cover story

System needs to reform to adapt to terror challenges

The Australian Law Reform Commission (ALRC) has called for Australia's courts and tribunals to reform the way they deal with classified and security sensitive information in light of increased concerns over international terrorism and Australia's national security.

"Courts, tribunals and government agencies need clearer and more refined procedures to ensure the proper handling of such highly sensitive material," ALRC President Professor David Weisbrot said.

"The protection of classified security information goes to the heart of the defence of the nation, including the maintenance of critical international relationships and the continued flow of intelligence information."

The ALRC has recently tabled its report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, in Parliament.

While compiling the report, the ALRC consulted widely with government, law enforcement and intelligence agencies, the legal profession and other interested parties.

Prof Weisbrot said a central recommendation is the introduction of a new National Security Information Procedures Act, which would apply to all Australian courts and tribunals.

The Australian Government recently introduced into Parliament the *National Security Information (Criminal Procedures) Bill 2004*, relating to the protection of classified information in criminal trials.

He said the Government Bill "largely incorporates the framework and terminology we developed, as well as a number of principles and processes that are consistent with those expressed by the ALRC - but there are also some differences in detail."

"While the Bill focuses on certain aspects of criminal proceedings, the Government asked the ALRC to provide advice on a much broader range of issues."

"The *National Security Information (Criminal Proceedings) Bill* (the NSI Bill) introduced by the Government last month is consistent with a number of the Commission's recommendations," Federal Attorney-General Phillip Ruddock said.

"I welcome the Commission's view that the NSI Bill largely incorporates the framework and terminology developed by the Commission, and I will be examining the Bill in further detail in light of their recommendations," Mr Ruddock said.

"This report makes a number of recommendations on a range of issues including the development of a legislative scheme to protect classified and security sensitive information during court and tribunal proceedings."

According to Prof Weisbrot, the ALRC has devised a sophisticated strategy that would allow courts and tribunals to provide a high degree of protection for sensitive information - without compromising the fundamental fairness, integrity and independence of our judicial system.

"Criminal trials involving allegations of espionage, terrorism and the improper disclosure of national security information have been rare in Australia. Unfortunately, however, we can expect increasing numbers of these types of matters, reflecting global tensions and local concerns.

"The use of classified and security sensitive information is also increasingly likely to surface administrative decisions to refuse someone a security clearance, a visa or a passport, or to resist the production of documents under Freedom of Information laws—so our justice system must be prepared."

Prof Weisbrot said the major challenge for the ALRC in this inquiry went beyond simply balancing the rights of the individual (to a fair trial) against the needs of the Government (to maintain official secrets).

"That oversimplifies the complexity of the legitimate, competing interests.

"Consideration also must be given to the broader and compelling public interests in safeguarding national security and strategic interests; facilitating the successful prosecution of terrorists and spies; and adhering, to the greatest extent possible, to the principles and practices of both 'open justice' and open and accountable government."

The ALRC's report's recommendations include: improvements to the practices and procedures used by government officers in classifying and handling national security information; promoting better monitoring of compliance; and, at the other end of the spectrum, restructuring the offences which punish the improper disclosure of classified information, whether by negligence or malice.

"A unique feature of the ALRC's National Security Information Procedures Act is the identification - as early as possible, and preferably before any legal proceedings - of the need for a court or tribunal to tailor the most effective strategies to protect security sensitive information," Prof Weisbrot said.

"At the moment, there are no clear statutory guidelines for Australian courts and tribunals, contrary to the position in the US, the UK, Canada, NZ and elsewhere.

"We have considered the various schemes used overseas and selected or adapted the best features for use here.

"The courts would have at their discretion many techniques for maximising the amount of evidence available for use in the proceedings, consistent with considerations of fairness and national security."

Prof Weisbrot said these techniques

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would include:

- editing or 'redacting' (obscuring the sensitive parts) classified material before it is admitted into evidence;
- replacing classified material with alternative, less sensitive forms of evidence; and
- using technology—such as closed circuit TV and computer monitors—to shield the content of sensitive evidence or to hide the identity of a sensitive witness (such as intelligence agent).

Given that this process should occur before trial, the Crown also would have the opportunity to drop some charges, or vary the charges, or try to secure a guilty plea, where this is believed to be the best way to protect especially sensitive information, and to serve the interests of justice.

On the contentious issue of security clearances, the ALRC concluded that it would be unconstitutional to require judges and juries to undergo security clearances, even if classified information is an issue in legal proceedings. However, the position regarding lawyers is somewhat different.

"Under our recommendations, courts can restrict access to classified material only to those lawyers who hold (or obtain) an appropriate security clearance, or to require strict undertakings from lawyers about how they deal with the information, or both.

"The proper focus should not be on the dignity or convenience of the lawyer, but rather on the *client* receiving the best possible representation in circumstances in which highly classified information must be protected. The central involvement of the court should guard against any unfairness."Other key recommendations made in the ALRC's *Keeping Secrets* report include:

- a comprehensive government review of all laws and regulations that give rise to penalties for improper disclosure of official secrets;
- implementing a program for the routine declassification of material that is no longer sensitive;
- the introduction of legislation to clarify the protection given to legitimate whistleblowers; and
- improvements to the content and organisation of the *Commonwealth Protective Security Manual*, which governs most aspects of official policy and practice in this area.

Bradley appointment cleared by the High Court

The North Australian Aboriginal Legal Aid Service (NAALAS) has lost its long running legal struggle against the appointment of Chief Magistrate Hugh Bradley.

On 17 June 2004, the High Court handed down a unanimous decision which cleared the appointment, ending the four-year court battle.

Former Chief Minister Shane Stone appointed Bradley to the position of Chief Magistrate on a two-year contract.

NAALAS raised concerns about the unusual term and conditions of employment and the potential of this to infringe on judicial independence.

In his judgment, Chief Justice Murray Gleeson stated: "The fundamental importance of judicial independence and impartiality is not in question".

"Within the Australian judiciary, there are substantial differences in arrangements concerning the appointment and tenure of judges and magistrates, terms and conditions of service, procedures for dealing with complaints against judicial officers, and court administration. All those arrangements are relevant to independence.

"The differences exist because there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements."

The High Court judgment stated: "In the course of argument, the case for the Legal Aid Service was developed and refined. The contention is that a declaration should be made that Mr Bradley was not validly appointed to the office of Chief Magistrate. That invalidity would be the consequence of a holding which should be made by this Court that the Magistrates Act is invalid in so far as it authorised the appointment of a Chief Magistrate to age 65 but with remuneration fixed only for the first two years of the term".

"It is true that, however unlikely that eventuality in practice, an officeholder under the system established by the Magistrates Act may be placed in the position of seeking the aid of the Supreme Court to compel observance of the obligations of the Administrator under s 6. But that circumstance does not render the magistracy of the Territory or the office of the Chief Magistrate inappropriately dependent on the legislature or executive of the Territory in a way incompatible with requirements of independence and impartiality. It does not compromise or jeopardise the integrity of the Territory magistracy or the judicial system."

Law Council of Australia President Bob Gotterson QC said the High Court ruling highlights the importance of the separation of powers.

"The case has been a valuable vehicle for the court to remind us that judicial independence is sacrosanct and has to be reflected in not only the way cases are conducted but in the way cases are appointed to the bench," Mr Gotterson said.

NAALAS has been ordered to pay 70 percent of legal costs. The NT Government has estimated its expenses at around $1 million.

According to NAALAS, the court action was funded by ATSIC from money allocated for special test cases.

NT Opposition Leader, Terry Mills, condemned NAALAS for its pursuit of legal proceedings.

"An obscene amount of money has been wasted – money that would have been better spent on Aboriginal Territorians," Mr Mills said.