Australian Government
Attorney-General's Department

Security and Critical
Infrastructure Division

19 April 2005

Ms Sophie Power
Principal Research Officer
Senate Legal and Constitutional Committee Secretariat
Parliament House
Canberra

Dear Ms Power

National Security Information Legislation Amendment Bill Hearing - Questions on Notice

I refer to your email of Thursday 14 April attaching the questions which the Attorney-General's Department took on notice at the Senate Legal and Constitutional Committee hearing on 13 April 2005.

Please find attached the responses from the Attorney-General's Department.

The action officer for this matter is Kirsten Kobus who can be contacted on 6250 5433.

Yours sincerely

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National Security Information Legislation Amendment Bill 2005
Public hearing 13 April 2005

Questions taken on notice

Attorney-General's Department

Question 1 (proof Hansard p. 36) – Application of the legislation to Tribunals

Senator LUDWIG—The ALRC raised the issue of tribunals and the like. They are currently not covered.

Ms Jackson—They are not.

Senator LUDWIG—Is there an intention to cover that field?

Ms Jackson—I am not really in a position to answer that question, but certainly the migration tribunals and the AAT already have fairly significant provisions that relate to the protection of sensitive information. For those Commonwealth tribunals there are already a range of mechanisms that can be adopted.

Senator LUDWIG—So there is nothing you can say as to whether there is an intention to cover this field?

Ms Jackson—No.

Senator LUDWIG—Are you in a position to find out and let the committee know whether there is an intention?

Ms Jackson—I will certainly do that.

AGD Response

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. 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 Act regime to tribunal proceedings.

Question 2 (proof Hansard pp. 36-37) – Range of proceedings covered by the Bill

Senator LUDWIG—…As to the range of proceedings, is there any idea of what the problem is currently in civil proceedings? Other than anecdotal evidence, in how many civil proceedings does sensitive information arise which the parties have problems with or which otherwise comes to the attention of the Attorney-General, who then indicates that it is security sensitive information, and the relevant department is concerned and raises it through the Attorney-General's Department or the Attorney-General's Department says that the current procedures are inadequate to deal with it?

Ms Jackson—I cannot give you an exact figure for the number of cases where this arises in civil matters but certainly the numbers are extremely small—of the order of half-a-dozen per year. 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, as you mentioned before, of compensation that flow from the actions of persons who happen to be security intelligence officers.

Senator LUDWIG—If that is the case, are we not using a sledgehammer to crack a nut? Why do we then have legislation that is as broad as it is when there perhaps is only a small incidence and in only a narrow field? Why wouldn't we, in the alternative, just cover some of those small areas and see whether that is adequate for the moment? If it were a painting, as we say, that is being developed then we need to fill in only a square at a time, if we are following it by the numbers.

Ms Jackson—I think that is a policy matter that really ought to be addressed to the Attorney.

Senator LUDWIG—Perhaps you could take it on notice.

CHAIR—Please seek an answer for the committee.

Senator LUDWIG—It is helpful to understand that in bringing bills forward there has got to be a mischief in some respects that is being dealt with. One of the tests that I certainly apply—and I am sure the committee more generally applies this—is: what is the mischief, what is the scale of the mischief, what is the likelihood of that mischief continuing and is the bill appropriate to and adapted to resolving that in the first instance? There is also the breadth of it and whether it overreaches. Those are the issues, amongst other matters as well, to which I certainly turn my mind to make sure that you are not simply covering the field in a more general way and using this as such an opportunity where the nature of the issue is far smaller and narrower and may require a more measured response than this one. So I would like an answer to that.

Ms Jackson—Certainly.

AGD Response

The Government considers 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. National security information may 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.

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. The immunity does not overcome procedural gaps in the protection of security classified information, such as mandating closed hearings.
Most importantly, while the court can make an order in relation to only part of a document, 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.

The ALRC in its report "Keeping Secrets" recommended that a regime to protect national security information extend to civil as well as criminal proceedings. The Bill enables courts to balance national security considerations against the ability to use the greatest amount of information possible to be admitted.

Question 3 (proof Hansard p. 37) – Operation of the Special Circumstances Scheme and the amount of funds in the Scheme

Senator LUDWIG—I refer to the opportunity for unrepresented litigants to access the fund where they may be declined a security clearance. Could you tell me how that scheme will operate and how much funds are in that scheme? As I understand it, it is a current scheme.

Ms Jackson—Yes, it is.

Senator LUDWIG—I am happy for you to take that on notice.

Ms Jackson—Thank you, I would like to take that on notice.

AGD Response

There is no separate appropriation for the Special Circumstances Scheme. There is a single appropriation for all schemes of financial assistance apart from the native title schemes (for which there is another appropriation). In this financial year there is an appropriation of $1.4 million for all non-native title schemes.

The delegate will make a decision based on the applicant fulfilling the relevant criteria; that is that the applicant is unrepresented in proceedings and has been denied the relevant security clearance. 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. As part of the application, the applicant will be required to provide details of financial circumstances verified for by example pay slips or bank statements. The delegate will assess that information.

It is the practice of delegates when making a decision to refuse assistance (whether under the Special Circumstances Scheme or any other scheme) to provide a written decision note including reasons. An applicant may request internal review of a decision within 28 days of being notified of the decision to refuse assistance. The review is conducted by another delegate who had no connection with the decision under review and who is at, or above, the Australian Public Service level of the original delegate.

Question 4 (proof Hansard p. 38) – Revisiting the procedures in the legislation if there is an obvious delay and increase in costs in proceedings as a consequence of this bill

Senator LUDWIG—You know the circumstance in family law—it has been anecdotally put forward—that one party can run up the costs and time of the other to cause them to abandon the proceedings or to just dry up their resources, as part of the horrible nature of the issue. They then might latch onto this as another way of achieving that end. There is a lot of current case management going on in the Family Court to stop that happening. This might just give parties another way of doing that. If it were to happen is really the question. I am not suggesting it could happen or it would be done by the litigants, but, if it were to be perceived to be happening, would the Attorney-General then come back and look at that issue again, especially in those circumstances?

Ms Jackson—I imagine so, yes.

Senator LUDWIG—Perhaps you could ask the Attorney-General.

AGD Response

It should be borne in mind that parties to proceedings cannot themselves invoke the application of the legislation. This is a matter for the Attorney –General to decide. The Government will monitor the practical operation of this new regime in criminal and civil proceedings. The Government will consider any amendments to the regime which it considers appropriate to ensure the efficiency of the process, whilst protecting Australia's national security.
