. It is crucial that national

---

1 See, for example, the Public Interest Advocacy Centre (PIAC), *Submission 7*, p. 5; Mr Patrick Emerton, *Committee Hansard*, 13 April 2005, p. 2.

2 *Committee Hansard*, 13 April 2005, pp 28 and 30; also *Submission 15*, p. 3.

> security information is appropriately protected in both criminal and civil proceedings.[3]

3.5 The ALRC also supported the Bill, noting that it reflects the recommendations of the ALRC report in relation to civil proceedings.[4] However, the ALRC noted that there were some departures 'in detail or tone' between the Bill and the statutory scheme proposed by the ALRC.[5] These departures will be considered where relevant in this chapter.

3.6 In response to the committee's questions as to the need for the regime, the Attorney-General's Department replied that 'it is essential to provide a regime to enable parties to use security sensitive information in civil cases without jeopardising Australia's national security.'[6] The Department further elaborated on the need for the Bill:

> The existing rules of evidence and procedure do not provide adequate, consistent and predictable protection for information that may affect national security and that may be adduced or otherwise disclosed during the course of proceedings. Public interest immunity as provided for in section 130 of the *Evidence Act 1995*, provides the Commonwealth with a recognised means to seek protection of security classified information. However, this provision only applies in some jurisdictions and relates to the production in evidence of information or other documents in court. Claims such as production for discovery are not covered by the Act, and unless otherwise legislated, such claims are covered by common law principles, which can result in greater uncertainty than the application of a legislative provision.[7]

3.7 The Department also argued that 'there is no clear authority for redaction (editing or revising a document) or substitution of the information with a summary or stipulation of the facts.'[8] The Department concluded that the Bill would enable 'courts to balance national security considerations against the ability to use the greatest amount of information possible to be admitted.'[9]

Application of the Bill

3.8 Many submissions noted that the Bill could potentially apply to a wide range of civil proceedings in which the protection of national security information may be at

---

3 *Submission 4*, p. 1.

4 *Submission 6*, p. 4; see also Professor George Williams and Dr Ben Saul, *Submission 10*, p. 1.

5 *Submission 6*, p. 4.

6 *Submission 16*, p. 3.

7 *Submission 16*, p. 3.

8 *Submission 16*, p. 3.

9 *Submission 16*, p. 3.

issue.[10] The Attorney-General's Department submitted that national security information could arise in a 'broad range of civil proceedings such as family law cases, accident compensation, contractual disputes or appeals to the Federal Court from decisions of the Administrative Appeals Tribunal.'[11] At the same time, a representative of the Attorney-General's Department noted that there is only a small number of cases in which national security information may be involved – around half-a-dozen per year. The representative further noted that:

> Our information is that some of those proceedings are family law proceedings where one of the parties is an intelligence officer. One of the other areas involves claims … of compensation that flow from the actions of persons who happen to be security intelligence officers.[12]

3.9 However, the Human Rights and Equal Opportunity Commission (HREOC) was concerned that the Bill could apply to many proceedings in which remedies for breaches of human rights are in issue. Some of the examples given by HREOC where information relating to 'national security' might arise included:

- proceedings in tort alleging assaults or unlawful conduct during questioning under a warrant issued pursuant to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act);
- proceedings seeking orders in the nature of habeas corpus in relation to a 'detention warrant' issued under the ASIO Act;
- proceedings relating to a person's entitlement to a protection visa, or concerning a decision to cancel a person's visa on character grounds;
- proceedings concerning a decision to detain and deport a non-citizen; and
- proceedings relating to a decision to order the surrender of a passport on security grounds.[13]

3.10 Mr Patrick Emerton was also particularly concerned that applications for review of executive decision-making in relation to 'terrorism' would be adversely affected by the Bill.[14] He noted that the Bill could apply to an application to a federal court for a remedy in relation to a questioning or detention warrant issued pursuant to the ASIO Act; or a decision by the Attorney-General to list (or refuse to de-list) an organisation as a terrorist organisation under the Criminal Code.[15] Mr Emerton was concerned that the Bill could advantage the Commonwealth in such proceedings, and indeed felt that the Bill could make it 'impossible for a person suing the

---

10 See, for example, ALRC, *Submission 6*, pp 2-3.

11 *Submission 16*, p. 3.

12 *Committee Hansard*, 13 April 2005, p. 36.

13 *Submission 12*, pp 3-4.

14 *Submission 8*, pp 4 and 29.

15 *Submission 8*, p. 5.

Commonwealth to make out their case.'[16] He concluded that the Bill therefore has the potential to undermine some of the safeguards in anti-terrorism legislation.[17]

3.11 Other submissions also raised concerns about the Bill's potential to impact adversely on other anti-terrorism legislation. For example, Amnesty International Australia (Amnesty) was also concerned about the interaction that the Bill may have with the ASIO Act. Amnesty agreed that the regime under the Bill could mean that a person could be unable to effectively challenge a warrant for detention, or to seek an appropriate remedy after their detention.[18]

3.12 However, a representative of the Attorney-General's Department responded to this argument as follows:

> … these bills in fact do little more than provide a formalised procedure for claims of public interest immunity based on national security grounds, I cannot see that the provisions of the bill would impact on the safeguards that are contained in the other terrorism legislation.[19]

3.13 Both HREOC and Mr Emerton disagreed with this statement.[20] Indeed, the committee notes that this statement appears to contradict the Department's argument in relation to the need for Bill. In particular, both Mr Emerton and HREOC pointed out a number of differences between the provisions of the Bill and the procedure for claiming public interest immunity under the *Evidence Act 1995*. For example, HREOC noted that, in claims for public interest immunity, the court retains control of the procedure.[21] Both noted that, unlike the Bill, the *Evidence Act 1995* does not direct courts as to the weighting to be given to the risk of prejudice to national security.[22]

3.14 Another issue raised during the committee's inquiry was the application of the national security information protection regime to administrative proceedings in tribunals. The ALRC noted that the Bill would not apply to such proceedings, and recommended that the scheme for protection of national security information should extend to administrative proceedings in tribunals, 'to ensure that such material is dealt with in a secure and consistent manner.'[23] The ALRC observed that administrative tribunals can deal with security sensitive information in a range of contexts, including, for example, in proceedings dealing with passport cancellations and visa refusals;

---

16 *Submission 8*, p. 27.

17 *Committee Hansard*, 13 April 2005, p. 3; see also *Submission 8*, pp 5 and 28-29.

18 *Submission 11*, pp 15-16; see also AMCRAN, *Submission 3,* p. 9.

19 *Committee Hansard*, 13 April 2005, p. 34.

20 Mr Patrick Emerton, *Submission 8A*, p. 1*;* HREOC, *Submission 12B*, p. 6.

21 *Submission 12B*, p. 6.

22 HREOC, *Submission 12B*, p. 6; Mr Patrick Emerton, *Submission 8A*, p. 1.

23 *Submission 6*, p. 3; see also Professor George Williams and Dr Ben Saul, *Submission 10*, p. 2.

denials of a security clearance (or a clearance at the requested level); and denials of requests made under Freedom of Information laws.[24] The ALRC further noted that:

> While some of the existing federal tribunals have legislative provisions and/or practices in place to deal with sensitive information, these are not always adequate, or consistent with the more general scheme now laid out in the National Security Information Legislation.[25]

3.15 Mr Craig Lenehan from HREOC expressed cautious support for the ALRC's suggestion that there should be a consistent scheme which covers administrative tribunals. In particular, Mr Lenehan observed that there is some inconsistency across federal tribunals as to how national security information is received and dealt with. However, Mr Lenehan cautioned that any such extension should be 'scrutinised closely and should only be implemented in a manner which follows the road map provided by human rights principles.'[26]

3.16 Others expressed considerable concern about extending the regime to cover administrative tribunals. For example, Dr Waleed Kadous from the Australian Muslim Civil Rights and Advocacy Network (AMCRAN) voiced his objection to any extension:

> I do not think they [these laws] should even apply in civil or criminal cases, and I do not see why they should be extended to administrative cases. However, if the law is reformed in such a way that the person who decides what is a national security issue is someone who is distinct from ASIO, someone who is distinct from the AFP and certainly someone who is distinct from the representative arm of government then, yes, I would consider that.[27]

3.17 In response to the committee's questions as to whether the regime would be extended to administrative tribunals, the Attorney-General's Department replied:

> There are existing regimes which are in place to cover the use of security sensitive information during proceedings in those Commonwealth tribunals where such issues are most likely to arise. These provisions have been specifically tailored to deal with the types of national security information likely to arise in those proceedings: for example sections 36 and 39A of the *Administrative Appeals Tribunal Act 1975*.[28]

3.18 However, the Department also conceded that:

---

24 *Submission 6*, p. 3; see also Professor David Weisbrot, ALRC, *Committee Hansard*, 13 April 2005, p. 9.

25 *Submission 6*, p. 3.

26 *Committee Hansard*, 13 April 2005, p. 21.

27 *Committee Hansard*, 13 April 2005, p. 17.

28 *Submission 16*, p. 2.

> At a future date and in light of experiences with the operation of these regimes, the Government may revisit the issue of extending the application of the NSI [National Security Information] Act regime to tribunal proceedings.[29]

3.19 The committee also sought clarification as to the extent of the Bill's coverage of other civil proceedings. Witnesses noted that the definition of 'civil proceeding' under clause 15A would cover matters such as interlocutory proceedings, discovery and exchange of documents.[30] However, the issue of whether certain types of arbitration or mediation would be covered by the Bill was less clear.[31]

3.20 A representative of the Attorney-General's Department responded that court-ordered mediation would be covered, but that other forms of mediation or arbitration would probably not be covered by the Bill. However, the representative also noted that other legislation provides for 'offences of disclosing national security information other than in the course of your duties.'[32] Similarly, Professor Weisbrot from the ALRC noted that there is other legislation that provides offences for improperly disclosing classified or security sensitive information, and so in some circumstances 'there would be sanctions against divulging that material to a third party for the purposes of dispute resolution.'[33]

3.21 In answers to questions on notice on this issue, HREOC stated that, having considered the issue further, it believed that 'undesirable ambiguity may arise from the definition of "civil proceedings".'[34] It noted in particular that the term 'court' in clause 15A could be quite uncertain and could 'potentially lead to wasteful litigation and delays'. HREOC suggested that extending the provisions of the Bill to tribunals, as outlined above, would be one way to avoid this difficulty.[35]

The committee's view

3.22 The committee supports the argument that it is necessary to provide a consistent and appropriate scheme for protection of national security information in civil proceedings. In particular, the committee recognises that extension of the national security information protection regime to civil proceedings is desirable to

---

29 *Submission 16*, p. 2.

30 See, for example, Professor David Weisbrot, ALRC, *Committee Hansard*, 13 April 2005, p. 12; Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, pp 22-23.

31 Professor David Weisbrot, ALRC, *Committee Hansard*, 13 April 2005, pp 12-13; Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, pp 22-23; also Mr Patrick Emerton, *Committee Hansard*, 13 April 2005, p. 7.

32 *Committee Hansard*, 13 April 2005, p. 35.

33 *Committee Hansard*, 13 April 2005, p. 13.

34 *Submission 16B*, pp 3-4.

35 *Submission 16B*, pp 3-4.

ensure consistency of protection across criminal and civil proceedings. However, the committee's support in this context is qualified by its recommendations for amendments to the Bill, which are made later in this report.

3.23 The committee acknowledges the concerns about the Bill's potential impact on the safeguards in anti-terrorism legislation. However, the committee considers that its recommendations elsewhere in this report may help address some of these concerns. The committee also encourages ongoing monitoring by the Attorney-General's Department, and by parliament, of the operation of the regime proposed by the Bill.

3.24 The committee also notes that there may be some uncertainty as to the Bill's application in some areas, such as arbitration and mediation related to civil proceedings. The committee also acknowledges suggestions that the regime provided for in the Act should be further extended to proceedings in administrative tribunals. In particular, the committee supports suggestions that a consistent, uniform scheme should apply across all Australian courts and tribunals. However, the committee notes that the Attorney-General's Department will monitor the operation of the regime and may revisit these issues if necessary.

Power to stay proceedings

3.25 Several submissions commented on the provisions of the Bill which would preserve the court's power to stay proceedings under proposed subsections 19(3) and (4)). In particular, some were concerned that a stay of proceedings would have different consequences in civil proceedings compared to criminal proceedings.[36] For example, the Law Council noted that it had strongly supported the stay provisions in the context of the criminal proceedings legislation.[37] However, in civil proceedings where the Commonwealth is a defendant, Mr Peter Webb from the Law Council noted that:

> … an unfortunate perception could be created: that a stay of proceedings compelled by difficulties relating to the admission of security sensitive information and ministerial certificates has enabled the government to evade a civil liability for which it might otherwise have been found responsible.[38]

3.26 The Law Council was unable to suggest any alternative mechanisms to remove this perception of unfairness.[39] The Law Council also conceded that the stay provisions could 'cut both ways'. That is, if the Federal Government were a plaintiff in

---

36 See, for example, Mr Patrick Emerton, *Submission 8*, pp 24-25; HREOC, *Submission 12*, p. 8.

37 *Submission 15*, p. 2.

38 *Committee Hansard*, 13 April 2005, p. 28; see also *Submission 15*, p. 2.

39 Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, p. 29.

a civil proceeding, the government could be 'equally frustrated in attempts to pursue civil remedies.'[40]

3.27 Professor Weisbrot from the ALRC also acknowledged that a stay could 'operate differentially' in certain civil proceedings:

> … in the bulk of civil cases that I can envisage, either delay or stay would favour the government's interests because the government would normally—but not always—be the defendant in those proceedings.[41]

3.28 Professor Weisbrot continued:

> We did not have a solution for that other than to say that, if the proceedings were more court centred —if they were proceeding in that way rather than on the basis of prescriptive certificates—the court would be able to fashion some sort of balance to try to make sure that the proceedings could go ahead if possible.[42]

3.29 Similarly, Mr Emerton was concerned that the court's power to stay proceedings establishes a victory for the defendant as the default position:

> … for the defendant, in a civil suit, a stay is as good as a win, and so by making a stay the last resort in the interests of justice, the Bill establishes as the default position a victory for the defendant. But it is far from clear that such an outcome is always consistent with the interests of justice.[43]

3.30 For Mr Emerton, this default position was particularly concerning in the context of certain proceedings, such as a challenge to unlawful detention under an ASIO warrant, where a stay would result in the person remaining in detention.[44] Mr Emerton also argued a stay could potentially advantage the Commonwealth in many circumstances.[45] However, he also acknowledged that a stay could work against the Commonwealth in matters where the Commonwealth is a plaintiff.[46]

3.31 HREOC was similarly concerned that the court's power to stay proceedings would generally work against the interests of a person seeking to use civil proceedings to obtain effective remedies for actual or future violations of their human rights:

> … in civil proceedings, the court's power to stay, discontinue, dismiss or strike out the relevant proceedings (where unfairness results from the fact

---

40 *Submission 15*, p. 2; see also Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, p. 29.

41 *Committee Hansard*, 13 April 2005, p. 11.

42 *Committee Hansard*, 13 April 2005, p. 11.

43 *Submission 8*, pp 24-25; see also *Committee Hansard*, 13 April 2005, pp 3-4.

44 *Submission 8*¸ pp 24, 28.

45 *Submission 8*¸ p. 29.

46 *Committee Hansard*, 13 April 2005, p. 4.

> that confidential information cannot be revealed) will work against parties seeking to use the courts to obtain effective remedies for violations of fundamental rights.[47]

3.32 While HREOC did not have any recommendations for amendments to the stay provisions of the Bill, it did propose a number of amendments to other provisions of the Bill (which are considered later in this chapter). HREOC believed that these other amendments would provide further safeguards against injustice in situations where remedies for human rights violations are at issue.[48]

3.33 A representative from the Attorney-General's Department acknowledged that, in developing the provisions of the Bill relating to the court's power to stay proceedings, they had difficulty finding guidance from cases in the area. However, the Department noted that:

> It is certainly not our intention to alter in any way the common law. We recognise that the position of litigants in a civil case is very different from that of a defendant in a criminal case. The court has to consider the impact on the proceedings as a whole rather than seeing its role as protecting the interests of one party—namely, a criminal defendant.[49]

3.34 The representative further noted that the cases indicate 'it is very rare for a court in a civil case to grant a stay… it would be extremely unusual… the court would look carefully at the impact of a decision to stay proceedings.'[50]

3.35 Similarly, the ALRC submitted that the stay provisions in the Bill are consistent with the ALRC's recommendation on the matter, which did not distinguish between criminal and civil proceedings. Further, the ALRC emphasised that:

> The ALRC considers that the particular consequences of the stay of any given proceedings would be given due consideration and weight by the court exercising its discretion, whether they be criminal or civil proceedings.[51]

3.36 Professor Weisbrot from the ALRC further observed that 'it would take a fairly powerful set of circumstances for a court to say there was no chance of having a trial at all in civil proceedings, although it could happen.'[52]

---

47 *Submission 12*, p. 8; also Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 21.

48 *Submission 12*, p. 8; also Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 22.

49 *Committee Hansard*, 13 April 2005, p. 32; see also p. 35.

50 *Committee Hansard*, 13 April 2005, p. 32.

51 *Submission 6*, p. 5.

52 *Committee Hansard*, 13 April 2005, p. 11.

The committee's view

3.37 The committee notes that, in its inquiry in relation to the Criminal Proceedings Bill, it recommended that the courts retain the power to stay proceedings if the defendant could not be assured of a fair trial.[53] However, the committee acknowledges that a stay of proceedings could have a very different impact in the context of civil proceedings. The committee also recognises that it is very rare for a court to order a stay in civil proceedings.

3.38 Nevertheless, the committee considers that the court should retain the power to stay civil proceedings as a last resort, and notes the ALRC's observation that the particular consequences of the stay of any given proceedings would be given due consideration and weight by the court exercising its discretion. The committee also considers that its recommendations later in this report will give the court a greater discretion over other matters during civil proceedings, and may therefore help avoid the need for a stay of proceedings.

Restrictions on the court's discretion

3.39 Many submissions were concerned that the Bill would affect the independence of the courts, particularly by giving the Attorney-General too much power to intervene in court processes.[54] Indeed, several submissions expressed the view that the Bill could give rise to the possibility of abuse of power by the Attorney-General.[55] For example, Dr Waleed Kadous from AMCRAN argued that:

> The potential for abuse of this power in civil cases is far more real than in criminal cases. It is rare for the government to be the defendant in a criminal case but it is hardly rare for it to be the defendant in a civil case.[56]

3.40 Other submissions suggested that, by giving the Attorney-General too much power to intervene in and influence civil court proceedings, the Bill raises issues in relation to the doctrine of separation of powers.[57]

3.41 Mr Emerton was particularly concerned that where the Commonwealth is a party in a proceeding:

---

53 See Criminal Proceedings Bill report, p. 25 (Recommendation 6).

54 See, for example, Mr Emerton, *Committee Hansard*, 13 April 2005, p. 2; Lesbian and Gay Solidarity, *Submission 2*, p. 3; Federation of Community Legal Centres (Vic), *Submission 9*, p. 4; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 15.

55 Mr Patrick Emerton, *Submission 8*, p. 18; Law Society of South Australia, *Submission 5*, p. 1; Australian Press Council, *Submission 13*, p. 2.

56 *Committee Hansard*, 13 April 2005, p. 15.

57 See, for example, Mr Patrick Emerton, *Committee Hansard*, 13 April 2005, p. 7; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 16; AMCRAN, *Submission 3*, pp 6-7; PIAC, *Submission 7*, p.3; Federation of Community Legal Centres (Vic), *Submission 9*, pp 1-2; Victoria Legal Aid, *Submission 14*, p. 2.

> … there would be the very obvious threat of these powers being exercised in a biased way to advance the Commonwealth's case. This possibility is only increased by the fact that the definition of 'permitted disclosure' together with the fact that the Commonwealth controls the granting of security clearances mean that the security clearance regime will be no obstacle to the Commonwealth's preparation of its own case.[58]

3.42 Mr Emerton further submitted that:

> In the final analysis, it does not matter whether such abuse actually occurs. The Attorney-General is a politician, and a senior member of the Cabinet. Even if he or she acts at all times with complete propriety, the mere fact that the Bill would give rise to the possibility of political abuse – whether by way of interference in proceedings to which the Commonwealth is not a party, or by use of the regime to advantage the Commonwealth in those matters to which it is a party – may potentially undermine confidence in, and the appearance of legitimacy of, the administration of justice in Australia.[59]

3.43 Mr Emerton was also particularly critical of the triggering mechanism in the Bill, noting that:

> It would give to the Attorney-General – one of the most senior political figures in the country – the power to determine whether or not the Bill's regime would apply to any given matter. This would open the door to both the appearance of, and the fact of, political interference in the administration of justice.[60]

3.44 In its report, the ALRC recommended a more flexible approach to dealing with security information and left greater discretion with the courts to determine how proceedings will be run.[61] The ALRC submitted that:

> It should be noted that closed hearings, ministerial certificates and security clearances are not the only methods of dealing with classified and security sensitive information (including the protection of the identity of a witness) in court proceedings. The ALRC recommended a flexible approach—allowing courts to make a broad range of orders to protect such information.[62]

3.45 Professor Weisbrot elaborated on this:

---

58 *Committee Hansard*, 13 April 2005, p. 2.

59 *Submission 8*, p. 18.

60 *Submission 8*, p. 2; see also *Committee Hansard*, 13 April 2005, p. 6.

61 *Submission 6*, p. 4; see also Professor George Williams and Dr Ben Saul, *Submission 10*, p. 2; and Mr Patrick Emerton, *Submission 8A*, p. 4.

62 *Submission 6*, p. 5; see also Professor David Weisbrot, *Committee Hansard*, 13 April 2005, pp 13-14; and Professor George Williams and Dr Ben Saul, *Submission 10*, p. 2.

> … in the ALRC's view, that was a matter, and judges are making those kinds of difficult balances all the time—for example, on whether important evidence is more prejudicial than it is probative and one side or the other is urging strongly that it is an important matter for their case. We think the courts are already sensitive and skilled at making those kinds of balances and we did not think it was necessary to provide that further direction. Similarly, on whether to close proceedings—those are the two that come to mind readily—the ALRC's recommendations were more along the lines of allowing the court to make those determinations itself.[63]

3.46 Dr Waleed Kadous from AMCRAN argued:

> …there should always be a trend or a preference for open accountability and open court proceedings. I do understand that there is occasionally the need for national security, but at least that process itself should be independent of the government. Having it in the hands of the government will make it just too tempting, and the old adage applies: imagine that these powers were not in your hands but in the hands of your worst enemy—that is, the opposing political party; imagine how they would soon be used.[64]

3.47 For this reason, AMCRAN suggested that an independent third party, such as the Inspector-General of Intelligence and Security (IGIS), should make certain decisions under the Bill, such as whether an issue is a matter of 'national security'.[65]

3.48 Indeed, as noted in the previous chapter, a key difference in relation to the civil proceedings regime is that, where the Attorney-General is a party to proceedings, the Bill provides for the Attorney-General to appoint a Minister to perform the Attorney-General's functions. A number of submissions were concerned that this was not an adequate mechanism to resolve any potential conflict of interest.[66] For example, the Federation of Community Legal Centres (Vic) argued that this mechanism 'fails to recognise the conflicted position any government minister would be in where another government department is involved in proceedings.'[67] Similarly, AMCRAN submitted that:

> It makes little difference whether the Attorney-General or another Minister hold the reins; in either case decisions having a major impact on the admissibility of evidence in a civil case are made by the person. It is obviously partial that this the same person probably belongs to the same political party or coalition as the Attorney-General.[68]

---

63 *Committee Hansard*, 13 April 2005, p. 13.

64 *Committee Hansard*, 13 April 2005, p. 18.

65 *Submission 3*, p. 7; see also Dr Waleed Kadous, *Committee Hansard*, 13 April 2005, p. 16.

66 Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 16; Law Society of South Australia, *Submission 5*, p. 1; Federation of Community Legal Centres (Vic), *Submission 9*, p. 3.

67 *Submission 9*, p. 3.

68 *Submission 3*, p. 9.

3.49 The Law Society of South Australia submitted that the decision-making powers 'would be best taken out of the political arena to reside with a senior public servant.'[69] As noted above, AMCRAN proposed that some of the Attorney-General's functions under the Bill should reside with an independent third party, such as the IGIS.[70] Dr Waleed Kadous of AMCRAN explained:

> … the power to issue certificates [should] be moved away from the representative arm of government to a senior public servant. In particular, rather than the Attorney-General deciding whether a case has national security implications, we suggest it should be given to some other office, perhaps to the Inspector-General of Intelligence and Security...[71]

3.50 AMCRAN proposed that 'the Attorney-General, for example, could apply to the IGIS for such a certificate, rather than he himself being the source.'[72] Dr Kadous explained that:

> The Inspector-General of Intelligence and Security obviously has the security clearances required and is well equipped in the role to balance the need for security against the rights of Australian citizens. That is his day-today job. At the very least, this should be the case when the Commonwealth is one of the litigants in a civil case, instead of the government sitting in judgment of itself.[73]

3.51 A representative of the Attorney-General's Department responded to AMCRAN's suggestion:

> Certainly there are cases in which public interest immunity affidavits have been given by senior public servants, but whether they would be considered to be independent is really a matter of speculation. They would probably not be. I am not aware of a situation where there is provision for an independent person to make that assessment. Generally, the courts have said that the Attorney or a minister is an appropriate person to make a decision that concerns the public interest in so far as it relates to national security. The IGIS is probably an alternative. Whether it fits the independence that was suggested by the submitters is another matter.[74]

3.52 The committee notes that the IGIS is an independent statutory office set up under its own legislation, the *Inspector-General of Intelligence and Security Act 1986*. Its responsibilities include monitoring the activities of intelligence and security agencies as well conducting inquiries, investigating complaints and making

---

69 *Submission 5*, p. 1.

70 *Submission 3*, p. 10.

71 *Committee Hansard*, 13 April 2005, p. 16.

72 *Submission 3*, p. 7; see also Dr Waleed Kadous, AMCAN, *Committee Hansard*, 13 April 2005, p. 16.

73 *Committee Hansard*, 13 April 2005, p. 16.

74 *Committee Hansard*, 13 April 2005, p. 37.

recommendations to government concerning those agencies. The committee notes that, in this regard, the IGIS is an important element of the accountability regime for Australia's intelligence and security agencies.[75]

The committee's view

3.53 The committee acknowledges the concerns that exist over the perceived conflict of interest arising out of the Attorney-General's power under the Bill to intervene in civil proceedings. This situation differs from that in federal criminal proceedings, where an independent statutory office holder — the Director of Public Prosecutions — would be involved in proceedings. The committee also acknowledges concerns of some witnesses in relation to the appointment of another Minister to perform the Attorney-General's functions under the Bill where the Attorney-General or the Commonwealth is a party to a civil proceeding.

3.54 However, the committee notes that the provisions in question will in effect authorise the Executive's intervention in civil legal proceedings in certain specified circumstances. The committee's view is that it would be inappropriate for such an intervention to be authorised by anyone other than the Executive (ie, by a Minister). The committee also notes witnesses' difficulty in identifying an independent alternative to a Minister who might appropriately exercise this role. While the IGIS was put forward as a possible alternative, the committee's view is that providing the IGIS with the responsibility to issue national security information certificates is at odds with the crucial role of the IGIS in holding Australia's intelligence and security agencies to account.

3.55 The committee considers that its recommendations later in this report may help to address these concerns by giving the court greater discretion over matters in civil proceedings. Moreover, it is noted that the committee - and parliament as a whole - will also have an active role in monitoring this issue in the future operation of the legislation.

Specific provisions relating to the court's discretion

3.56 In the context of interference with the court's discretion, several specific provisions were raised in submissions, including provisions relating to:

- closed hearing requirements;
- weighing national security against the right to a fair trial; and
- access to court records of closed hearings.

3.57 Many submissions were concerned about the provisions of the Bill requiring the court to hold closed hearings (subclauses 38G(3) and 38H(7)). Similar concerns

75 See further: http://www.igis.gov.au (accessed 28 April 2005).

were raised in relation to analogous provisions of the Criminal Proceedings Bill during the committee's inquiry into that Bill.[76]

3.58 During this inquiry, for example, the Public Interest Advocacy Centre (PIAC) argued that the closed hearing requirements may offend principles of open and transparent administration of justice.[77] Mr Emerton also queried the logic of the closed hearing regime:

> … we could see the court reach a decision after the closed hearing that certain information is to be excluded or to be admitted only in a limited way. This would be the court in its capacity as a court of law deciding that, in its capacity as a tribunal of fact, it is not allowed to consider the information. Again, one asks what the logic is of this.[78]

3.59 HREOC noted that article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR) specifically requires a public hearing, except in certain limited circumstances including in the interests of national security.[79] However, HREOC explained that this:

> … does not mean that any matter touching upon national security may be considered in closed court without offending article 14(1). Rather such encroachments on the right to a public hearing must be limited to what is strictly necessary in proportion to the perceived threat to national security.[80]

3.60 HREOC believed that, by removing from the court the discretion to hold a closed hearing, the approach adopted in the Bill would be unlikely to satisfy this test of proportionality.[81] HREOC further noted that '… where the 'exceptional circumstances' specified in article 14(1) are relied upon for closing a court, reasons must be provided for not providing a public trial.' HREOC therefore recommended that the provisions of the Bill directing the court to hold closed hearings (that is, subclauses 38G(3) and 38H(7)) be omitted and that the matter of closed hearings be left to the discretion of the court. HREOC also recommended that the court be expressly obliged to provide reasons where proceedings are heard *in camera*.[82]

3.61 In the same vein, the ALRC noted that, in its report, it:

---

76 See Criminal Proceedings Bill report, pp 19-22.

77 *Submission 7*, p. 4; see also the Federation of Community Legal Centres (Vic), *Submission 9*, pp 1-2 and 4.

78 *Committee Hansard*, 13 April 2005, p. 2; see also pp 4-5.

79 *Submission 12*, p. 9; Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 22.

80 *Submission 12*, p. 9.

81 *Submission 12*, p. 9; Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, pp 22-23.

82 *Submission 12*, p. 9.

> … did not propose that a court be directed by statute to hold any hearing in closed session. The ALRC recommendations in this regard contemplate that the power to determine how the proceedings will be run should rest with the court.[83]

3.62 Many submissions raised concerns in relation to subclauses 38L(7) and (8) of the Bill.[84] Once again, similar concerns were raised in relation to analogous provisions of the Criminal Proceedings Bill during the committee's inquiry into that Bill.[85] In this Bill, subclause 38L(7) requires the court to consider a number of factors when making orders for dealing with national security information. These include the risk of prejudice to national security and whether the court's order would have a *substantial* adverse effect on the substantive hearing in the proceeding. However, subclause 38L(8) requires the court to give the greatest weight to the risk of prejudice to national security.

3.63 Several submissions suggested that subclause 38L(8) be removed altogether.[86] For example, HREOC expressed its view that:

> While acknowledging that possible prejudice to national security ought to be given great weight, the Commission is of the view that the courts should retain a more flexible discretion which can be better tailored to the circumstances of each matter. That will be particularly so in matters … where decisions to exclude certain evidence may diminish a party's capacity to seek remedies for violations of their human rights.[87]

3.64 HREOC and AMCRAN also recommended that the word 'substantial' be deleted from proposed paragraph 38(L)(7)(b).[88] HREOC further proposed that:

> … a new subsection be added to s38(L)(7) requiring the court to consider 'whether any such order would have an adverse effect on the human or fundamental rights of a party'.[89]

3.65 Mr Emerton also supported similar amendments, suggesting that the court should have the right 'to weigh the protection of national security against the fairness to the litigants involved and to itself be able to assess all of those factors with no statutorily imposed weighting in favour of one consideration against another.'[90]

---

83 *Submission 6*, p. 3; see also Professor George Williams and Dr Ben Saul, *Submission 10*, p. 2.

84 See, for example, Mr Patrick Emerton, *Submission 8*, pp 22-23; HREOC, *Submission 12*, p. 7; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 15.

85 See Criminal Proceedings Bill report, pp 41-43.

86 See, for example, AMCRAN, *Submission 3*, p. 8; Law Council, *Submission 15*, p. 3; HREOC, *Submission 12*, p. 7.

87 *Submission 12*, p. 7.

88 HREOC, *Submission 12*, p. 7; AMCRAN, *Submission 3*, p. 8.

89 *Submission 12*, p. 7.

90 *Committee Hansard*, 13 April 2005, p. 6.

3.66 A representative of the Attorney-General's Department observed that, in relation to the amendments proposed by HREOC:

> Many of the issues that were raised in the submission are issues that are common to both the Criminal Proceedings Act and the bill. To the extent that those provisions are similar, it would certainly not be desirable, I think, to inject different procedures—for example, in relation to giving the court a greater discretion under 38L(7) and 38L(8).[91]

3.67 Several submissions also raised concerns that the Bill, particularly subclause 38I(9), would restrict the court's discretion in relation to access to court records of closed hearings.[92] Again, restrictions on access to court records were raised during the committee's inquiry into the Criminal Proceedings Bill.[93]

3.68 For example, the Federation of Community Legal Centres (Vic) was concerned that the provisions relating to court records effectively meant that 'the Attorney-General is able to determine definitively what information parties to civil proceedings are able to obtain'.[94]

3.69 HREOC was also concerned that access restrictions in clause 38I may frustrate a person's ability to appeal from a court order under s38L. HREOC recommended that the Bill be amended at least to permit access to the record by security cleared parties who have engaged lawyers. HREOC also recommended that the Bill be amended to:

- give the court a wider discretion to determine the disclosure regime for the record (including the power to allow access by parties and legal representatives who are not security cleared, subject to such undertakings and conditions as the court considers appropriate); and
- expressly require the court to consider the possible adverse effects on affected parties in applications to vary the record by the Attorney-General.[95]

The committee's view

3.70 The committee notes that similar concerns in relation to the level of intervention by the Attorney-General in court proceedings were raised during the committee's inquiry into the Criminal Proceedings Bill. The committee made a

---

91 *Committee Hansard*, 13 April 2005, p. 34.

92 See especially subclause 38I(5). See also HREOC, *Submission 12,* pp 9 and 11-12; Law Council, *Submission 15*; Federation of Community Legal Centres (Vic), *Submission 9*, p. 2.

93 Criminal Proceedings Bill report, pp 20-22.

94 *Submission 9*, p. 2.

95 *Submission 12*, p. 12; see also Mr Patrick Emerton, *Submission 8*, p. 20.

number of recommendations in relation to that Bill that were intended to give courts greater discretion in the conduct of their proceedings.[96]

3.71 Some of these recommendations were taken up in amendments to the Criminal Proceeding Bill, which are now contained in the Act. In particular, the Act and the Bill reflect the committee's recommendation that the court retains the power to stay proceedings if a fair trial cannot be guaranteed (see Recommendation 6). This addresses many of the committee's concerns, notwithstanding its differential impact in relation to civil proceedings as discussed earlier in this report. Nevertheless, the committee remains concerned about some provisions of the Bill which restrict the court's discretion.

3.72 The committee recognises that other amendments were made to the Act, and these are also reflected in this Bill. For example, under section 32 of the Act, the court is required to give reasons for making orders under the Act. Similarly, clause 38M of the Bill will require the court to give reasons for making orders under clause 38L.

3.73 The committee also notes that other recommendations made by this committee were not reflected in the final Act. The committee therefore considers it appropriate to reiterate some of its previous recommendations in relation to this Bill, to ensure that the court has an appropriate level of discretion in the conduct of proceedings.

3.74 In relation to the closed hearing requirements, the committee reiterates its concern that the court will have no discretion to determine whether these proceedings should be opened or closed. The committee remains of the view that the court should retain the discretion in relation to whether or not to make an order for closed hearings when considering the Attorney-General's certificate. The committee also considers that the court should be required to provide a statement of reasons for holding a closed hearing. The committee notes that it made recommendations to this effect in relation to the Criminal Proceedings Bill, but they are not reflected in the Act.

Recommendation 1

3.75 The committee recommends that subclauses 38G(3) and 38H(7) 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

3.76 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.

---

96 See Criminal Proceedings Bill report, pp 19-22 and 41-45; and especially Recommendations 2-5 and 11-13.

Recommendation 3

3.77 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 hearing, 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.

3.78 As with the Criminal Proceedings Bill, the committee is concerned about the requirement for the court to give the greatest weight to the risk of prejudice to national security. In this Bill, those requirements are contained in subclauses 38L(7) and (8) of the Bill. The committee therefore again proposes similar recommendations in relation to this Bill – that is, that the term 'substantial' be removed from paragraph 38L(7)(b) and that subclause 38L(8) should be removed from the Bill.

Recommendation 4

3.79 The committee recommends that the term 'substantial' be removed from paragraph 38L(7)(b) of the Bill.

Recommendation 5

3.80 The committee recommends that subclause 38L(8) be removed from the Bill.

3.81 In relation to access to the record of the closed hearing, the committee also believes that the Bill should allow the court greater flexibility in determining how evidence taken in-camera should be made available. In particular, the committee believes that the defendant and his or her legal representative should only be denied access to the transcript in the most extraordinary of circumstances. If the court restricts access to the record, reasons should be provided. Further, if the Attorney-General applies for the record to be varied, the court should be required to consider the possible adverse effects on affected parties if a variation is made to that record.

Recommendation 6

3.82 The committee recommends that subclauses 38I(5) and (9) of the Bill be amended to allow the courts the discretion to determine to what extent the court record or parts of it should be made available and any undertakings required for people to have access to the record.

Recommendation 7

3.83 If the above recommendation is accepted, 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 record.

Recommendation 8

3.84 The committee recommends that the Bill be amended to require the court to consider the possible adverse effects on affected parties in making a decision under subclause 38I(8) in relation to an application to vary the record by the Attorney-General.

Security clearances

3.85 Many submissions raised concerns in relation to security clearance requirements.[97] Once again, very similar concerns, in relation to analogous provisions, were raised during the committee's inquiry into the Criminal Proceedings Bill.[98] For example, Victoria Legal Aid argued that:

> … there are already sufficient stringent requirements to ensure that lawyers are competent to operate in sensitive areas of national security, and are answerable for contraventions of this duty. A requirement for security clearance for lawyers will seriously affect the provision of adequate and proper services by an organisation such as VLA.[99]

3.86 The ALRC informed the committee that, in the course of its inquiry into classified and security sensitive information, it had:

> … 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.[100]

3.87 As with the Criminal Proceedings Bill, some submissions expressed the view that the requirements relating to security clearances for lawyers would unfairly restrict a person's choice of lawyer.[101] For example, Dr Waleed Kadous from AMCRAN expressed his view that:

---

97 See, for example, PIAC, *Submission 7*, p. 5; Mr Patrick Emerton, *Submission* 8, p. 10; Victoria Legal Aid, *Submission 14*, pp 2-3; Law Council, *Submission 15*, p. 3; AMCRAN, *Submission 3*, p. 11.

98 See Criminal Proceedings Bill, especially pp 34-40.

99 *Submission 14*, pp 2-3.

100 *Submission 6*, p. 4.

101 See, for example, Amnesty, *Submission 11*, pp 14-15; Law Council, *Submission 15*, pp 3-4; Federation of Community Legal Centres (Vic), *Submission 9*, p. 2; Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, p. 28.

> … if a client is really interested in presenting the best possible case, then realistically that person, if their lawyer does not get security clearance, will have to hire another lawyer and once again go through the process of briefing that lawyer—at their own expense, possibly, if they happen to lose the case. In addition, that new lawyer has to go through a security clearance. The person could be on this roundabout picking lawyer after lawyer that he trusts but that the government does not want to give security clearance to. Eventually he has to settle for a lawyer that already has security clearance, even if he would not like to choose that particular lawyer.[102]

3.88 Several submissions expressed concern about aspects of the procedures for obtaining security clearances. For example, as with the Criminal Proceedings Bill, many felt that basing the security clearance process on the Australian Government Protective Security Manual was inappropriate.[103] One of the key concerns was that the manual is a policy document issued by the Attorney-General's Department and is not publicly available. AMCRAN also expressed concern about some of the 'vague' and 'subjective' terms used in the manual, such as 'reliability, truthfulness, honesty'.[104] The Federation of Community Legal Centres (Vic) expressed concern that the manual is 'subject to variation by the executive government at any time, free of any legislative, judicial or public oversight.'[105]

3.89 As with the committee's inquiry into the Criminal Proceedings Bill, it was suggested that the courts should retain discretion over the security clearance process, rather than the Secretary of the Attorney-General's Department.[106] For example, the Law Council argued that:

> Fundamentally the Law Council believes that a court, and not the Secretary of the Attorney General's Department, should determine whether a legal representative and, in the case of this Bill, the parties and the assistants of a legal representative, require a security clearance. Failing this, the process undertaken by the Secretary of the Attorney General's Department should be as fair and as transparent as possible.[107]

---

102 *Committee Hansard*, 13 April 2005, p. 19.

103 See, for example, Mr Patrick Emerton, *Submission* 8, p. 10; AMCRAN, *Submission 3*, p. 11; Law Council, *Submission 15*, p. 3; Federation of Community Legal Centres (Vic), *Submission 9*, p. 3; Victoria Legal Aid, *Submission 14*, p. 2; see also Note 1 to subclause 39A(2) of the Bill.

104 Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, pp 18-19.

105 *Submission 9*, p. 3; see also Mr Patrick Emerton, *Submission 8*, p. 10.

106 See, for example, AMCRAN, *Submission 3*, p. 10; Law Council, *Submission 15*, p. 3; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 18.

107 *Submission 15*, p. 4; see also Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, p. 28.

3.90 AMCRAN suggested that the security clearance process should be set out in the legislation. AMCRAN further observed that its objections to the security clearance procedures are:

> … even more relevant in the present Bill in that a self-represented party to proceedings may seek security-clearance in order to access the material in question. For some, going to court is already a harrowing experience, especially those who have no choice but to be self-represented because of a social- or economical disadvantage. To further subject them to personality analysis that brings into question their maturity, honesty and loyalty would no doubt have the additional effects of intimidation and demoralisation.[108]

3.91 Indeed, unlike the Act's provisions in relation to criminal proceedings, the Bill provides that a party (not just the party's representative) may apply for a security clearance. The ALRC noted that, while it did not make a recommendation about the security clearance of a party, this provision in the Bill was consistent with the ALRC's approach to the issue. The ALRC also noted that this provision will be particularly relevant where a party is unrepresented (which is a more likely occurrence in civil proceedings).[109]

3.92 During his second reading speech, the Attorney-General noted these provisions and acknowledged that many parties may represent themselves in civil proceedings:

> In recognition of the additional financial burden involved in engaging a security cleared legal representative to attend a closed hearing, the government has agreed that a self-represented litigant involved in a civil matter under Commonwealth law who is refused a security clearance at the appropriate level would be eligible to apply for financial assistance under the non-statutory special circumstances scheme.[110]

3.93 The Attorney-General continued:

> If approved, this would provide financial assistance for the legal costs and related expenses associated with engaging a legal representative to attend the closed hearing. It is my expectation that such legal assistance in those circumstances would be available.[111]

3.94 The ALRC noted that the opportunity for unrepresented parties who are unable to obtain a security clearance to access financial assistance to obtain a security cleared lawyer is an important component of the scheme and is consistent with the

---

108 *Submission 3*, pp 10-11.

109 *Submission 6*, p. 4; see also Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 24.

110 The Hon. Mr Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 10 March 2005, p. 1.

111 The Hon. Mr Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 10 March 2005, p. 1.

ALRC's approach.[112] Similarly, the Law Council also appeared to be supportive of the provision of financial assistance to self-represented litigants.[113]

3.95 In response to questioning from the committee on this issue, Mr Lenehan from HREOC observed that, if a self-represented litigant were refused financial assistance:

> … in some circumstances that is going to mean that the potential of the court to provide an effective remedy is going to become illusory, so where violations of human rights are concerned that again is going to raise article 2 of the ICCPR.[114]

3.96 The committee asked the Attorney-General's Department how the scheme for financial assistance for self-represented litigants would operate, and the funds that would be available to the scheme. The Attorney-General's Department responded that, while there is no separate appropriation for the scheme, there is an appropriation of $1.4 million for all schemes of financial assistance (apart from native title schemes). The Attorney-General's Department also explained that a decision in relation to financial assistance would be made based on whether the applicant fulfilled the relevant criteria – that is, 'that the applicant is unrepresented in proceedings and has been denied the relevant security clearance.' The Department further clarified that:

> Funding is only available for the purpose of engaging a legal representative with the appropriate security clearance to attend the closed hearing or appeal. Funding will be approved if the applicant would suffer financial hardship if assistance were refused.[115]

3.97 The Department also explained that, where there is a decision to refuse assistance, written reasons will be provided, and an internal review of that decision may be requested.[116]

Security clearances - associated issues

Disclosure provisions and offences

3.98 One of the key implications of the security clearance requirements relates to the Bill's restrictions on the disclosure of national security information. In particular, once the regime under the Bill has been invoked by the Attorney-General issuing a certificate, clause 46G creates an offence for disclosing information to parties, legal representatives and persons assisting legal representatives, where that disclosure is likely to prejudice national security. The Bill then sets out 'a complex set of

---

112 *Submission 6*, p. 4.

113 Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, p. 30.

114 *Committee Hansard*, 13 April 2005, p. 24.

115 *Submission 16*, p. 4.

116 *Submission 16*, p. 4.

exemptions that apply to that offence'.[117] Mr Patrick Emerton and HREOC explained that these exceptions include situations where:

- the person disclosing the information is a legal representative or person assisting a legal representative who has been given a security clearance considered appropriate by the Secretary of the Attorney-General's Department and discloses the information in the course of her or his duties in relation to the proceedings;
- the person disclosing the information is a party who has been given a security clearance considered appropriate by the Secretary of the Attorney-General's Department and discloses the information in the proceeding or a closed hearing;
- the person receiving the information is a party, legal representative or person assisting a legal representative who holds such a security clearance; or
- the disclosure is by an employee, officer or Minister of the Commonwealth, and takes place in the course of his or her duties in relation to the proceeding.[118]

3.99 HREOC observed that 'this scheme creates a somewhat odd series of anomalies.'[119] Similarly, Mr Emerton submitted that 'the effects of this offence are several. Because of the complexity of the exceptions, not all of them are obvious.'[120] Mr Emerton observed:

> … as far as I can tell, the interaction of the two sections [clause 46G and section 16] result in an outcome where A could talk to B if A was security cleared or if B was security cleared but A was not, but not if neither was, but there would be no requirement that both be security cleared—and I ask what the logic is of this. It seems to me that all the security regime really achieves is to undermine the integrity and the independence of lawyers by making them beholden to the Commonwealth and by making it harder for litigants to be represented by a lawyer of their choice.[121]

3.100 Several submissions felt that these provisions may interfere with lawyer-client relations and/or impact on a party's ability to prepare their case.[122] For example, Mr Emerton argued that 'the general effect of the offence [in clause 46G] is to inhibit all

---

117 HREOC, *Submission 12*, pp 12-13; see also Mr Patrick Emerton, *Submission 8*, pp 6-7.

118 See proposed section 16 and subclause 46G; also HREOC, *Submission 12*, pp 12-13; Mr Patrick Emerton, *Submission 8*, pp 6-7.

119 HREOC, *Submission 12*, p. 13.

120 *Submission 8*, p. 7.

121 *Submission 8*, p. 2.

122 See, for example, Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 19; HREOC, *Submission 12*, pp 12-13; Mr Patrick Emerton, *Submission 8*, pp 6-9; Victoria Legal Aid, *Submission 14*, p. 2; Amnesty, *Submission 11*, pp 12-13.

parties to the proceeding in the preparation of their cases, by making it an offence for anyone to disclose certain information to them.'[123] Similarly, the Federation of Community Legal Centres (Vic) was concerned that the effect of clause 46G:

> … would be to limit the capacity of a lawyer to receive a comprehensive briefing from his or her client, or to discuss the subject matter of the proceedings with possible witnesses and others. It would also seem to restrict a lawyer from informing a client, who is not security cleared, about the details and even outcome of proceedings.[124]

3.101 Mr Emerton argued that the disclosure provisions may also unfairly advantage the Commonwealth if they are a party, because it will be able to disclose the information in question for the purposes of working on its case, while other parties may well not be able to do so.[125] Mr Emerton explained:

> The Commonwealth has a ready supply of security-cleared personnel, and through its control of the security clearance procedure is able to generate more of these if required. The Commonwealth is also in a good position to have the Secretary of the Attorney-General's Department approve disclosures.[126]

3.102 HREOC observed that the disclosure scheme departs from the ALRC recommendations that the court should determine the disclosure regime for such information.[127] Mr Lenehan from HREOC argued that:

> Courts have extensive experience dealing with this sort of information and, for that matter, confidential information in a private sector context…Courts have very flexible procedures for dealing with this sort of material. That is our fundamental point: it really should be left with a court rather than being dependent upon the exercise of a discretion by the executive.[128]

Exclusion of non-security cleared parties

3.103 Another important implication of the security clearance provisions is that clause 38I allows the court to exclude parties and legal representatives without security clearances from parts of closed hearings in certain circumstances. The Federation of Community Legal Centres (Vic) were concerned that the security clearance requirements meant that 'the Bill gives extensive power to the government to control who can participate in legal proceedings.'[129] Mr Patrick Emerton felt that

---

123 *Submission 8*, p. 7.

124 *Submission 9*, p. 2.

125 *Submission 8*, p. 13.

126 *Submission 8*, p. 8.

127 HREOC, *Submission 12*, p. 13.

128 *Committee Hansard*, 13 April 2005, p. 24.

129 *Submission 9*, p. 2.

these provisions were objectionable because 'they permit a party to a matter to be excluded from a hearing at which the admission of evidence potentially crucial to the matter is to be discussed.'[130]

3.104 Similarly, Amnesty believed that:

> … the parties should be present in court during the hearing to hear the full case, to refute or provide information to enable their counsel to refute evidence and to examine witnesses or advise their counsel in the examination of witnesses.[131]

3.105 HREOC was likewise concerned that an excluded party would have difficulties offering assistance to the court by presenting a contrary argument. HREOC argued that the absence of such an argument 'may well result in a central evidentiary element of the case being excluded or (in the case of documents) considerably modified.'[132] HREOC suggested that clause 38I be amended to:

- require the court to consider whether the making of an order excluding a party and/or their legal representative would adversely affect their right to a fair hearing, including the right to contest all the argument and evidence adduced by other parties; and
- in exceptional circumstances where an 'exclusion order' is made, require the court to consider making orders which will ensure that a person is able to contest all the argument and evidence adduced by the Attorney-General or her or his legal representative (including through the use of redacted evidence or submissions).[133]

3.106 HREOC argued that the latter amendment 'would ensure that the right to make submissions about non-disclosure or witness exclusion (preserved by proposed s38I(4)) may be exercised in a meaningful fashion.'[134]

The committee's view

3.107 The committee notes that the security clearance requirements and associated restrictions were a major concern during the ALRC's inquiry and this committee's inquiry into the Criminal Proceedings Bill.[135] In relation to the Criminal Proceedings

130 *Submission 8*, p. 19.

131 *Submission 11*, p. 12.

132 *Submission 12*, p. 10.

133 *Submission 12*, p. 11; see also Mr Craig Lenehan, *Committee Hansard*, 13 April 2005, p. 22.

134 *Submission 12*, p. 11.

135 See Criminal Proceedings Bill report, especially pp 34-39.

Bill, the committee made a number of recommendations in relation to security clearance requirements, some of which were implemented.[136]

3.108 In relation to this Bill, the committee supports some of HREOC's suggestions for amendments to this Bill. In particular, the court should be required to consider whether the making of an order excluding a party and/or their legal representative would adversely affect their right to a fair hearing, including the right to contest all the argument and evidence adduced by other parties.

3.109 In addition, the court must have a more active role in determining whether a party or a party's legal representative requires a security clearance. In particular, the committee accepts HREOC's suggestions for an amendment to clause 38I to ensure that the court is able to consider the impact of excluding a party or their legal representative, and whether that would adversely affect their right to a fair trial.

Recommendation 9

3.110 The committee recommends that clause 38I of the Bill be amended to require the court to consider whether the making of an order excluding a party and/or their legal representative would adversely affect their right to a fair hearing, including the right to contest all the argument and evidence adduced by other parties.

Other issues

3.111 A number of other issues were raised during the committee's inquiry, including:

- the definition of 'national security';
- compliance with international obligations;
- the potential for increased delays and costs in civil proceedings;
- the appointment of court security officers;
- restrictions on judicial review;
- a possible sunset clause; and
- related provisions of the Migration Act.

Definition of national security

3.112 The definition of 'national security', contained in section 8 of the Act, is central to the proposed legislation. 'National security' is defined as 'Australia's defence, security, international relations or law enforcement interests'. These elements, in turn, are defined in sections 9 to 11 of the Act. For example, 'international

136 For example, the Criminal Proceedings Bill report recommended that courts retain the power to stay proceedings if the defendant could not be assured of a fair trial (p. 25, Recommendation 6). The court retains the power to stay proceedings under section 19 of the Act.

relations' in the Act is defined to mean 'political, military and economic relations with foreign governments and international organisations'.

3.113 As with the Criminal Proceedings Bill, several submissions expressed concern that the definition of 'national security' in the Act is too broad, vague and subjective.[137] For example, Professor George Williams and Dr Ben Saul submitted that:

> A vast range of information potentially falls within the ambit of these definitions, particularly Australia's 'international relations interests' … The Bill imposes strict liability for failure to notify the Attorney-General, regardless of whether a party unintentionally, inadvertently or mistakenly failed to notify.[138]

3.114 AMCRAN also commented that:

> It is not inconceivable that according to this definition, almost any matter involving a non-Australian citizen or naturalised Australian citizen could be a matter relevant to 'national security'.[139]

3.115 PIAC suggested that guidelines should be created upon which self represented litigants and the legal profession could rely in preparing for civil proceedings.[140]

3.116 For many submitters, the broad nature of the definition was of particular concern given that the proposed criminal offences in the Bill rely on this definition.[141] For example, Professor George Williams and Dr Ben Saul submitted that:

> Considering the breath and vagueness of the definition of 'national security' under federal law, it is unduly onerous to criminalise the failure to notify the Attorney-General of national security information arising in civil proceedings (sections 38D and 46C).[142]

3.117 For example, clause 46C of the Bill contains an offence for failure to notify the Attorney-General if a party to civil proceedings knows or believes that they will

---

137 Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, pp 15 and 17; AMCRAN, *Submission 3*, pp 3-5; Amnesty, *Submission 11*, p. 16; Law Council, *Submission 15*, pp 5-6; Australian Press Council, *Submission 13*, p. 2; Australian Civil Liberties Union, *Submission 1*, p. 1; PIAC, *Submission 7*, p. 6.; Federation of Community Legal Centres (Vic), *Submission 9*, p. 2; Professor George Williams and Dr Ben Saul, *Submission 10*, p. 1; Victoria Legal Aid, *Submission 14*, pp 1-2; Mr Patrick Emerton, *Submission 8*, p. 4 and *Committee Hansard*, 13 April 2004, p. 2.

138 *Submission 10*, pp 1-2.

139 *Submission 3*, p. 4.

140 *Submission 7*, p. 6.

141 See, for example, Amnesty, *Submission 11*, p. 17; Law Council, *Submission 15*, p. 5; PIAC, *Submission 7*, p. 6; Law Society of South Australia, *Submission 5*, p. 2; Mr Patrick Emerton, *Submission 8*, p. 11.

142 *Submission 10*, p. 1.

disclose information that relates to or may affect national security.[143] AMCRAN suggested that the offence in clause 46C should be removed altogether, arguing that:

> … given the breadth of the definition of "national security" and all of its inherent vagueness and biases … it would be almost impossible for a person, especially one who is unrepresented, to form an opinion as to whether or not the information is likely to prejudice national security. To further impose a two-year prison sentence under these circumstances is entirely unjust.[144]

3.118 In the same vein, Amnesty argued 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 affect national security and therefore it is virtually impossible to know if one is committing an offence.[145]

3.119 Similarly, the Law Society of South Australia expressed concern that the Bill requires:

> … a party and his/her legal advisors to be particularly prescient as to what the Attorney might consider affects national security, upon which opinions will be varied.[146]

3.120 The Law Council was particularly concerned that the offence in clause 46G (for disclosing information in civil proceedings to persons without security clearances) appeared to be 'absolute' in its application. That is, if information disclosed 'is likely to prejudice national security', the state of knowledge about the information on the part of the person unaware of its security nature appears to be 'immaterial'. [147]

3.121 The Law Council suggested that, among other things, a defence or exception to the offence should be made available based on the 'reasonableness of the actions of the person disclosing the information.'[148] In response to this suggestion, a representative of the Attorney-General's Department pointed to the provisions of Division 5 of the Criminal Code, which 'requires intentional disclosure of the information and recklessness as to whether or not it is national security information'.[149]

---

143 Or they will call a witness who may make such disclosures.

144 *Submission 3*, p. 6; Dr Waleed Kadous, AMCRAN *Committee Hansard*, 13 April 2005, p. 16.

145 *Submission 11*, p. 17.

146 *Submission 5*, p. 2.

147 *Submission 15*, p. 6; see also Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, pp 28-29.

148 Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, p. 29; see also *Submission 15*, p. 6.

149 *Committee Hansard*, 13 April 2005, p. 37.

The committee's view

3.122 The committee notes that similar objections and concerns were raised in relation to the definition of national security under Criminal Proceedings Bill.[150] The committee noted its concern in relation to the definition of national security under the Criminal Proceedings Bill. The committee acknowledges that the definition was amended slightly to remove the references to 'national interests'.

3.123 Nevertheless, the committee still considers that the definition of 'national security' is extremely broad, especially in light of the fact that criminal offences under the Bill are based on the definition. However, the committee considers that its recommendations elsewhere in this report may help address some of these concerns. The committee also recognises the Attorney-General's Department's evidence that the offences would require intentional disclosure of the information and recklessness as to whether or not it is national security information.

Compliance with international obligations

3.124 HREOC and Amnesty, among others, were concerned that the Bill may not comply with Australia's international obligations, for example, under the ICCPR. HREOC was particularly concerned with two key obligations under the ICCPR, that is:

- the right to a fair and public hearing under article 14(1)); and
- the right to provide an effective remedy for violations of human rights under article 2(3).[151]

3.125 HREOC's submission outlined a number of provisions of the Bill which may impact on the right to a fair and public hearing, such as the closed hearing requirements.[152] In relation to the obligation to provide effective remedies, HREOC submitted that the Bill would apply to many proceedings in which such remedies are in issue, such as proceedings relating to visa or passport entitlements; or proceedings relating to unlawful detention.[153] HREOC argued that, if the Bill operates so as to unduly restrict the ability of courts to provide remedies for potential human rights violations, it may leave Australia in breach of its obligations under article 2(3) of the ICCPR.[154] HREOC then outlined some of the specific provisions of the Bill which may be of concern in this context, including: the restrictions on the court's discretion; closed hearing requirements; potential to exclude parties and legal representatives

---

150 See Criminal Proceedings Bill report, pp 15-17.

151 HREOC, *Submission 12*, p. 2; Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 20; see also Amnesty, *Submission 11*, pp 11-15.

152 *Submission 12*, pp 10-11; also Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 20.

153 *Submission 12*, pp 3-4.

154 *Submission 12*, p. 5.

from parts of closed hearings; and restrictions on disclosure of information to parties and legal representatives.[155]

3.126 HREOC made a number of suggestions for amendments to the Bill which it felt would address its concerns in relation to potential breaches of these international obligations.[156] These proposed amendments are considered elsewhere in this report. In particular, Mr Craig Lenehan from HREOC observed that:

> The commission's key concerns in relation to both those rights [under the ICCPR] arise from the manner in which the bill applies constraints upon judicial discretion.[157]

3.127 Mr Lenehan continued:

> … such constraints can operate to diminish the court's power to ensure equality between parties, which is one of the fundamental characteristics of a fair trial. Similarly, it can limit the court's capacity to provide effective remedies for violations of human rights. The commission's approach has therefore been to suggest amendments which would return power to the courts.[158]

3.128 Amnesty also pointed out the right to a fair hearing under international law. Amnesty observed that 'an essential component of the right to a fair hearing is the principle of "equality of arms"'.[159] According to Amnesty, this principle firmly establishes the need for equality between the parties. Amnesty argued that:

> … this principle would be violated, for example, if a party was not given access to information necessary for the preparation of their case, if a party was denied access to expert witnesses, or if a party was excluded from an appeal hearing where the other party was present. This Bill proposes several such restrictions that would directly undermine the right to "equality of arms" and would remove the equality between the parties.[160]

3.129 Amnesty was also concerned that the Bill would have an impact on international obligations to provide effective remedies. In this context, Amnesty was particularly concerned about the interaction that the Bill may have with the ASIO Act.[161] Amnesty also pointed to a number of other components of the right to a fair and public hearing under international law, such as the right to prepare, the impact of delay, and the right to a lawyer of a party's own choice. Amnesty argued that the Bill

---

155 *Submission 12*, pp 5-13.

156 *Submission 12*, pp 5-13.

157 *Committee Hansard*, 13 April 2005, p. 20.

158 *Committee Hansard*, 13 April 2005, p. 21.

159 *Submission 11*, p. 11.

160 *Submission 11*, p. 12.

161 *Submission 11*, pp 15-16.

may have adverse impacts on all these components.[162] These issues are considered in relation to specific provisions elsewhere in this report.

3.130 In response to the committee's questions as to whether the ALRC had any opinion on whether the regime may breach Australia's international obligations, Professor Weisbrot of the ALRC was less concerned, stating that:

> … black-and-white reading of the covenant tends not to be how the world works in practice. We do allow proceedings to be closed in a number of circumstances, such as in the Children's Court and so on. So those rights are balanced against what is reasonably justifiable in a democratic society. In the particular circumstances of dealing with highly sensitive national security information, I think that those are some of the trade-offs you have to make.[163]

3.131 Professor Weisbrot continued:

> Given that we are putting things into the court process and giving the court the decision about ultimately whether things are conducted in closed hearings and how evidence is presented and whether it should be presented and ultimately whether fairness to the parties means fully proceeding or issuing a stay, I think those protections are well guarded.[164]

3.132 However, Professor Weisbrot appeared to indicate that there could be some concerns under international law if the regime were not extended to administrative tribunals, as discussed earlier in this report.[165]

The committee's view

3.133 The committee notes the concerns in relation to the potential impact of the Bill on Australia's obligations under international law. However, the committee considers that its recommendations elsewhere in this report may help alleviate these concerns.

Delay and costs

3.134 Several submissions were concerned about the Bill's potential to result in increased delays and costs in civil proceedings, due to the numerous provisions for adjournment, the security clearance requirements and the lack of time limits in the Bill.[166] For example, Amnesty argued that:

---

162 Amnesty, *Submission 11*, pp 12-15.

163 *Committee Hansard*, 13 April 2005, p. 11.

164 *Committee Hansard*, 13 April 2005, p. 12.

165 *Committee Hansard*, 13 April 2005, p. 12.

166 See, for example, PIAC, *Submission* 7, p. 6; Law Council, *Submission 15*, p. 5; Amnesty, *Submission 11*, p. 13; Law Society of South Australia, *Submission 5*, p. 2.

> … there is a multiplicity of opportunities for delay in the proceedings. This will have significant impact on the parties as it will make the proceedings more expensive and will ultimately limit their access to justice.[167]

3.135 For AMCRAN, the length of time it may take for a lawyer to get a security clearance was of particular concern.[168] Mr Emerton also pointed out that the Bill does not establish a time period in which the Attorney-General must come to a decision in relation to any notice given by the parties or the court of a potential disclosure of information relevant to national security.[169]

3.136 Amnesty and HREOC pointed out that the creation of delay may also be problematic in the context of Australia's obligations under international law. Amnesty argued that 'the parties have a right to a remedy in civil proceedings and this right may be adversely affected by the continued delay of the proceedings made possible under this Bill.'[170] Similarly, Mr Craig Lenehan from HREOC observed that:

> In cases where a person has not been able to access a court in sufficient time to prevent the violation in question taking place, the European Court [of Human Rights] has said that that constitutes a violation of the right to an effective remedy.[171]

3.137 Mr Lenehan from HREOC supported the suggestion that time limits could be imposed, either on the Attorney-General to make a decision on the issuing of a certificate within a given time, or to allow the court to impose a time limit on the Attorney-General. However, Mr Lenehan expressed a preference for a court supervised process, where:

> The court would, at a very early stage, be empowered under an amended version of this [A]ct to inquire of the Attorney whether he or she ought to invoke it and would give them a time frame for doing so. That would then ensure fairness for the detained party in that any delay on the part of the Attorney could not be used to derail the proceedings...[172]

3.138 Mr Lenehan also observed that it would be possible to seek a court order (a writ of mandamus) to compel the Attorney-General to make a decision under the Act. However, he noted that this would in itself be time consuming.[173]

3.139 As noted earlier, the potential for delay could be of particular concern in relation to certain urgent proceedings. For example, AMCRAN and Mr Patrick

---

167 *Submission 11*, p. 14.

168 Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 19.

169 *Submission 8*, p. 17.

170 *Submission 11*, p. 14.

171 *Committee Hansard*, 13 April 2005, p. 25.

172 *Committee Hansard*, 13 April 2005, p. 26.

173 *Committee Hansard*, 13 April 2005, p. 26.

Emerton both raised the situation of a person wanting to challenge the lawfulness of a warrant for detention under the ASIO Act, where the detention itself only lasts for seven days.[174] AMCRAN commented that challenging such detention would be:

> … almost impossible in a time frame of seven days. For starters, the lawyer has to be security cleared if he is to be there in the first place, as I understand it. If the person did not have a lawyer present they would have to get a lawyer. The lawyer that they chose may not have security clearance. A closed hearing would then have to be conducted. It is unrealistic that someone could, within the seven day time frame, raise a court case and have it heard while they are being detained. It is basically automatic that they will be detained for seven days if that is what the prescribing authority allows.[175]

3.140 Similarly, Mr Emerton observed:

> In a time-critical administrative law action such as a suit to challenge the legality of detention by ASIO, the way that this particular regime of certificates creates automatic adjournments and gives the Attorney-General or the delegated minister so much power to intervene and control the way the action evolves at that stage strikes me as really worrying.[176]

3.141 The ALRC also acknowledged that the Bill could potentially result in delays and additional costs. However, Professor Weisbrot also pointed out that:

> One of the central pieces of logic in the legislation, which is also reflected in the ARLC's recommendations, is that where classified [or] security sensitive material is likely to be an issue in a proceeding it be notified early and brought right up to the start of the proceeding or preferably pretrial. Hopefully some of those matters could be dealt with more quickly in that way.[177]

3.142 Professor Weisbrot also noted that, in its report, the ALRC had suggested a range of measures that the courts could use to try to ensure that trials proceed as quickly and efficiently as possible, including redaction; and having sensitive witnesses appear behind screens or in some other concealed form. Professor Weisbrot also observed that 'nevertheless, there will inevitably be some delay. Delay is a feature of our court proceedings generally.'[178]

---

174 *Submission 8*, p. 17; see also *Committee Hansard*, 13 April 2005, p. 5.

175 Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 13 April 2005, p. 17.

176 *Committee Hansard*, 13 April 2005, p. 5.

177 *Committee Hansard*, 13 April 2005, p. 10.

178 *Committee Hansard*, 13 April 2005, p. 10.

3.143 The Law Council submitted that the Attorney General's Department and other relevant agencies should be properly resourced so that the processes in the Bill do not lead to increased court hearing times and lengthy delays in the judicial system.[179]

3.144 As to delays in relation to security clearance procedures, Professor Weisbrot from the ALRC noted that it had received assurances from the Attorney-General's Department that it would try to 'fast-track' security clearances where they were required in relation to criminal or civil proceedings. Professor Weisbrot further observed the experience in the United States (US) indicated that, while the ordinary time frame for a security clearance was substantial, when it came to court proceedings, clearances were processed quickly in a more limited timeframe.[180]

3.145 In response to the committee's questions on this issue, a representative of the Attorney-General's Department noted that the Attorney General's role in the closed hearing was described as 'an intervener' in the Bill. An intervener in proceedings can have the costs of those proceedings awarded against them to the benefit of the litigants in the original proceedings.[181] In the same vein, the Law Society of South Australia noted that, while the Bill may increase the costs of litigation:

> To some extent this can be ameliorated by cost orders against the Commonwealth where it seeks to intervene or where it is a party. [182]

3.146 The Explanatory Memorandum also notes that some attempts have been made in the provisions of the Bill to reduce delays in relation to civil proceedings. For example, the procedures where a witness may disclose security sensitive information in giving evidence are different to the procedures in criminal proceedings. According to the Explanatory Memorandum, 'this departure from the procedure for criminal proceedings will seek to reduce delays and adjournments during the civil proceedings.'[183]

3.147 In response to the committee's questions as to whether litigants (such as in the area of family law) could use the Bill to deliberately increase delays and costs in proceedings, the Attorney-General's Department responded that 'parties to proceedings cannot themselves invoke the application of the legislation. This is a matter for the Attorney-General to decide.' The Attorney-General's Department also submitted that:

> The Government will monitor the practical operation of this new regime in criminal and civil proceedings. The Government will consider any

---

179 *Submission 15*, p. 5; see also Mr Peter Webb, Law Council, *Committee Hansard*, 13 April 2005, p. 28.

180 *Committee Hansard*, 13 April 2005, p. 10.

181 *Committee Hansard*, 13 April 2005, p. 38.

182 Law Society of South Australia, *Submission 5*, p. 2.

183 Explanatory Memorandum, p. 1.

> amendments to the regime which it considers appropriate to ensure the efficiency of the process, whilst protecting Australia's national security.[184]

The committee's view

3.148 The committee notes the criticisms that the Bill has the potential to result in increased delays and costs. The issue of delay was also raised in relation to the Criminal Proceedings Bill. The committee encourages the Attorney-General's Department to monitor the operation of the Bill in practice, and to consider provisions imposing time limits in the future if necessary.

Appointment of security officers

3.149 The ALRC recommended that, in any proceeding in which classified and security sensitive information may be used, a specially trained security officer should be made available to the court to assist in the management and protection of security information.[185] The ALRC noted that this proposal was modelled on an existing scheme in the US. According to the ALRC, the US scheme 'has proved to be very successful and has received strong support from all quarters.'[186] Professor David Weisbrot elaborated on this:

> … one of the reasons that the proceedings operate reasonably well in the federal courts there is that they have trained court security officers who are able to explain to counsel for both sides exactly what their obligations are and how not to make mistakes...[187]

3.150 Under the ALRC's proposed scheme, the security officer would:

> • ensure that the court and the parties are fully informed about the proper handling of such sensitive information; ensure that appropriately secure facilities exist for transporting and/or storing the information when the court is not in session; and
>
> • facilitate the application and vetting process for any person (such as counsel) who requires a security clearance in order to see the material.[188]

3.151 The ALRC suggested that such security officers would be trained by the Attorney-General's Department and be available for assignment to a court as needed. The ALRC also noted that this proposal received strong support in submissions and consultations made during its inquiry.[189]

---

184 *Submission 16*, p. 4.

185 *Submission 6*, p. 5; see also Professor George Williams and Dr Ben Saul, *Submission 10*, p. 2.

186 *Submission 6*, p. 5.

187 *Committee Hansard*, 13 April 2005, pp 9-10.

188 *Submission 6*, pp 5-6.

189 *Submission 6*, p. 6.

3.152 Mr Peter Webb from the Law Council expressed qualified support for this proposal:

> ...if the role of that sort of person were confined to process issues—for example, giving advice about how to handle information and so on—that may well be useful. If in fact the role went further than that, I think we would have serious misgivings about a role that extended beyond simply the giving of advice about process and handling.[190]

3.153 In response to the committee's questions on this proposal, a representative from the Attorney-General's Department stated that:

> It is certainly envisaged that the Protective Security Coordination Centre [PSCC] would be available to provide ongoing advice to courts, legal representatives and litigants on the measures that should be taken to protect this information and that some training would be available if the courts were to seek to have staff specially trained by the PSCC...[191]

The committee's view

3.154 The committee supports the ALRC's proposals in relation to the provision of court security officers to assist the court in relation to the proposed regime. The committee also recognises the Attorney-General's Department's suggestion that the Protective Security Coordination Centre may have a role to play in training existing court officers.

Restrictions on judicial review

3.155 Some submissions raised concerns with the provisions in Part 2 of the Bill, which amend the ADJR Act to limit jurisdiction for judicial review of a decision by the Attorney-General to grant a certificate under the Bill.[192] Victoria Legal Aid observed that:

> In effect the Bill increases the government's powers and reduces mechanisms to monitor the exercise of those powers. Such restrictions are in clear contravention of the principle of natural justice.[193]

3.156 Similarly, the Federation of Community Legal Centres (Vic) was concerned that:

> By exempting the Attorney-General's decision from judicial review, the Bill gives the government extensive powers without providing any mechanism to monitor the exercise of those powers.[194]

---

190 *Committee Hansard*, 13 April 2005, p. 31.

191 *Committee Hansard*, 13 April 2005, p. 38.

192 See, for example, Victoria Legal Aid, *Submission 14*, p. 2; PIAC, *Submission 7*, p. 4; Federation of Community Legal Centres (Vic), *Submission 9*, p. 3.

193 *Submission 14*, p. 2.

3.157 PIAC also opposed these provisions because, in their opinion, the Bill would already give the executive too much control over the decision making of judicial officers.[195]

The committee's view

3.158 The committee notes concerns that the Bill will exempt the Attorney-General's decision in relation to a certificate from review under the ADJR Act. However, the committee recognises that this is consistent with the position for the criminal proceedings regime.

Sunset clause

3.159 The Australian Press Council suggested that a sunset clause be inserted into the Bill so that the legislation lapses in 2007. The Australian Press Council felt that the regime could then be renewed for three year terms if necessary, and after full parliamentary debate.[196] Dr Waleed Kadous from AMCRAN also expressed support for a sunset clause, arguing that the Bill's impact on the 'judicial system is not yet clear' and that:

> … because of the changing nature of the international security environment things can move very quickly, and I think a review in three years time to evaluate the impact of this legislation would be prudent.[197]

3.160 In response to the committee's questioning on the issue, HREOC observed that a sunset clause would address some of their concerns, and would assist in keeping the legislation within the limits of 'proportionality' for the purposes of the ICCPR. However, HREOC also noted that:

> … while such a clause may be desirable for those reasons, it will not in itself be decisive in determining whether any proportionality requirements are met. That is a matter which will depend upon the substantive provisions of the Bill, the purpose they are said to serve and the relevant circumstances. The Commission is therefore primarily concerned that the Bill be amended to incorporate the safeguards recommended by the Commission.[198]

3.161 As noted earlier, the Attorney-General's Department submitted that, in any case, the operation of the legislation would continue be monitored.[199]

---

194 *Submission 9*, p. 3.

195 *Submission 7*, p. 4.

196 *Submission 13*, p. 3.

197 *Committee Hansard*, 13 April 2005, p. 16.

198 *Submission 12B*, p. 5.

199 *Committee Hansard*, 13 April 2005, p. 32; also *Submission 16*, p. 4.

The committee's view

3.162 The committee notes suggestions for a sunset clause to be inserted into the Bill. However, the committee also recognises that it remains unknown how key provisions in the Bill – especially the stay provisions – will actually operate in practice and impact on parties in civil proceedings. The committee's view is that, subject to the recommendations made elsewhere in this report, the regime contained in the Act and proposed by this Bill ought to operate for a relatively short period after which the regime's operation and impact can be reviewed and evaluated. Any such a report would be more comprehensive than the reports to Parliament currently required under section 47 of the Act. The committee does not see the need for the legislation as a whole to be subject to a sunset clause.

Recommendation 10

3.163 The committee recommends that the Bill be amended to insert a requirement that, as soon as practicable after the end of 18 months from the date of the Bill's commencement, the Minister must cause to be laid before each House of Parliament a comprehensive report on the operation of the Act (including the provisions of the Bill).

Provisions of the Migration Act

3.164 HREOC also raised concerns in relation to the existing provisions of the *Migration Act 1958* (Migration Act). It observed that the provisions of the Migration Act go a step further than the Bill and permit a court to rely on 'secret evidence' that is not disclosed to a party for the purposes of a substantive hearing regarding visa cancellation decisions.[200] Mr Lenehan from HREOC explained further that the Migration Act:

> … goes even further than that and allows the minister to test the waters, if you like, by disclosing the material in question to the court and then asking the court whether it is prepared to make orders for the non-disclosure of the information. In the event that the court does not make those orders, then the information can be withdrawn and not used in the substantive proceedings.[201]

3.165 HREOC noted that these provisions had been criticised in the ALRC report, and argued that this approach should only be permitted in the most extraordinary circumstances.[202] In response to the committee's questions in relation to this issue, a representative of the Attorney-General's Department stated:

---

200 *Submission 12*, pp 15-16.

201 *Committee Hansard*, 13 April 2005, p. 25.

202 *Submission 12*, pp 15-16; see also Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, pp 21 and 25.

> … in deciding whether or not to apply the [National Security Information] [A]ct to the proceedings, great regard would be given to the adequacy of other mechanisms to protect the information…for example, in many cases the application of public interest immunity would be considered sufficient … in a case where these provisions of the Migration Act applied, it is possible that those provisions would be considered to be adequate to protect the information in that particular case.[203]

3.166 However, the representative also conceded that there is nothing in the Bill which expressly requires the Attorney-General to consider mechanisms in other legislation.[204]

The committee's view

3.167 The committee notes concerns in relation to the provisions of the Migration Act, but considers that they are outside the scope of this Bill.

Conclusion

3.168 As with the Criminal Proceedings Bill, the committee recognises that this Bill attempts to reconcile two important objectives that in some cases may conflict—promoting and upholding the right to a fair trial and maintaining national security by protecting sensitive information during civil proceedings. The committee has once again made a number of recommendations intended to ensure that there are adequate safeguards in the proposed legislation to balance these two objectives.

3.169 On balance, the committee is of the view that the Bill should be passed, subject to the committee's recommendations. The committee notes that its recommendations will allow the courts a greater level of discretion in decision-making under the proposed regime. However, the committee also encourages the Attorney-General's Department to monitor the operation of the national security information protection regime provided for under the Act and this Bill in order to ensure that an appropriate balance is maintained. The committee considers that parliament should also take an active role in monitoring the future operation of the legislation.

3.170 The committee is mindful of possible arguments that inconsistency may arise if amendments are made to the civil proceedings regime in this Bill in isolation from the provisions of the Act which apply to criminal proceedings. In its view, these arguments do not carry weight. It is axiomatic that different procedures do apply and operate in criminal and civil proceedings. It is stressed that the committee holds the views expressed in its earlier report concerning the National Security Information (Criminal Proceedings) Bill 2004. However, it acknowledges that the recommendations in that report concerning criminal proceedings were not adopted by

---

203 *Committee Hansard*, 13 April 2005, p. 33.

204 *Committee Hansard*, 13 April 2005, p. 34.

Government and, moreover, that the committee's responsibility is to address the Bill before it.

Recommendation 11

3.171 The committee recommends that, subject to the above recommendations, the Senate pass the Bill.

Senator Marise Payne
Chair