Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005

Answers to questions taken on notice by the Human Rights and Equal Opportunity Commission

22 November 2005

Question 1

1. At proof Hansard p47, the Commission took the following question on notice:

> **Senator BRANDIS**—Do you think we really need a sedition law, given all the other laws that we have?
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> **Mr Lenehan**—We have noted your comments in relation to the offence of incitement. This may be a matter that is appropriate for us to take on notice. We broadly feel that the offence of incitement does cover similar territory to the sedition offences, subject to the caveat that Mr McDonald gave you the other day, which is that there is a need for a further intention that the offence in question be committed. Our preliminary view on that caveat would be that that is an appropriate requirement—that is, that should be the limits beyond which the criminal law does not go. We are happy to take that on notice and consider it.
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> **Senator BRANDIS**—If you would not mind. We have to consider what recommendations we make, but I would like to have the benefit of a considered and legally well-argued critique of Mr McDonald's response to my questions, if you would be good enough to furnish us with that.
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> **CHAIR**—Covering all of the above criteria.
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> **Mr Lenehan**—Certainly.

2. Section 11.4 of the *Criminal Code* makes it an offence to urge another person to commit an offence.[1] That provision provides:

> **SECT 11.4 Incitement**
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> (1) A person who urges the commission of an offence is guilty of the offence of incitement.
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> (2) For the person to be guilty, the person must intend that the offence incited be committed.
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> (2A) Subsection (2) has effect subject to subsection (4A).
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> (3) A person may be found guilty even if committing the offence incited is impossible.
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> (4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
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> (4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
>
> (5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

3. Incitement has two physical elements:

- urging another person to do something (**Element One**)

[1] s 11.4(1). This is called incitement under the *Criminal Code*. Note that the term 'offence' is defined in the *Criminal Code* as an offence against a law of the Commonwealth.

- that thing being to commit an 'offence' under a law of the Commonwealth (**Element Two**)

4. Intention is the required mental element for both of these physical elements.

5. In relation to the Element One, this follows from s 5.6(1).[2]

6. In relation to Element Two, this follows from s 11.4(2). There are a number of matters to note here:

   - In contrast to the approach taken with the proposed new sedition offences regarding the urging of force or violence (see further below), the drafters considered it necessary to expressly provide that intention applied to Element Two. This is arguably consistent with the point made by the Commission in paras 2-11 of its supplementary submission. Element Two appears to have been viewed as a physical element in the nature of a circumstance or a result. As such, s11.4(2) was arguably necessary to avoid the operation of s5.6(2) of the Criminal Code, which may have otherwise operated to make recklessness the relevant fault element;
   - The Criminal Law Officers Committee in its final report into the Model Criminal Code pointed out that a 'lesser fault element of recklessness would be too great a threat to free speech';[3]
   - It is, however, somewhat unclear *what* has to be established to prove that the inciter intended that the incitee commit the offence.

7. As regards the final matter, there is no case law on point.

8. It is therefore useful to consider the position at common law. Under the common law it appears that the inciter had to intend the incitee undertake the relevant act **and** possess the relevant *mens rea* of the offence being incited. For example, P Gilles states that:

> D must intend that the incitee will act **in such a way as to incur criminal liability as a principal**. It follows that if D intends no more than that the other person will commit an actus reus but without any mental element required by the corresponding crime, but without any mental element required by the corresponding crime, D does not incite the commission of the crime.[4] (Emphasis added)

9. The question is whether the *Criminal Code* has modified (and if so, to what extent) the position under the common law.

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[2] Section 5.6(1) provides:

> If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

[3] *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final report Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1993) (AGPS: Canberra).

[4] P Gilles, *Criminal Law*, 3rd Ed, 1993, Law Book Co, p 651. This is also the position taken in C Clarkson & H Keating, *Criminal Law*, 5th Ed, Thompson: Sweet & Maxwell, p 523: '[The] inciter must intend that as a result of his persuasion the incitee will bring about the crime and the person incited will have the mens rea for the crime'. See also, Glanville Williams, *Textbook on Criminal Law*, 2nd Ed, 1983, London: Steven & Sons, p 442.

10. In the Commission's view, there are a number of matters which indicate that the Criminal Code should be read consistently with the position under the common law. For instance, sections 11.4(4) and (4A) provide that any defences, procedures, limitations, qualifying provisions or special liability provisions[5] that apply to an offence apply also to the offence of incitement in respect of that offence.

11. Consequently, in the Commission's view, it is likely that the physical element in section 11.4 (that the inciter intends that the incitee commit the offence) will require the inciter to intend that the incitee commit the physical elements of the offence being incited **and** possess the mental state necessary for the corresponding fault elements to apply. This is consistent with the Attorney-General's Department's view of the operation of section 11.4.[6]

12. However, it does not follow that the offences in proposed s80.2 would significantly differ from the offences available under the law of incitement.

13. For example, the offence in proposed s80.2(1) covers similar territory to that which would already be covered by incitement to commit the offence of treason under s24AA(1A) of the *Crimes Act 1914*(Cth), which provides:

> A person shall not:
> (a) do any act or thing with intent:
> (i) to overthrow the Constitution of the Commonwealth by revolution or sabotage; or
> (ii) to overthrow by force or violence the established government of the Commonwealth, of a State or of a proclaimed country

14. The principal differences between what is required to be proved for the new offence in proposed s80.2(1) as compared to incitement to commit treason under the existing provisions would appear to be as follows:

- on the view of both the Department and the Commission, recklessness applies to what Senator Brandis has described as the equivalent 'purpose elements' of proposed s80.2(1) (overthrowing the Constitution or government);
- on the view of the Commission in its supplementary submission, recklessness may also apply to the physical element in s80.2(1) requiring that the person be urged to *do something* (being to use force or violence). In contrast, the incitement provisions clearly require that the inciter intend that the incitee use force or violence.

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[5] *Special liability provisions* is defined in the Dictionary as meaning:
(a) a provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence; or
(b) a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew a particular thing; or
(c) a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing.

[6] See Attorney-General's Department on p 3 of their responses to questions taken on notice.

15. The Department appears to disagree with the Commission's view on the second matter.[7] Hence, on the Department's view, the principal difficulty that the new provision is intended to overcome would appear to be the requirement to prove that the inciter intended that the incitee would intentionally overthrow the Commonwealth etc.

16. There is a straightforward solution to that perceived problem, which requires no further legislation at a Commonwealth level. The following state and territory legislation provides for the statutory offence of incitement: *Criminal Code 2002* (ACT), section 47[8]; *Criminal Code* (Tas), section 298[9]; *Crimes Act* 1958 (Vic), sections 321G-L[10]; *Criminal Code* (WA), sections 553[11], 555A[12]. The common law offence of incitement has been retained in New South Wales, Queensland and South Australia. As such, incitement to commit crimes involving violence against property and people is already a crime in every Australian jurisdiction. Those offences do not require proof that the inciter intended that the incitee would undertake the relevant act of violence with, for example, the intention of overthrowing the Commonwealth etc. Indeed, the inciter need not even be reckless to that matter – it is simply not an element of the relevant offences. Moreover, the penalties are comparable for those proposed in the Bill. For example, in New South Wales, a person guilty found

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[7] See Proof Hansard, Friday 18 October 2005, pp37-8.

[8] Section 47(1) provides that "if a person urges the commission of an offence (the ***offence incited***), the person commits the offence of incitement". Maximum penalty depends on the severity of the offence incited. See s47(1)(a) – (e). Section 47 (2) provides the person commits the offence of incitement only if the person intends that the offence incited be committed, although s47(3) states that "despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of incitement to commit the offence". Under s 47 (4) a person may be found guilty of the offence of incitement even though it was impossible to commit the offence incited and any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence (s47(5). The offence of incitement does not apply to an offence against section 44 (Attempt), section 48 (Conspiracy) or this section (s47(6).

[9] Section 298 provides "any person who incites another to commit a crime is guilty of a crime".

[10] Section 321G provides that, (1) Subject to this Act, where a person in Victoria or elsewhere incites any other person to pursue a course of conduct which will involve the commission of an offence by- (a) the person incited; (b) the inciter; or (c) both the inciter and the person incited- if the inciting is acted on in accordance with the inciter's intention, the inciter is guilty of the indictable offence of incitement. (2) For a person to be guilty under sub-section (1) of incitement the person- (a) must intend that the offence the subject of the incitement be committed; and (b) must intend or believe that any fact or circumstance the existence of which is an element of the offence in question will exist at the time when the conduct constituting the offence is to take place. (3) A person may be guilty under sub-section (1) of incitement notwithstanding the existence of facts of which the person is unaware which make commission of the offence in question by the course of conduct incited impossible.

[11] Section 553 provides "[a]ny person who, intending that an indictable offence be committed, incites another person to commit the offence, is guilty of an indictable offence".

[12] Section 555A provides: (1) any person who attempts to commit a simple offence under this Code is guilty of a simple offence and is liable to the punishment to which a person convicted of the first-mentioned offence is liable. (2) Any person who, intending that a simple offence under this Code be committed, incites another person to commit the offence, is guilty of a simple offence and is liable to the punishment to which a person convicted of the first-mentioned offence is liable. (3) A prosecution for an offence under subsection (1) or (2) may be commenced at any time if the offence alleged to have been attempted or incited is one for which prosecutions may be commenced at any time.

of inciting another to commit assault occasioning actual bodily harm'[13] would be liable to imprisonment for 7 years.

17. A similar analysis may be applied in respect of the sedition offences in proposed ss80.2(3) and (5). Existing Commonwealth offences could form the basis for a prosecution in relation to conduct caught by those provisions.[14] However, more fundamentally, state and territory law could be applied in the manner suggested above for words which incite violence against person or property.

18. In relation to the other proposed sedition offences in the Bill (proposed ss80.2(7) and (8)), the Commission considers that Senator Brandis is correct in suggesting that a prosecution could be brought in respect of the same conduct as incitement to commit the offences in proposed ss80.1(e) and (f) of the Criminal Code.

19. The prosecution may, of course, face difficulties in proving that in uttering particular words a person intended that the person or people to whom they were uttered would commit a particular crime. That would be a significant obstacle in the case of words that are more general in nature. In the Commission's view, that is an entirely appropriate limitation, which will ensure that the Criminal Code is not used to prosecute those whose words (while distasteful) are in the sphere of legitimate free speech which attracts the protection of article 19 of the ICCPR. As noted above, that was also the view expressed by the Criminal Law Officers Committee in its final report into the Model Criminal Code.

20. In those circumstances, the Commission considers that the preferable course would be to withdraw schedule 7 (save for the clauses repealing the existing sedition provisions in the *Crimes Act 1914* (Cth)). The Committee could, if it saw fit, recommend a review of the existing state and federal incitement provisions to identify any issues of particular concern to law enforcement authorities. This may provide a more clearly articulated and better justified case for additional legislative measures, if they are in fact thought necessary.

Question 2

21. At proof Hansard p50, the Commission took the following question on notice:

> **Senator MASON**—Mr Murphy raised the fact that the role of the Attorney-General has changed over the last century—that he or she is a more political figure rather than being an independent law officer. Now they are very much a member of the executive and of the cabinet. We have seen examples of that over recent times.
> Do you think it would be better if the DPP were to exercise the discretion?
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> **Mr von Doussa**—The DPP was established to be an independent officeholder, to bring to bear an objective mind which is influenced and informed by the weight of the evidence and so

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[13] See s59, *Crimes Act 1900* (NSW) which provides that: (1) Whosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for five years. (2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 7 years.

[14] See ss24C and 24D the *Crimes Act 1914* (Cth) and s28 of the *Crimes Act 1914* (Cth) in conjunction s11.4 of the Criminal Code.

on, and not by political considerations. In that respect the notion that the consent should lie with the DPP has some force, but there may still be some political consideration here where it is thought that there would be, in effect, a second hurdle that one has to get over. Presumably, the DPP would be considering this anyway, and here is a second hurdle.

Senator BRANDIS—What is the position in the UK?

Mr Lenehan—We would have to take that on notice.

22. The Commission notes that the offence of sedition does not form part of existing United Kingdom anti-terrorism legislation or the *Terrorism Bill 2005* (UK).[15]

23. In the United Kingdom the urging of terrorist offences is criminalised by the offence of incitement, which is an offence at common law. Specific offences of inciting terrorism overseas were introduced by the *Terrorism Act 2000.* [16]

24. Section 117 of the *Terrorism Act 2000* provides that prosecutions under the provisions of that act (subject to some exceptions)[17] shall not be instituted without the consent of the Director of Public Prosecutions for the relevant territorial area. Where it appears to the Director of Public Prosecutions that an offence to which s117 applies is committed for a purpose connected with the affairs of a country other than the affairs of the United Kingdom, proceedings for the offence can not be commenced with out the consent of the Attorney-General.[18]

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[15] The oral or written publication of words with a seditious intention is a common law offence. Stephen's Digest of the Criminal Law (9th ed), Sweet & Maxwell Limited, 1950, p 91. A common law offence of seditious conspiracy occurs when one person agrees with another person or persons to act in the cause of a seditious intention common to both or all of them. It is noted that according to Stephen's digest the tendency of an act or words is seditious if it is a tendency: (a) to bring into hatred or contempt, or to excite disaffection against, the sovereign or the government and constitution of the United Kingdom or either House of Parliament or the administration of justice; or (b) to excite the sovereign's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established; or the alteration of any matter in Church or State by law established; or (c) to incite persons to any crime in disturbance of the peace; or (d) to raise discontent or disaffection amongst the sovereign's subjects; or (e) to promote feelings of ill will and hostility between different classes of those subjects. See Blackstone's Criminal Practice 1995 (5th ed), Peter Murphy (Ed), Blackstone Press Limited, London, p654-655. This commentary notes that "given the potential broad scope of the categories of seditious tendency, the requirement of the mens rea of seditious intention is an important limitation on the scope of the offence".

[16] *The Terrorism Act* 2000 (UK) ss59, 60, 61.

[17] Section 117 (1) states this section applies to an offence under any provision of this Act other than an offence under- (a) section 36, (b) section 51, (c) paragraph 18 of Schedule 7, (d) paragraph 12 of Schedule 12, or (e) Schedule 13. s117 (2) provides that proceedings for an offence to which this section applies shall not be instituted in England and Wales without the consent of the Director of Public Prosecutions, and shall not be instituted in Northern Ireland without the consent of the Director of Public Prosecutions for Northern Ireland. Section 117(3) states where it appears to the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland that an offence to which this section applies is committed for a purpose connected with the affairs of a country other than the United Kingdom- subsection 117(2shall not apply, and proceedings for the offence shall not be instituted without the consent of the Attorney General or the Attorney General for Northern Ireland.

[18] The Commission notes the *Terrorism Bill 2005* proposes amending s117 of the *Terrorism Act 2000* as follows by substituting s117(3) with the following provision: "(2A) But if it appears to the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland that an offence to which this section applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for the purposes of this section may be given

25. The *Terrorism Bill* 2005 (UK) proposes to introduce offences covering direct and indirect incitement, including:

- Encouragement of terrorism[19]; and
- Dissemination of Terrorist publications[20].

26. Proposed s 19 of the Bill provides that, as is the case with other serious offences in the United Kingdom, the prosecutions for offences under Part 1 of the Bill will require the consent of the Director of Public Prosecutions in England and Wales, or in Northern Ireland, the consent of the Director of Public Prosecutions for Northern Ireland.[21]

27. In relation to offences that are alleged to have occurred for a purpose wholly or partly connected with the affairs of a country other than the UK, proposed s19 states the Director of Prosecutions will only be able to give consent to the prosecution with the permission of the Attorney General or, in the case of Northern Ireland, the Advocate General for Northern Ireland.

Question 3

28. At proof Hansard p50, the Commission took the following question on notice:

> **Senator MASON**—Mr Murphy raised the fact that the role of the Attorney-General has changed over the last century—that he or she is a more political figure rather than being an independent law officer. Now they are very much a member of the executive and of the cabinet. We have seen examples of that over recent times.
> Do you think it would be better if the DPP were to exercise the discretion?
>
> **Mr von Doussa**—The DPP was established to be an independent officeholder, to bring to bear an objective mind which is influenced and informed by the weight of the evidence and so on, and not by political considerations. In that respect the notion that the consent should lie with the DPP has some force, but there may still be some political consideration here where it

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only with the permission— (a) in the case of the Director of Public Prosecutions, of the Attorney General; and (b) in the case of the Director of Public Prosecutions for Northern Ireland, of the Advocate General for Northern Ireland. (2B) In relation to any time before the coming into force of section 27(1) of the Justice (Northern Ireland) Act 2002, the reference in subsection (2A) to the Advocate General for Northern Ireland is to be read as a reference to the Attorney General for Northern Ireland."

[19] Proposed section 1 makes it an offence, punishable by up to seven years' imprisonment, for a person to publish a statement or cause another to publish a statement on his behalf if at the time he "knows or believes, or has reasonable grounds for believing, that members of the public to whom the statement is or is to be published are likely to understand it as direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences". Section 1(2) provides that statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts in terrorism include every statement which: (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances. It is irrelevant to the offence whether the conduct complained of actually has the effect of encouraging terrorism (prosed s1 (3). There is a defence for innocent publication on the internet.

[20] Proposed section 2 creates an offence, punishable by up to seven years' imprisonment, relating to the disseminating or making available a "terrorist publication".
Proposed section 2(2) defines a 'terrorist publication'.

[21] Before the Crown Prosecution Service (CPS) was formed in 1986, it was the police who decided whether to take cases to court. Pursuant to the *Prosecution of Offences Act* 1985 (UK) the Crown Prosecution Service now makes the decision whether or not to prosecute.

is thought that there would be, in effect, a second hurdle that one has to get over. Presumably, the DPP would be considering this anyway, and here is a second hurdle.

Senator BRANDIS—What is the position in the UK?

Mr Lenehan—We would have to take that on notice. Another compelling reason for adopting your suggestion, Senator Mason—

Senator MASON—It is not mine. Mr Murphy can take credit for that.

Mr Lenehan—would be that it is the nature of sedition that you are dealing with speech that is potentially in the political sphere. In that context maybe it is highly desirable to remove it from somebody who is perceived to be involved in that sphere.

Senator MASON—Just to bounce off Senator Brandis's question on notice, I am wondering if Lord Carlisle has said anything about it; I do not know. Perhaps you could check that for us.

Mr Lenehan—We will take that on notice.

29. The Commission has discussed the position of the United Kingdom in relation to the consent to prosecute terrorism offences above.

30. In his report on the *Terrorism Bill 2005* Lord Carlile stated:

> Clause 19 is important. Prosecution of any of the proposed offences described earlier in the Bill requires the consent of the territorial Director of Public Prosecutions; and the concurrent consent of the Attorney General (or Advocate General of Northern Ireland) if the offence has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom. This double consent provision in all foreseeable circumstances should provide a safety valve against hasty or inappropriate decisions.[22]

31. His Lordship was of course there discussing the clause which applies to offences involving a purpose wholly or partly connected with the affairs of a country other than the UK. As noted above, the DPP is otherwise the relevant authority for granting consent to a prosecution.

Question 4

32. At proof Hansard p51, the Commission took the following question on notice:

Senator KIRK—What would your suggestion be in relation to that?

Mr Lenehan—We have suggested in paragraph 29 of our supplementary submission that there be a similar procedure under the bill for the disclosure of that information and for the regime to govern the disclosure of that information. We have specifically drawn attention to the balancing test in sections 31(7) and 38L(7) of the National Security Information (Criminal and Civil Proceedings) Act. That is a section which quite prescriptively directs the court as to what it is to take into account when considering what orders it should make under that act in terms of disclosure, non-disclosure or redaction of security sensitive material.

Mr von Doussa—I think we have to take this on notice, but I have a recollection that there were some provisions in the AAT Act for dealing with security information.

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[22] "Proposals by her Majesty's Government for Changes to the Laws Against Terrorism", Report by the independent reviewer Lord Carlile of Berriew Q.C, October 2005, 14, para.49

33. The AAT Act establishes a regime for dealing with security information in applications under section 54(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth) for review of a security assessment (Security Appeals Matters).[23]

34. Section 39A sets out the procedure that is required to be taken in Security Appeals Matters.

35. The following provisions are of particular note:

- Section 39A(3), which imposes a duty on the Director-General of Security to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to the applicant.
- Section 39A(5), which provides that the proceedings are to be in private and, subject to section 39A, the AAT is to determine what people may be present at any time.
- Section 39A(6), which provides that, subject to section 39A(9) the applicant and a person representing the applicant may be present when the AAT is hearing submissions made or evidence adduced by the Director-General of Security or the Commonwealth agency to which the assessment was given.
- Section 39A(7), which provides that the Director-General of Security or a person representing the Director-General, and a person representing the Commonwealth agency to which the assessment was given, may be present when the AAT is hearing submissions made or evidence adduced by the applicant.
- Section 39A(8), which provides that the Minister administering the *Australian Security Intelligence Organisation Act 1979* (Cth) may, by signed writing, certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of the Director-General of Security or the Commonwealth agency to which the assessment was given are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security or the defence of Australia.
- Section 39A(9), which provides that if a certificate is given under s 39A(8):
  a) the applicant must not be present when the evidence is adduced or the submissions are made; and
  b) a person representing the applicant must not be present when the evidence is adduced or the submissions are made unless the responsible Minister consents.
- Section 39A(9), which provides that if a person representing the applicant is present when evidence to which a certificate given under section 39A(8) relates is adduced or submissions to which such a certificate relates are

[23] Section 39A sets out the procedure that is required to be taken if an application for a review of a security assessment is made to the Tribunal. We note that in particular that section 39A(3) imposes a duty on the Director-General of Security to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to the applicant.

made, the representative must not disclose any such evidence or submission to the applicant or to any other person.

36. In addition, section 35AA of the AAT Act provides:

SECT 35AA
Restriction on publication of evidence and findings in a proceeding before the Security Appeals Division

For the purposes of a proceeding before the Security Appeals Division to which section 39A applies, the Tribunal may give directions prohibiting or restricting the publication of:

a. evidence given before the Tribunal; or
b. the names and addresses of witnesses before the Tribunal; or
c. matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; or
d. the whole or any part of its findings on the review.

37. It is currently somewhat unclear how these procedures are to be adapted for the application provided for by proposed s105.51 of the Criminal Code as that matter is to be dealt with by regulation.[24]

38. The AAT also has a general power to hold closed hearings other than in Security Appeals Matters in section 35(2) of the AAT Act. That section provides:

Private hearing etc.

(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:

(a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and
(aa) give directions prohibiting or restricting the publication of the names and addresses of
witnesses appearing before the Tribunal; and
(b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and
(c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.

(3) In considering:

[24] See proposed s105.51(9).

(a) whether the hearing of a proceeding should be held in private; or
(b) whether publication, or disclosure to some or all of the parties, of evidence given before the Tribunal, or of a matter contained in a document lodged with the Tribunal or received in evidence by the Tribunal, should be prohibited or restricted;

the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.

39. In chapter 10 of its report, *Keeping Secrets: the protection of classified and security sensitive information* the ALRC outlined this regime established by the AAT Act.[25] It relation to that regime it noted the concern expressed by the President of the AAT about:

> the problems which arise when parties and legal advisers are required to be excluded from a hearing and never see the evidence before the Tribunal. This is not a matter over which the Tribunal has any real control where the Attorney-General gives appropriate certificates under the Act. Having heard cases in the Security Appeals Division of the Tribunal, I am also aware of the fact that it can be necessary for material to be withheld from applicants before the Tribunal. ... it can be difficult to balance the interests of an applicant who has a right to have a decision reviewed and a prima facie right to know what was the basis for the decision with the requirements of protecting national security. ...
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> It is certainly true to say that there are a greater number of matters in the Security Appeals Division of the Tribunal which raise these issues than there have been in the past. In previous years the matters in the Security Appeals [Division] of the Tribunal have largely been confined to appeals from adverse security assessments of Commonwealth public servants. The Minister for Foreign Affairs and Trade has recently cancelled a number of passports as a result of adverse security assessments and these have given rise to appeals in the Tribunal in which issues much wider than the security assessments of Commonwealth Public Servants are raised.[26]

40. The ALRC went on to provide an example in which section 35(2) has been used:

> [T]he use of secret evidence in the AAT has repercussions in cases involving passport cancellations. Secret evidence was led by the Australian Government and ASIO in the case of Zak Mallah, who was refused an Australian passport based on an adverse ASIO security assessment. Mallah appealed the decision to the AAT. He and his lawyers were not permitted in an AAT hearing while counsel for the Australian Government led certain evidence, and his counsel could not be present to cross-examine the ASIO evidence. Mallah's counsel told the AAT:

[25] The full text of the report is available at http://www.austlii.edu.au/au/other/alrc/publications/reports/98/.
[26] See paragraph 10.43.

> I am at a disadvantage in this case by not knowing the evidence and it's akin to boxing in the dark.[27]

41. The ALRC went on to recommend that:

> The use for any purpose of evidence that is not freely available to all parties—especially the party against whom it is led or the person whose interests may be adversely affected by reliance upon it (such as a visa applicant)—should be countenanced only in the most exceptional circumstances.[28]

[27] See paragraph 10.44.
[28] See paragraph 11.201.