

Additional Comments and Points of Dissent

Senator Brian Greig On behalf of the Australian Democrats

The Australian Democrats share the many concerns raised by the Committee in relation to this Bill. In particular, we are concerned that the Bill has the potential to:

- undermine procedural fairness in the context of civil proceedings and limit the right to a fair and public hearing;
- compromise the right to access effective remedies in relation to violations of human rights;
- breach Australia's international human rights obligations;
- decrease, rather than increase, Australia's national security;
- generate delays in civil proceedings;
- increase the cost of civil proceedings;
- blur the separation of powers between the Executive government and the Judiciary; and
- reduce public confidence in the rule of law.

The Australian Democrats acknowledge that the government has had to grapple with some difficult issues in drafting this Bill, however we do not agree with the Attorney-General's assertion in his Second Reading Speech that, "the government has yet again struck the right balance between protecting national security and protecting the rights of parties".

We are conscious of the many and varied civil proceedings which could potentially be covered by this Bill – including urgent applications to challenge the validity of detention by the Australian Security Intelligence Organisation, family law proceedings involving intelligence officers, defamation proceedings in cases where the Government has defamed an individual, and proceedings for the review of an administrative decision, just to name a few.

In many cases, the Executive government will be the defendant or the respondent in the proceedings, yet it will also have the power to determine whether the national security information regime applies or not. This is concerning, given the significant consequences of a decision to issue a notice under clause 6A.

The Democrats believe that the proposed regime represents an inappropriate interference by the Executive government in the processes of Australian courts.

Even if the interference is not inappropriate, there is a risk that it will be perceived to be so, thereby undermining public confidence in the rule of law.

The Government's stated intention in introducing this Bill is to protect Australia's national security. While much has been said about the broad definition of 'national security' in the Bill (and the Democrats share the concerns that have been expressed about the breadth of that definition), it is also relevant to consider what the Australian community sees national security as embodying. This is because the community's concept of national security will determine its perceptions about the appropriateness of the Bill.

The Democrats suggest that, in the minds of many Australians, national security means the protection of the physical safety and fundamental rights of all Australians. Given that national security involves protecting, not just physical safety, but also freedom and liberty, we should ask ourselves whether national security initiatives which infringe the rights of Australians are actually compromising, rather than strengthening, Australia's national security.

In the context of this Bill, the Democrats are concerned that the Bill has such a profound impact on the rule of law and the rights of Australians that it may actually be detrimental to Australia's national security.

Having carefully considered the provisions of this Bill, the Democrats have concluded that the Bill is deeply flawed. At best it is unworkable, but it's also potentially dangerous. Consequently, we do not believe that it should be passed – even if it is amended in accordance with the Committee's recommendations.

However, if the Bill is to be passed by the Parliament, it will be critical for the Committee's recommendations to be implemented. In addition, the Democrats believe that a sunset clause is crucial. Given the significant implications of this Bill for the independence of the courts, the rule of law and the rights of Australians, it is important for the Bill to be fully debated by the Parliament if it is to continue beyond three years.

It will also be important to monitor the operation of the legislation carefully during that period of time and, in this respect, the Democrats welcome the Committee's recommendation for a formal review after a period of 18 months. It will be particularly important for such a review to test the Government's proposition that it has struck an appropriate balance between protecting national security and protecting the rights of parties. The evidence may well prove otherwise, in which case the Parliament may conclude that there is no justification for the legislation to be re-enacted.

Recommendation 1:

That the Bill be opposed.

Recommendation 2:

That, if the Bill is not to be opposed, it be amended in accordance with the Committee Recommendations.

Recommendation 3:

That, if the Bill is not to be opposed, it be amended to include a sunset clause which provides that the legislation will cease to have effect three years after it commences.

Senator Brian Greig
Australian Democrats

