SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO

THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ON THE

NATIONAL SECURITY LEGISLATION AMENDMENT BILL 2005

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Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') has been invited by the Senate Legal and Constitutional Legislation Committee ('the Committee') to make submissions on the National Security Legislation Amendment Bill 2005 ('the Bill'). The Commission welcomes the opportunity to make this submission and thanks the Committee for its invitation.

2. The Bill amends the *National Security Information (Criminal Proceedings) Act 2004* (Cth) (the Act). The Act was considered as a bill by this Committee in 2004.[1] The Commission made a submission to that inquiry. Shortly after that bill was referred to this Committee,[2] the ALRC published its report into the protection of national security information[3] (the ALRC Report). The Act currently applies only to federal criminal proceedings. The Bill implements the ALRC's recommendation that the statutory scheme should also govern civil proceedings.

Summary of Commission's Submission

3. The Commission has raised concerns in respect of the following provisions of the Bill:

   - proposed sections 38L(7) and (8), which restrict the Court's discretion in making orders for dealing with national security information;
   - the requirement to hold closed hearings when considering such orders;
   - the provisions allowing for the exclusion of parties and their legal representatives from closed hearings in certain circumstances;
   - the provisions regarding access to and the variation of the record of a closed hearing; and
   - the restrictions which apply to the disclosure of information to parties and legal representatives, where that disclosure is likely to prejudice national security.

   Those concerns relate to:

   - Australia's obligation to provide an effective remedy for violations of human rights (article 2(3) of the *International Covenant on Civil and Political Rights*[4] (ICCPR)); and
   - the right to a fair and public hearing (article 14(1) of the ICCPR).

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[1] See Senate Legal and Constitutional Committee *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* August 2004.
[2] On 16 June 2004.
[3] *Keeping Secrets: The Protection of Classified and Security Information* (ALRC 98, 2004), tabled on 23 June 2004.
[4] Opened for signature 16 December 1966, 999 United Nations Treaty Series 171; entered into force 23 March 1976 except article 41 which came into force 28 March 1979; ratified by Australia 13 August 1980 except article 41 which was ratified by Australia 28 January 1993.

The Commission has made various recommendations designed to avoid breaches of those obligations.

The Commission has also:

- considered whether the derogation provisions in article 4 of the ICCPR would provide a 'defence' in respect of such breaches (and concluded that Australia could not relevantly invoke those provisions); and
- raised an issue regarding the existing provisions of the *Migration Act 1958* (Cth).

Key human rights issues

4. In the Commission's view, the Bill raises concerns in respect of two key human rights:
   - the right to a fair and public hearing; and
   - the right to an effective remedy for violations of a person's human rights.

5. The right to a fair and public hearing is provided for in article 14(1) of the ICCPR which states:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

6. The right to a fair hearing under Article 14(1) is not limited to criminal matters. Rather, it guarantees certain rights to parties in "suits at law". Those rights include, for example, 'equality of arms, the respect of adversarial proceedings… and the swiftness of the procedure at all stages'.[5] We discuss those and other specific protections below.

7. The central issue in determining whether article 14(1) applies to a particular set of civil proceedings is whether those proceedings constitute a 'suit at law'. The Human Rights Committee has adopted an expansive construction of that term. It plainly includes the determination of private law rights, such as those in tort or contract. However, the Committee has held that the determination of public law rights will also constitute a 'suit at law' if:

[5] Weissbrodt D, *The Right to a Fair Trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights* (Kluwer Law International, The Hague, The Netherlands: 2001) at 125.

- within the particular municipal legal system, such determination is conducted by a court of law; or
- administrative determination of such rights is subject to judicial control or judicial review.[6]

As such, article 14(1) would seem to apply to most (if not all) matters to which the Bill applies.

8. The obligation to provide effective remedies for violations of human rights appears in Article 2(3) of the ICCPR states:

> Each State Party to the present Covenant undertakes:
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> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
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> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

9. The Bill would apply to many proceedings in which such remedies are in issue. For example, information that relates to 'national security'[7] may be relevant in the following proceedings:

- Proceedings relating to the Attorney's decision not to de-list a 'terrorist organisation'.[8] Such proceedings would potentially provide a remedy for a violation of a person's freedom of association.[9]

- Proceedings in tort alleging assaults or unlawful conduct during questioning under a warrant issued pursuant to Part 3 of Division III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Such proceedings would potentially provide a remedy for breaches of the right not to be subjected to torture and other cruel or inhuman treatment[10] and the right to be treated with humanity and respect for the human person while detained.[11]

- Proceedings seeking orders in the nature of habeas corpus in relation to a 'detention warrant' issued under Divison 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Such proceedings would potentially provide a remedy for violation of the right not to be arbitrarily detained.[12]

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[6] See Weissbrodt D, *op. cit.* at 139; see also *Y.L. v Canada* (112/81) and *Casanovas v France* (441/90).
[7] See discussion of the definition of this term below.
[8] Under section 102.1(17) *Criminal Code* (Cth).
[9] See article 22 of the ICCPR.
[10] See article 7 of the ICCPR.
[11] See article 10 of the ICCPR.
[12] Article 9 of the ICCPR.

- Proceedings relating to a person's entitlement to a protection visa.[13] Such proceedings potentially provide remedy against violation of the prohibition on 'refoulement' (returning a person to a country where they face persecution). As the Commission has observed in other submissions to this Committee, that prohibition is recognised as one of the most fundamental principles in international human rights law. It arises out of Australia's obligations under the Refugees Convention as well as the ICCPR, the CRC and the CAT.[14]

- Proceedings concerning a decision to cancel a person's visa on character grounds.[15] Again, such proceedings may provide a remedy against possible refoulement. As will be discussed below, the *Migration Act 1958* (Cth) already imposes a restrictive regime for the treatment of information obtained from security agencies in such matters.

- Proceedings concerning a decision to detain and deport a non-citizen.[16] Depending on the circumstances, such proceedings may provide a remedy for violation of the right not to be arbitrarily detained[17] and/or the prohibition on arbitrary interference with family life.[18]

- Proceedings relating to a decision to order the surrender of a passport on security grounds.[19] Those proceedings might provide a remedy for a violation of the right to leave one's own country.[20]

10. Whether a victim has available an **effective** remedy through such proceedings may only be determined in the particular case, having regard to matters such as the relevant circumstances and the features of the right or freedom in question.[21] In particular, in the context of judicial remedies it is necessary to consider any constraints which apply to the exercise of judicial power. This may be seen in the decision of the European Court of Human Rights in *Chahal v United Kingdom*,[22] where the Court considered article 13 of the *European Convention on Human Rights* (ECHR) which is analogous to article 2(3) of the ICCPR. In that decision, the Court found that the availability of judicial review from a deportation decision did not provide an effective remedy because the court was limited to satisfying itself that the Home Secretary had balanced the risk to the individual against the danger to national security.[23]

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[13] See as an example of proceedings where the disclosure of such information arose: *NAVK v MIMIA* [2004] FCAFC 160.
[14] See paras 9-15 of the Commission's submission dated 29 April 2004 on the Migration Amendment (Judicial Review) Bill 2004.
[15] See s 501 *Migration Act 1958* (Cth).
[16] See ss202 and 253 of the *Migration Act 1958* (Cth).
[17] Article 9 of the ICCPR. See *C v* Australia, Communication No. 900/1999.
[18] Article 17 of the ICCPR. See *Winata v Australia* Communication No. 930/2000.
[19] See s16(1) *Passports Act 1938* (Cth).
[20] Article 12(2) of the ICCPR.
[21] See M Nowak *UN Covenant on Civil and Political Rights* NP Engel 1993 p61.
[22] (1996) 23 EHRR 413.
[23] The Court stated (at [153]): 'In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security (see paragraph 41 above). It follows from the above considerations that

This was not considered to provide an effective remedy to the potential violation of Mr Chahal's right not to be subjected to torture (guaranteed by article 3 of the ECHR).

11. Similarly, if the Bill operates so as to unduly restrict the ability of Courts to provide remedies for the potential human rights violations described in paragraph 9 above, it may leave Australia in breach of its obligations under article 2(3).

12. The Commission now turns to its specific concerns regarding the provisions of the Bill.

Hearings to consider the disclosure of security information and restrictions upon the Court's discretion

13. Under proposed sections 38G(1) and 38H(6) of the Bill, courts are directed to hold a hearing in closed session in certain circumstances. In essence, those circumstances arise where the Attorney forms the view that:

- information will be disclosed in a civil matter, being information (in documentary or oral form) which will prejudice national security;[24] or
- a person whom a party intends to call as a witness will disclose information by his or her mere presence and that disclosure would prejudice national security.[25]

In such circumstances, the Attorney may give parties, witnesses or other persons a certificate, which prevents or restricts disclosure of the information in question or prevents the calling of a witness.[26]

14. 'National security' has been defined broadly.[27] For example, it includes matters such as political and economic relations between Australia and foreign governments and international organisations.[28] There is no carve out for information which provides evidence of corruption or maladministration on the part of government decision makers.[29] As such, the Attorney's powers to issue certificates are very broad. Further, like the Act, the Bill places an onerous burden upon parties to civil litigation to provide certain notifications where they know or believe that information will be disclosed which relates to national security.[30] It is an offence to contravene those notification provisions

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these cannot be considered effective remedies in respect of Mr Chahal's Article 3 (art. 3) complaint for the purposes of Article 13 of the Convention (art. 13)'.

[24] See proposed ss38F(1) and 38G(1).

[25] See proposed ss38H(1) and (6).

[26] See proposed ss38F(2) and (3) and 38H(2).

[27] See ss8-11 of the Act.

[28] See ss 8 and 10 of the Act.

[29] See discussion in Senate Legal and Constitutional Committee *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* August 2004, pp 17-19.

[30] See proposed ss38D(1)(3) and (4) and 38E(2).

where the disclosure of the information in question is likely to prejudice national security.[31]

15. Any certificate issued by the Attorney must be provided to the Court[32] and will trigger the requirement to hold a closed hearing. The Court must hold the closed hearing before the substantive proceedings begin.[33] If the substantive proceedings have already begun, the Court must adjourn and hold a closed hearing.[34] The restrictions specified in the Attorney's certificate operate until the conclusion of the closed hearing.

16. At the conclusion of the closed hearing, the Court must make one of the following orders:

    A. In cases other than disclosure through mere presence of a witness:

    - orders for the non-disclosure of the information in question (whether in the civil proceeding or otherwise);[35]
    - orders allowing the disclosure of the information in the civil proceeding;[36] or
    - in the case of information in documents, orders that the information not be disclosed in the civil proceeding or otherwise, but permitting disclosure of the following documents in the proceeding:
        - documents containing deletions of the information in question;
        - documents containing deletions and a summary of the deleted information; or
        - documents containing deletions and a statement of facts which the deleted information would or would be likely to prove.[37]

    B. In the case of witnesses whose mere presence would disclose information, orders that they not be called in the substantive proceedings or orders allowing them to be called.[38]

17. Under proposed section 38(L)(7) the court is to take into account certain matters when deciding what orders to make at the conclusion of the closed hearing:

    - whether, having regard to the certificate required to be issued by the Attorney, there would be a risk of prejudice to national security if the relevant information were disclosed or the witness called;

[31] See proposed s46C.
[32] See proposed ss 38F(5) and 38H(4).
[33] See proposed ss38G(1)(a) and 38H(6)(a).
[34] See proposed ss38G(1)(b) and (c) and 38H(6)(b).
[35] See proposed s 38L(4).
[36] See proposed s 38L(5).
[37] See proposed s38L(2).
[38] See proposed s38L(6).

- whether such an order would have a *substantial* adverse effect on the substantive hearing; and
- any other matter the Court thinks relevant.

The inclusion of the word 'substantial' means that some adverse impacts upon substantive hearings are to be tolerated. In addition, proposed section 38(L)(8) requires the Court to give greatest weight to prejudice to national security.

18. 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 such as those referred to in paragraph 9 above, where decisions to exclude certain evidence may diminish a party's capacity to seek remedies for violations of their human rights. The Commission also notes that the ALRC did not make a recommendation for such constraints to apply to the Court's discretion.[39]

19. The Commission would therefore recommend:

- the word 'substantial' be deleted from proposed clause 38(L)(7)(b);
- proposed section 38(8) be omitted; and
- 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'.

20. This Committee made recommendations similar to the first two dot points in paragraph 19 in respect of the comparable provisions of the Act (which apply to criminal proceedings).[40] The concerns which motivated those recommendations apply equally to the civil proceedings described in paragraph 9 above. The Committee's recommendations were not pursued by the Parliament at that time.[41] However, this might be a timely opportunity to give that issue further consideration. For, as the Director-General of ASIO commented recently:

> Perhaps those concerned that some terrorism laws go too far in the compromise of individual rights, should have more confidence in the capacity of our own democratic system, with its proper separation of powers, to ensure that any legislative excess, however unintended, can, and will, be corrected.[42]

21. In any event, the need for such an amendment is arguably more pressing in the case of at least some civil proceedings. For example, in the case of proceedings regarding deportation or removal orders under the *Migration Act 1958* (Cth),

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[39] See ALRC Report [8.241]-[8.243], [11.164]-[11.167], [11.173]-[11.184] and recommendations 11-33, 11-34 and 11-36.
[40] See Recommendations 12 and 13 at page 43.
[41] Although some amendments to the corresponding provisions of the Act were made – see Senator Ludwig, *Hansard* 30 November 2004, p72.
[42] Mr Dennis Richardson AO, Address LawAsia Conference 2005 Gold Coast Wednesday 23 March 2005, available at http://www.asio.gov.au/Media/comp.htm.

the lives of one or more of the parties to those proceedings may literally depend upon their outcome.

22. A further relevant difference between civil and criminal proceedings arises from the possible effects of orders that proceedings be stayed or summarily dismissed. As with the existing provisions of the Act, the Bill expressly provides that:

> [t]he power of a court to control the conduct of a civil proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise[43]

and that:

> [a]n order under section 38L does not prevent the court from later ordering that the civil proceeding be stayed on a ground involving the same matter, including that an order made under section 38L would have a substantial adverse effect on the substantive hearing in the proceeding.[44]

23. It will be recalled that this Committee took some comfort from the fact that criminal matters could be stayed or dismissed where the orders provided for by the Act adversely affected a criminal defendant's right to a fair trial.[45] Indeed, following the Committee's report, amendments were made to further clarify that issue.[46] However, in civil proceedings, the Court's power to stay, discontinue, dismiss or strike out the relevant proceedings (where unfairness results from the fact that confidential information cannot be revealed) will work against parties seeking to use the courts to obtain effective remedies for violations of fundamental rights. Such orders may still be important in protecting human rights in some civil matters. For example, defamation proceedings against a journalist over an article concerning maladministration in a security agency where truth is raised as a defence and documents relevant to that defence are not permitted to be disclosed.[47] A stay in such a matter would protect the right to freedom of expression.[48] However, in each of the examples given in paragraph 9 above, a stay or summary dismissal would foreclose the possibility of the party obtaining an effective (or indeed any) remedy for the relevant human rights violation. In those circumstances, the provisions of the Bill will result in violations of article 2(3) of the ICCPR. The amendments recommended in paragraph 19 above would provide further safeguards against injustice in such situations.

Requirement that hearings be closed

24. The requirement to hold the hearings referred to above in closed session raises a further human rights issue. Article 14(1) specifically requires public

[43] See Schedule 1, Item 13 of the Bill.
[44] Ibid.
[45] See eg at paras 3.132 and 3.135.
[46] See Senator Ludwig, *Senate Hansard* 30 November 2004, p72.
[47] See comments made by the Hon. Mr McClelland, *House Hansard* 15 March 2005, pp34-5.
[48] Article 19(2) ICCPR.

hearings, with limited exceptions. That requirement applies equally to civil and criminal matters.[49] The Human Rights Committee has discussed this requirement in the following terms:

> The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons...

25. In addition, 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.[50]

26. While one of the exceptions to a public hearing is 'for reasons of … national security', that 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.[51]

27. By removing from the court the discretion to hold a closed hearing, the Bill adopts a 'one size fits all' approach to the issue. This leaves no room for judicial officers to order greater or lesser restrictions, depending upon the nature of the information said to require protection. As such, the approach adopted in the Bill seems unlikely to satisfy the test of proportionality.

28. The Commission also notes that the ALRC Report did not propose that a court be directed or legislatively required to hold any hearing in closed session in either criminal or civil matters.[52]

29. The Commission would therefore recommend that sections 25(3), 27(3) and 28(5) of the Bill be omitted and the matter left to the discretion of the Court. The Commission would also recommend that the Court be expressly obliged to provide reasons where proceedings are heard *in camera*.

30. Similar recommendations were made by this Committee in respect of the comparable provisions of the Act (which apply to criminal proceedings).[53] Again, those recommendations were not pursued by the Parliament. However, as with the recommendations referred to above, this might be a timely

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[49] See eg *Van Meurs v Netherlands* (215/86).
[50] In *Estrella v Uraguay* (74/1980), the Human Rights Committee found that a trial *in camera* violates Article 14(1) of the ICCPR if the State fails to provide a reason for not providing a public trial.
[51] Joseph S, "*A Rights Analysis of the Covenant on Civil and Political Rights*" (1999) 5 *Journal of International Legal Studies* 57 at 78.
[52] See recommendations 11-19 and 11-20.
[53] See recommendations 1 and 2.

opportunity to reconsider these issues in respect of civil and criminal proceedings.

Proposed section 38I – parties and legal representatives may be excluded from part of hearing

31. Clause 38I provides that the court may exclude a party and/or a party's legal representative from certain parts of a closed hearing if the Court considers:

- they have not been given security clearance at the level 'considered appropriate' by the Secretary of the Attorney-General's Department in relation to the information concerned; and
- the disclosure of the information concerned would prejudice national security.

32. The parts of the closed hearing from which those persons may be excluded are those parts where the Attorney or his or her legal representative intervenes (under proposed s38K) and:

- gives details of the information in question; or
- gives information in arguing that the court should exercise its powers (under proposed section 38L) to restrict disclosure of the information or prevent the calling of a witness.[54]

33. In many cases, the excluded party will have difficulties offering assistance to the Court by presenting a contrary argument. 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.[55] In the matters referred to in paragraph 9 above, this will once more potentially render ineffective the remedy which could otherwise be offered by the Court.

34. Moreover, while there is no explicit right to be present at a civil hearing (cf criminal defendants, who do have explicit protection under article 14(3)(d) of the ICCPR), the Human Rights Committee has stressed the importance of being able to respond to the legal contentions and evidence of the other parties in a civil matter. For example, *Äärelä v Finland*[56] concerned an injunction sought in respect of certain logging and road-making activities. The Finnish Court of appeal refused to allow the authors of the complaint an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority. In finding a violation of article 14(1), the Committee made the following comments:

> …the Committee notes that it is a **fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party**. The Court of Appeal states that it had "special reason" to take account of

[54] See proposed sub-sections 38(I) (2)(e) and (3).
[55] See proposed s38L(2).
[56] Communication No 779/1997 CCPR/C/73/D/779/1997

these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.[57]

35. In the absence of an explicit requirement to be able to be present at one's civil hearing,[58] article 14 may permit the exclusion of a party from civil proceedings in exceptional circumstances, provided the fundamental obligation to ensure equality between the parties is preserved. The Commission would therefore recommend that clause 38I be amended so as to:

- require the Court to consider, in exercising the discretion conferred by s38I(3), 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 or her or his legal representative (including through the use of redacted evidence or submissions). This 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.

This approach will also alleviate the concerns referred to in paragraph 33 above regarding the availability of an effective remedy.

36. On a related issue, while the Court is required to make a record of a closed hearing and give a statement of reasons for orders made under s38L:

- access to record is restricted to:
  - the appellate court;
  - the Attorney (and the Attorney's representatives) if she or he exercises the intervention power in proposed section 38K;
  - legal representatives of parties; and
  - parties who have not engaged a legal representative;[59]

[57] Ibid at 7.4.
[58] The Human Rights Committee has also found that article 14(1) includes the right to be present at one's hearing (*Wolf v Panama* (289/88) at para 6.6). However, this was in the context of a criminal matter.
[59] See proposed s38I(5).

- in the case of access to the record by a party without legal representation or the legal representative of a party, the person must possess a security clearance at the level 'considered appropriate' by the Secretary of the Attorney-General's Department;[60]
- the Attorney may seek to have the record varied if she or he considers disclosure to such a person is likely to prejudice national security.[61]
- while the parties and their legal representatives must be given a copy of the reasons, for matters where the Attorney is an intervener, she or he has an opportunity to have the reasons varied to avoid the disclosure of information likely to prejudice national security.[62]

37. In the Commission's view, those provisions stand to frustrate a person's appeal from a decision made under s38L, which may in turn violate their right to an effective remedy. They also raise further possible violations of article 14(1), in the sense that one or more of the parties to a piece of litigation may be treated less favourably than the Attorney (where they intervene[63]) or the other parties. Amendments should at least be made to permit access to the record by security cleared parties who have engaged lawyers– otherwise the capacity to give meaningful instructions is diminished. The Commission would also recommend that:

- the Court be given 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 –see also the discussion in the next section);

- in applications to vary the record, the Court be expressly required to consider the possible adverse effects on affected parties. Further, to avoid doubt, an appeal court should be empowered to vary such an order.

Restrictions on disclosure of information to parties and legal representatives

38. Section 46G creates an offence of disclosing information to parties, legal representatives and persons assisting legal representatives, where that disclosure is likely to prejudice national security. A complex set of exemptions apply to that offence, including that:

- 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 and discloses the information in the course of her or his duties in relation to the proceedings;[64]

[60] See proposed s38I(9).
[61] See proposed ss38I(7) and (8).
[62] See proposed section 38M(3).
[63] See proposed s38K.
[64] See proposed s16(ac).

- the person **disclosing** the information is a party who has been given a security clearance considered appropriate by the Secretary and discloses the information in the proceeding or a closed hearing;[65] or
- the person **receiving** the information is a party, legal representative or person assisting a legal representative who holds such a security clearance.[66]

39. As others who have made submissions to this inquiry have observed, this scheme creates a somewhat odd series of anomalies.[67] More fundamentally, it departs from the recommendation made by this Committee[68] and the ALRC[69] to the effect that the court should determine the disclosure regime for such information. Such matters should not be solely dependent upon the exercise of executive discretion, particularly in proceedings in which the Commonwealth or officers of the Commonwealth are parties. Again, that approach gives rise to the possibility of a breach of article 14(1) because the Court is not in a position to ensure equality between parties in their preparations for hearing.[70]

Derogation

40. The drafters of the ICCPR envisaged that there would be occasions when some of the human rights set out in the Covenant would be justifiably infringed by States in times of public emergency. A procedure for the derogation from certain rights was provided in article 4 of the ICCPR which applies 'in times of public emergency which threatens the life of the nation'.

41. That power of derogation is carefully circumscribed so as to avoid the arbitrary disregard for human rights. It also includes certain procedural requirements, particularly official proclamation at the domestic level[71] and notification of the other states parties to the ICCPR.[72] Australia has not sought to use that procedure and has never suggested that it relies upon article 4 in enacting legislation relating to national security. As some commentators have observed, that does not deprive Australia of its substantive rights of derogation.[73] Australia could still raise the 'defence' conferred by article 4 if an Optional Protocol complaint was made to the Human Rights Committee in relation to the operation of the Bill or the Act.[74] While that may be so, a failure to meet those procedural requirements in cases of purported derogation would also expose Australia to international criticism for failing to meet its obligations under the ICCPR.[75]

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[65] See proposed s16(aa).
[66] See proposed s46G(c)(i).
[67] See eg the submission of Mr Patrick Emerton.
[68] See recommendation 10.
[69] See ALRC Report [11.131]-[11.133] and recommendations 11.24-11.25.
[70] See, in that regard, *Jansen-Gielen v Netherlands* 846/99.
[71] See article 4(1).
[72] Via the Secretary-General of the United Nations - See article 4(3).
[73] See S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 447.
[74] See *Landinelli Silva v Uruguay* (34/78) para 8.3.
[75] See eg *Concluding Comments on Mexico* CCPR/C/79/Add 109, 27 July 1999 and *Concluding Comments on Ireland* CCPR/C/79/Add 21, 3 August 1993.

42. It should also be noted that there has been some controversy as to whether current security threats constitute a 'public emergency threatening the imminent life of the [Australian] nation'.[76] In the United Kingdom the House of Lords recently concluded, considering the analogous provisions of the *European Convention on Human Rights*, that such an emergency does exist: see *A v Secretary of State for the Home Department*.[77] The legislation in question in that matter provided for the potentially indefinite detention of certain foreign nationals suspected of being 'international terrorists'.

43. Although Australia may be in a different position to the United Kingdom, we will assume for the purposes of this submission that there is currently a relevant public emergency threatening the life of the Australian nation (albeit one that has not been the subject of any relevant official domestic proclamation or international notification by Australia for the purposes of article 4). Even on that assumption, Article 4(1) appears unlikely to allow Australia to avoid a breach of the ICCPR in connection with the provisions of the Bill.

44. Article 4(2) of the ICCPR expressly provides that certain rights are not subject to suspension under any circumstances.[78] The Human Rights Committee has observed that there are other rights, in addition to those specified in article 4(2), which cannot be subject to lawful derogation. Included in that category are the rights protected by article 14(1):

> States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by … deviating from fundamental principles of fair trial...[79]

45. Further, in dealing with derogations from the right to an effective remedy, the Human Rights Committee has stated:

> Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments

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[76] Compare C Michaelson 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' 25 Sydney Law Review (2003) p 275 at 300-301 with S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 448-9.

[77] [2004] UKHL 56.

[78] The list of non-derogable rights includes the right to life (article 6); freedom of thought, conscience and religion (article 18); freedom from torture or cruel, inhuman or degrading punishment or treatment (article 7); the right to recognition everywhere as a person before the law (article 16) and the principles of precision and non-retroactivity of criminal law (article 15).

[79] Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001, para 11.

> to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

Existing provisions of the *Migration Act 1958* (Cth)

46. The Commission also notes that existing provisions of the *Migration Act 1958* (Cth) actually go a step further than the Bill and permit a Court to rely upon 'secret evidence' in substantive hearings regarding visa cancellation decisions.

47. The relevant provisions allow the Federal Court or the Federal Magistrates Court may make a non-disclosure order, preventing the applicant, their legal representative and any member of the public from accessing the information in question.[80] The effect of this is to allow the Court to rely upon the confidential information for the purposes of the substantive visa cancellation proceedings even though it may choose not to disclose that information to anyone, including the applicant whose visa has been cancelled and that person's legal representatives.[81] In contrast, information which is deleted or suppressed under the Bill may not be relied upon for the purposes of the substantive hearing as it is never admitted into evidence.

48. The provisions of the *Migration Act 1958* (Cth) also allow the Minister to 'test the waters' when disclosing such information to the Court. If the court decides not to make a non-disclosure order, the Minister can either adduce the evidence in the visa cancellation proceedings and the information can be supplied to the non-citizen applicant and his or her legal representatives, or the Minister can withdraw the information from the court's consideration, in which case the information will not be disclosed and cannot be relied upon by the court as evidence in the visa cancellation proceedings.[82]

49. Some criticism was directed at this procedure and the ancillary provisions in the ALRC Report:

> The options available to the Federal Court or the Federal Magistrates Court in dealing with the information under the *Migration Act* are limited. The court will either never have access to the information itself or, where the Minister authorises disclosure to the court, it can make interim or permanent non-disclosure orders on the application of the Minister or refuse to make such non-disclosure orders. It would be desirable for the courts to be able to consider a greater number of options in making an order resulting in the withholding of evidence from an affected party. The principle that secret evidence should only be used as a last resort in the most exceptional matters in order to protect classified or sensitive national security information highlights the desirability for statutory provisions (modelled on CIPA) which

[80] See s503B(1) *Migration Act 1958* (Cth).
[81] See *Senate Hansard*, 26 June 2003, 12385 (Senator Sherry).
[82] See ss503B(6) and (7) *Migration Act 1958* (Cth).

expressly set out the powers of a court to make orders in lieu of full disclosure.[83]

50. The ALRC did not ultimately make a formal recommendation in respect of those provisions.[84] This Committee may consider it appropriate to do so. For example, if secret evidence is still to be permitted in substantive hearings in visa cancellation cases (which, in the Commission's view, is an issue which requires further careful consideration), then it should at least be subject to the safeguards proposed by the ALRC in recommendation 11-43 of the ALRC Report.

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[83] See ALRC Report [11.220].
[84] Noting that it had not been asked to undertake a review of the provisions of the *Migration Act 1958* (Cth))