Human Rights and Equal Opportunity Commission

22 April 2005

Mr Owen Walsh
Secretary
Legal and Constitutional Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Sir

Re: Inquiry into the National Security Information Legislation Amendment Bill 2005

At the hearing held 13 April 2005, the Commission took a number of questions on notice. I am advised that the answers to the Honourable Senators' questions are as set out below.

The Commission has also taken the liberty of providing clarification regarding an issue which arose during the hearing regarding public interest immunity privilege.

1. Secret evidence

At proof Hansard p. 22, the following discussion took place:

> **CHAIR**— … The ALRC have said in their submission, in relation to the stay provisions, that the consequences of a stay of any given proceedings would always be considered by the court, and I suppose they take some comfort from that. What is your observation in relation to that and is there any way to amend the stay provisions that might address your concerns?
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> **Mr Lenehan**— We do not have any recommendations for the amendment of the provisions of the bill that deal with the granting of stays. However, we regard the safeguards we have proposed concerning other provisions of the act to be amendments which would better protect the rights of people who would otherwise potentially be subject to those sorts of orders by the court. I should add that we have listened with interest to the evidence of Mr Emerton this morning. I take it that Mr Emerton is of the view that, in many circumstances, perhaps, secret evidence should be considered by the court. That would be another way of getting around the potential injustice caused by the act.
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> Secret evidence has been the subject of fairly adverse comment, to put it mildly, by the Human Rights Committee, so I think that is quite a difficult issue. I am happy to take on notice, however, the question of whether that may be able to be implemented in a matter that is consistent with human rights. I suppose it could be envisaged that, if that was done with the consent of the parties, perhaps, and if it were subject to other

> safeguards, possibly including the presence of an amicus curiae before the court, that fairly difficult question could be addressed. I do not have the views of the commission on that, but I am happy to seek them.
> **CHAIR**—I appreciate that. If you could take that on notice and give us the benefit of the commission's views when you have an opportunity, that would be helpful.

The Commission has considered the question taken on notice by Mr Lenehan and has also had regard to the further submission of Mr Emerton (dated 14 April 2005).

The Commission is of the view that Mr Emerton has identified a category of case where the admission of evidence not disclosed to a party ('secret evidence') might appropriately be considered by a Court for the purposes of a substantive decision. That is:

- in proceedings seeking civil remedies against the Commonwealth or a Commonwealth entity; provided that

- the material that would otherwise be excluded (under proposed sections 38L(2), (4) or (6)(a)) would assist the case of the party seeking that relief.

The Commission considers that the use of such material should be made conditional upon the consent of the party seeking relief against the Commonwealth or Commonwealth entity. It would also obviously need to be admissible under the rules of evidence.

The Committee will recall that the Commission's concern over secret evidence arose from the Human Rights Committee's observation in *Äärelä v Finland*[1] to the effect that the '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'. However, in the Commission's view, those issues do not arise where:

- the evidence is not being adduced in support of the Commonwealth's case;

- the Commonwealth is necessarily aware of and in a position to contest that evidence; and

- consent is given by the party to whom that material is not disclosed.

Provided any amendments reflected those limitations, the Commission would consider them acceptable from a human rights perspective.

Specific provision would need to be made for the record of that part of the hearing where the secret evidence was considered and for those parts of the Court's written reasons which deal with that material. Proposed sections 38I (amended as per the Commission's suggestions in its written submission) and 38M may provide useful templates.

In addition, as discussed in Mr Lenehan's evidence, the Court should be empowered to appoint counsel as *amicus curiae* to provide the Court with assistance in relation to such material. This will assist in ensuring that the court receives adequate assistance in the absence of one or more of the parties. Consistent with the Commission's written submission (see para 39), the Court would be given discretion to determine that such a person had provided sufficient confidentiality undertakings or was security cleared to an appropriate level.

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[1] Communication No 779/1997 CCPR/C/73/D/779/1997

2. Definition of civil proceedings

At proof Hansard pp. 23-24, Mr Lenehan took a question on notice in relation to the definition of 'civil proceedings'.

> **Senator LUDWIG**— …. In trying to define civil proceedings, this legislation may not have defined it adequately. Do you have a view about that?
> **Mr Lenehan**—I do not have a considered view. My reading of the proposed section 15A is similar to Professor Weisbrot's in that I think you would at least have to have commenced proceedings in a court. It would presumably draw in the sorts of matters that you have mentioned, which are ancillary to those proceedings. For example, 15A(2) talks about an ex parte application discovery and inspection of documents and evidence and other interlocutory proceedings. It would seem that, say, court ordered mediation may be included there, although it is not altogether clear. When it comes to a choice between a tribunal and court proceedings, upon making the election you would be outside the provisions of this act depending on the particular statute that provided for that choice. It may become an administrative decision, depending upon how that proceeds and under whose auspices it is done. It is an interesting question, and I would be happy to seek the commission's views if that would be of assistance.
> **Senator LUDWIG**—It would be helpful.

Having considered this issue further, the Commission is of the view that undesirable ambiguity may arise from the definition of 'civil proceedings'.

The definition of that term appears in proposed clause 15A, which states inter alia:

> In this Act, ***civil proceeding*** means any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding.

The term 'court' is not defined in the Bill or in the Act. Australian courts have interpreted that term as having its ordinary meaning, rather than a technical meaning.[2] They have held that whether a body qualifies as a 'court' for a particular statutory purpose is a matter to be determined on a case by case basis having regard to:

- the functions and powers of the body and whether it can be properly said to have the characteristics of a 'court';[3] and
- whether the statutory context indicates an intention by the Parliament that the body qualify as a 'court' for the purposes of that Act.[4]

Hence, the potential application of the Bill may be quite uncertain in the circumstances discussed by Senator Ludwig (at Proof Hansard p23). That is, in circumstances where there is a choice of jurisdiction between a tribunal and a 'court' (in the stricter sense of the term).

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[2] *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497, 515 (McHugh JA); *Brian Rochford (Administrator Appointed) v Textile Clothing & Footwear Union of NSW* (19998) 47 NSWLR 47, 61-62 (Austin J).

[3] *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497, 516 (McHugh JA), 512 (Kirby P); *Brian Rochford (Administrator Appointed) v Textile Clothing & Footwear Union of NSW* (19998) 47 NSWLR 47, 61-62 (Austin J); *Woodcrest Homes Pty Ltd v Fair Trading Tribunal* [2002] NSWSC 552, [16] (Bell J); *Anderson Stuart v Treleaven* [2000] NSWSC, [8] – [9] (Santow J).

[4] Ibid.

A further example of the possible difficulty raised by Senator Ludwig would arise where a person seeks compensation for an injury suffered in connection with a terrorist act and where evidence relating to national security information is relevant to their claim. A victim of such a crime in New South Wales may elect to pursue their compensation claim before:

- the Victims Compensation Board (under the *Victims Support and Rehabilitation Act 1996* (NSW)); or
- the NSW Local, District or Supreme Courts.

The issue of whether the Board was a 'court' (such that the provisions of the Bill applied) would potentially lead to wasteful litigation and delays.

One means of avoiding such difficulty would be to extend the provisions of the Bill to tribunals. The Commission (like the ALRC) supports that approach. However, if such an approach is taken, the Commission considers that it would provide a useful opportunity to critically examine the use of secret evidence before tribunals. This was discussed in the Commission's opening statement:

> On a related point, and this has been discussed this morning, the commission notes that in its submission to the inquiry, the ALRC has repeated its recommendation that the bill apply to administrative tribunals as well as to courts. As the ALRC observed in its report, a number of tribunals are empowered to rely upon secret evidence not disclosed to a party for the purpose of a substantive decision. The commission did not address tribunals in its submission as it understood that they were outside the scope of the bill. However, should this committee feel that it is able to address that issue, the commission would support the ALRC's suggestion that there be a consistent scheme which covers tribunals. If such a scheme allows tribunals to continue to make use of secret evidence for the purposes of substantive decisions which, again, the commission considers should be the subject of close examination then the safeguards proposed by the ALRC should apply.[5]

The ALRC's recommendations referred to by Mr Lenehan are recomendations 11-41 to 11-43 of *Keeping Secrets: The Protection of Classified and Security Information*.[6]

3. Sunset Clause

At proof Hansard pp. 26-27, Mr Lenehan took a question on notice in relation to the possibility of inserting a sunset clause into the Bill:

> **Senator GREIG**— …If a sunset clause were to be inserted into this, would that placate you somewhat or are you more interested in looking at amendments to more acutely address the issues that you have raised this morning?
> **Mr Lenehan**—Unfortunately I do not have the views of the commission on that point. I will take that on notice and seek them. On a very preliminary basis, a sunset clause would address some of those concerns in this respect. We have pointed out in the submission that the ICCPR allows you to take certain security measures, with the qualification that they need to be proportional and necessary in the particular circumstances. A sunset clause would—if we accept that we are in circumstances where there is heightened concern about security information—ensure that the provisions of the bill do not go beyond what is necessary to protect that information in

[5] See *Proof Hansard*, p21.
[6] (ALRC 98, 2004), tabled on 23 June 2004.

> this particular period. If we become more relaxed about it in the future, if there is less cause for concern, then that is more likely to keep it within those limits. But that is an off the top of my head response and I am happy to seek the views of the commission on that suggestion.
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> **Senator GREIG**—Thank you.

The issue of proportionality referred to by Mr Lenehan arises in two respects.

First, as noted in paragraphs 26-27 of the Commission's submission, legislative measures excluding the public from court proceedings for the purpose of national security must be 'proportionate' to that purpose. This means that they must be the least restrictive means of achieving that purpose.[7]

Proportionality might also arise to the extent that Australia relies upon the provisions in article 4(1) of the ICCPR, which provide for derogation from certain provisions of the ICCPR in times of public emergency. As noted in the Commission's submission, if that is the case:

- Australia has not complied with its obligations to publicly proclaim an emergency;
- nor has it complied with the international notification requirements;
- there is some controversy as to whether the current security threats constitute a 'public emergency threatening the imminent life of the [Australian] nation'; and
- the rights discussed in the Commission's submission appear to be rights from which derogation is not permitted.[8]

However, if article 4 were to operate to permit derogation from the right to an effective remedy and the right to a fair and public hearing, any such derogation would be required to be 'strictly limited to the exigencies of the situation'. The Human Rights Committee has observed that this involves the application of a proportionality test.[9]

A sunset clause will assist in keeping the legislation within the limits of proportionality. Such a clause would require Parliament to return to the question of whether the legislation still represents the least restrictive means of achieving the purposes of protecting national security information. This may be particularly important if, at that time, concerns over national security are not as great as at the present.

However, 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 in its submission and in section 1 above. As was observed in the Commission's opening statement, those recommendations reflect the approach that protective security actions may be taken by states provided they remain within carefully crafted limits of international human rights law.

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[7] Joseph S, "*A Rights Analysis of the Covenant on Civil and Political Rights*" (1999) 5 *Journal of International Legal Studies* 57 at 78.
[8] See paragraphs 40-45 of the Commission's submission.
[9] Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001, para 4.

4. Public interest immunity privilege

In their evidence, the officers of the Attorney-General's Department appeared to place some reliance upon the suggestion that provisions of the Bill:

> do little more than provide a formalised procedure for claims of public interest immunity based on national security grounds[10]

The Commission disagrees.

The Commission considers that Mr Emerton has correctly identified the points of difference between the provisions of the Bill and the procedure for claiming public interest immunity privilege (see Mr Emerton's submission of 14 April 2005). In particular, in claims for public interest immunity privilege, the Court retains control of the procedure.

A further significant difference is that the *Evidence Act 1995* (Cth) (in codifying the common law of public interest immunity privilege) does not direct courts as to the weighting to be given to risk of prejudice to national security.[11] Moreover, the onus rests upon the party seeking to preserve the secrecy of matters of state to prove that factor outweighs the public interest in admitting the evidence in question.[12] The Bill is silent on the question of onus. However, even assuming that the Attorney-General or other party opposing disclosure bears a similar onus to that which applies to a claim of public interest immunity, their task is made considerably easier because:

- proposed section 38(L)(8) of the Bill requires the Court to give greatest weight to prejudice to national security; and
- the inclusion of the word 'substantial' in proposed section 38L(7) of the Bill requires the Court to start from the position that some adverse impacts upon substantive hearings are to be tolerated.

The significance of these differences, from a human rights perspective, was explained by the Commission in its opening statement:

> The commission's key concerns in relation to [the right to a fair and public hearing and the right to an effective remedy] arise from the manner in which the bill applies constraints upon judicial discretion...As the commission has stated in its submission, 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.[13]

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[10] See *Proof Hansard*, p34.
[11] See s130(5) *Evidence Act 1995* (Cth).
[12] See s130(1) *Evidence Act 1995* (Cth) and the discussion by the ALRC in *Keeping Secrets: The Protection of Classified and Security Information* (ALRC 98, 2004), tabled on 23 June 2004 at para 8.161.
[13] See *Proof Hansard*, pp 20-21.

Thank you again for the opportunity to participate in this inquiry. The Commission would be very happy to clarify any other issue which may arise.

Yours faithfully

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