Australian Government

Australian Law Reform Commission

1975-2005 30 YEARS OF LAW REFORM

ALRC submission on the National Security Information Legislation Amendment Bill 2005

1 April 2005

1. The Australian Law Reform Commission (ALRC) makes the following submission to the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005.

The ALRC inquiry into the protection of classified and security sensitive information

2. Terms of Reference for the ALRC inquiry into the protection of classified and security sensitive information were issued by the then Attorney-General of Australia, the Hon Daryl Williams AM QC MP, on 2 April 2003.

3. The Terms of Reference asked the ALRC to assess the effectiveness of the various existing mechanisms designed to prevent the unnecessary disclosure of classified and security sensitive information in the course of official investigations and criminal or other legal proceedings. The ALRC therefore gave consideration to civil proceedings as part of the inquiry.

4. In accordance with usual practice, the ALRC established a broad-based Advisory Committee to assist with the reference, providing advice about directions and priorities, and commenting upon draft documents, proposals and final recommendations. The Advisory Committee included a number of senior federal and state judges; senior prosecutors and defence counsel; the President of the AAT; a former NSW Attorney-General; a former Secretary of the Attorney-General's Department; the former Inspector-General of Intelligence and Security; the Chair of the Administrative Review Council; a former Director-General of Intelligence; a former senior legal counsel to ASIO; and an emeritus professor of human rights law.

5. As part of its community consultation program, the ALRC produced two consultation documents. A Background Paper (BP 8)[1] was published in July 2003 setting out the scope of the inquiry, and laying the ground for the ALRC's first round of consultations with, and submissions from, interested parties. In late January 2004, the ALRC published its Discussion Paper *Protecting Classified and Security Sensitive Information* (DP 67).[2] DP 67 provided further research and discussion about the position in Australia and overseas, set out the ALRC's preliminary proposals for reform, and acted as the basis for later consultations and submissions.

6. The ALRC received 35 written submissions,[3] and arranged consultations with individuals and organisations identified as experts or key stakeholders. These included various government

---

[1] Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information*, BP 8 (2003) <www.austlii.edu.au/au/other/alrc/publications/bp/8/bp8.html>.

[2] Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information*, DP 67 (2004) <www.austlii.edu.au/au/other/alrc/publications/dp/67/>.

[3] A list of those individuals and organisations that made submissions (whether in response to the release of the Terms of the Reference, BP 8, or DP 67) is found in Appendix 1 to the Report.

departments and agencies (including those comprising the 'Australian intelligence community'), media organisations, legal professional associations, human rights NGOs and civil liberties groups, community organisations, academics and judges.

7. The President of the ALRC also held meetings in Washington DC with senior officers of the FBI and the CIA, senior prosecutors of the US Attorney's Office (for the Northern District of Virginia), and the Executive Director of the Center for National Security Studies (a human rights NGO). The President also attended a seminar organised by the American Bar Association, which featured prosecutors and defence attorneys appointed to the US Military Commissions established to try 'unlawful combatants' detained in Guantanamo Bay, Cuba.

8. The inquiry was completed with the tabling of *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004)[4] on 23 June 2004. The final report contains 80 recommendations for reform, covering a range of matters of law and practice.

Keeping Secrets: The Protection of Classified and Security Sensitive Information (ALRC 98)

9. The ALRC's challenge in this inquiry was to develop mechanisms capable of reconciling, so far as possible, the tension between disclosure in the interests of fair and effective legal proceedings, and non-disclosure in the interests of national security. It would be an oversimplification, however, to characterise the task as striking a balance between the right of an *individual* to a fair and open trial with the need of the *Government* to maintain official secrets. Due consideration and weight also must be given to the broader and compelling *public* interests in:

- safeguarding national security and strategic interests (including international relations, since much of Australia's intelligence information is sourced overseas);
- facilitating the successful prosecution of individuals who engage in acts of terrorism or espionage;
- maintaining the fundamental fairness, integrity and independence of our judicial processes; and
- adhering, to the greatest extent possible, to the principles and practices of both 'open justice' and open and transparent executive government.

10. While much of the discussion in ALRC 98 is directed to criminal proceedings, many of the ALRC's recommendations are more broadly aimed at criminal, civil and administrative proceedings. Civil proceedings in which the protection of such information may be issues includes claims:

- brought against a government department or agency by, for example, members of the defence forces, intelligence personnel or their dependents or estates;
- against the Government by private third parties, the evidence surrounding which involves classified or security sensitive information that would emerge in the normal course of that litigation; and

[4] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004) <www.austlii.edu.au/au/other/alrc/publications/reports/98/>.

- brought by the Government against a third party arising, for example, out of damage caused by that third party to property, the existence or significance of which the third party was unaware, or which would emerge if evidence that would normally be disclosed is produced.

Proceedings for judicial review of administrative decisions based on evidence withheld from a party may also involve classified or security sensitive information.

11. The ALRC notes that, if the current Bill is passed by Parliament, the only area of law outside of the scheme for protection of national security information will be administrative proceedings in tribunals. The ALRC believes that it is very important that such proceedings also be brought within the new regime for national security information, to ensure that such material is dealt with in a secure and consistent manner. During the inquiry, the ALRC was told of many instances where administrative tribunals deal with security sensitive information—in some cases, of a more sensitive nature than the types of information introduced into criminal and civil court proceedings. For example, classified and security sensitive may come up in administrative proceedings dealing with passport cancellations and visa refusals; denials of a security clearance (or a clearance at the requested level); and denials of requests made under Freedom of Information laws. 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. The ALRC hopes that further work will be undertaken to extend the scheme to tribunals in the near future.

12. The central recommendation of ALRC 98 is the introduction of a National Security Information Procedures Act to govern the use of classified and security sensitive information in all stages of proceedings in all courts and tribunals in Australia (except where expressly displaced by other legislation). The ALRC therefore supports the introduction of the National Security Information Legislation Amendment Bill 2005 and extension of the *National Security Information (Criminal Proceedings) Act 2004* (Cth) to cover federal civil proceedings.

13. There are differences between criminal and civil proceedings which were considered by the ALRC throughout its inquiry.

- In civil cases, interlocutory processes such as discovery of documents, interrogatories, the issues of subpoenas, and the serving of witness statements and affidavits by all parties to the proceedings will normally raise concerns involving any classified or security sensitive information at an early stage of the proceedings, so that those issues can be dealt with by the court before the final hearing.
- Parties to a civil matter have much greater flexibility to tailor the court's procedures to meet their concerns in relation to confidentiality of any information that emerges, whether or not it involves classified or security sensitive information, and to settle or otherwise resolve the matter using alternative dispute resolution techniques.
- The courts themselves also have greater flexibility to adjust their procedures in civil proceedings, and the legitimate public interest in open justice arises less starkly in purely private civil matters.

14. For these reasons some of the recommendations made by the ALRC in relation to criminal proceedings were adjusted for civil proceedings.[5] Generally, however, the recommendations in

[5] See, eg, recommendations on secret evidence: ALRC 98, [11.206]–[11.212] and Rec 11–41.

ALRC 98 apply equally to criminal and civil proceedings, with the basic thrust of the recommendations attempting to move all participants away from the idea that the public interests in full disclosure and in proper confidentiality are necessarily completely opposed, and that the only solution must necessarily favour one at the expense of the other.

15. As a whole, the proposed scheme set out in the National Security Information Legislation Amendment Bill 2005 reflects the recommendations of the ALRC in relation to civil proceedings. The following provides comment on some key points where the ALRC notes a departure in detail or tone between the Bill and statutory scheme proposed in ALRC 98.

Security clearances

16. Although the option was considered during consultations, the ALRC felt uncomfortable about making a recommendation to the effect that a court or tribunal could order a lawyer to submit to the security clearance process. However, the ALRC noted that if important material is not available to counsel in the proceedings, they run a risk of failing to provide their client with effective assistance, and consequently should consider seeking a security clearance or withdrawing from the proceedings. The ALRC suggested that the proper focus should not be on the dignity or convenience of the lawyer, but rather on the *client* receiving the best possible representation in circumstances in which highly classified information must be protected.

17. The National Security Information Legislation Amendment Bill 2005 provides that a party or a party's legal representative may apply for a security clearance. The ALRC did not make a recommendation about the security clearance of a party (as opposed to the party's representative) but this provision in the Bill is consistent with the ALRC's approach to the issue, and will be particularly relevant where a party is unrepresented (which is a more likely occurrence in civil proceedings). The ability for unrepresented parties who are unable to obtain a security clearance to access financial assistance to obtain a security cleared lawyer is also an important component of the scheme that is consistent with the ALRC's approach.

18. Under the Bill, where a party or party's legal representative does not apply for a security clearance within a given timeframe, the court may advise the party of the consequences of not being security cleared or of being represented by an uncleared counsel and may recommend that the party seek a security clearance or engage a legal representative of his or her own choosing with an appropriate security clearance. At present the Bill provides the Secretary of the Attorney-General's Department with a discretion to advise the court that a security clearance has not been sought or has not been given, and the court has a discretion to give this warning. The ALRC supports the Bill being changed to require the Secretary to advise the court of such a fact, and require the court to give such a warning. This approach would be more consistent with the ALRC's concerns about the consequences of a party not having access to certain information relevant to the proceedings.

Closed hearings

19. The National Security Information Legislation Amendment Bill 2005 directs that, under certain circumstances, a civil hearing must be held in closed session. The ALRC 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 (see ALRC 98, [9.52]–[9.67], [11.186]–[11.188] and Recommendations 11–18 and 11–19).

20. The Bill preserves the court's power to determine that the proceedings should be stayed in the event that a party would not be guaranteed a fair hearing, even after the court makes an order after the closed hearing. The ALRC notes that this discretion has received some criticism based on the fact that the stay of civil proceedings is more likely to have adverse consequences for parties than the stay of criminal proceedings. The provision in the Bill is consistent with the ALRC's recommendation on the matter, which did not distinguish between criminal and civil proceedings. 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.

21. 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 (see paragraph 13, above and ALRC 98, [11.123]–[11.127] and Recommendation 11–10.

Triggering the special procedures

22. The special procedures contained in the Bill are triggered only if and when the *Attorney-General* gives the parties and the court notice in writing to that effect. If for some reason the matter proceeded without the trigger, normal public interest immunity would have to be relied upon.

23. The ALRC's recommendations—which are intended to cover civil and administrative proceedings, as well as criminal—provide that the special procedures are to be triggered by the notice that must be given by *any* party, as soon as it learns that sensitive national security information is likely to arise in the proceedings (whether at trial or in any interlocutory proceeding), or by the court or tribunal on its own motion (see ALRC 98, [11.86]–[11.98] and Recommendation 11–6). Under the Bill, a party is required to provide notice to the Attorney-General if it considers that sensitive national security information is likely to arise, but only the Attorney-General can then trigger the special procedures.

Court security officers

24. The ALRC also recommended that in any proceeding in which classified and security sensitive information may be used, the court should have the assistance of a specially trained security officer to advise on the technical aspects of managing and protecting such information. This recommendation is modelled on the existing position in the in the United States,[6] which has proved to be very successful and has received strong support from all quarters.[7]

25. Under this recommended scheme, the security officer would:

- ensure that the court and the parties are fully informed about the proper handling of such sensitive information;

[6] See *Classified Information Procedures Act* (USA), s 9, which authorises the Chief Justice of the United States, in consultation with the Attorney General, the Director of the CIA and the Secretary of Defense, to prescribe procedures for the protection of classified information in the custody of the courts. In 1981, the then Chief Justice, Warren Burger, promulgated the rules that govern the appointment and role of court security officers: see ALRC 98 [8.82]–[8.86].

[7] The use of court security officers was viewed favourably by various US intelligence agencies—the FBI and the Department of Justice have provided court security officers—as well as by prosecutors and defence counsel.

- 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.

26. Security officers (most likely drawn from the ranks of the AFP) would be trained by the Attorney-General's Department and be available for assignment to a court needed.[8] The ALRC's initial proposal (which referred only to courts) received strong support (and no opposition) in consultations and submissions, and the Administrative Appeals Tribunal (AAT) supported its extension to tribunals[9]—as is now reflected in the final recommendation. See ALRC 98, [8.81]–[8.93] and Recommendation 11–38.

[8] The ALRC understands that in the *Lappas* case, an officer of the Australian Federal Police was assigned to assist the court in connection with the security arrangements put in place to handle the classified and security sensitive material. As the case was, in many ways, unique in Australian legal history, it is understandable that neither that officer, the court nor the participants in the proceedings had any prior direct experience of such cases; nor were there any manuals, guidelines or precedents on which they could rely.

[9] However, the Department of Immigration and Multicultural and Indigenous Affairs submitted that it should not apply to merits review tribunals under the *Migration Act 1958*.