

# **Human rights and the use of national security information in civil proceedings**

**The Hon John von Doussa**

President, Human Rights and Equal Opportunity Commission

Since the codification of human rights in 1948, international law has recognised the need to limit, in appropriate circumstances, the enjoyment of individual human rights in the name of national security and public order.<sup>1</sup> The difficulty has always been identifying the proper balance between full and partial implementation of rights. As the European Court of Human Rights recognised in *Klass v Germany*, we must avoid ‘undermining, or even destroying democracy on the grounds of protecting it...’<sup>2</sup> The Government’s recent efforts to manage the risk of terrorism clearly demonstrate how difficult it is to achieve this balance.

The impact of national security laws on the use of evidence in civil proceedings highlights this difficulty. On 3 August 2005 the *National Security Information Act 2004* was amended to extend the scope of the Act to include civil as well as criminal proceedings. As a result, considerations of national security may now be relevant in a broad range of cases at the State and Territory as well as Federal level.

## **Provisions of the Act**

Under the Act, evidence that is ‘likely to prejudice national security’<sup>3</sup> must be brought to the attention of the Attorney-General. Where a party knows or believes that security-sensitive evidence will be adduced, the party must inform the court,<sup>4</sup> the court must adjourn the hearing<sup>5</sup> and the evidence must be sent to the Attorney-

---

<sup>1</sup> Art 29(2), *Universal Declaration of Human Rights, 1948* and Art 4, *International Covenant on Civil and Political Rights, 1966*.

<sup>2</sup> *Klass V Germany* (A/28), para 48.

<sup>3</sup> S 3(1)

<sup>4</sup> Sections 38D(4) and 38E(2)

<sup>5</sup> Sections 38D(5) and 38E(4)

General.<sup>6</sup> The Attorney-General has the power to issue a non-disclosure certificate that summarises or redacts the information.<sup>7</sup> Where a witness might compromise national security by his or her mere presence, the Attorney-General may issue a certificate prohibiting the witness appearing.<sup>8</sup> Failure to comply with the requirements certificate is an offence.<sup>9</sup>

Certain consequences flow from the Attorney-General's decision to issue a certificate: the Court must adjourn the principal hearing and hold a separate closed hearing to determine what order to make in relation to the disclosure of the information.<sup>10</sup> The Court must order that the information be fully disclosed, fully withheld, summarised, or redacted.<sup>11</sup> In making those orders the Court can depart from the terms of the Attorney-General's certificate,<sup>12</sup> though it must give greater weight to the risk of prejudicing national security than the risk of causing 'substantial adverse effect to the substantive hearing'.<sup>13</sup> Before the court informs the parties of its orders, it must give a copy to the Attorney-General, who may request that they be varied.<sup>14</sup>

Where the Court considers that unfairness may result from non-disclosure to a party, it may stay the proceedings.

In relation to closed hearings the Act provides that only the judge, court officials, parties, legal representatives, Attorney-General and relevant witnesses may be present<sup>15</sup> and all must have the requisite security clearance.<sup>16</sup> If a person does not have such clearance they may be excluded from the hearing.<sup>17</sup>

---

<sup>6</sup> Sections 38D(3) and 38E(5)

<sup>7</sup> S 38F. 'Redacting' is the practice of blacking out text.

<sup>8</sup> S 38H

<sup>9</sup> Ss 46C and 46D

<sup>10</sup> S 38G

<sup>11</sup> S 38L

<sup>12</sup> S 38L(2)

<sup>13</sup> S 38L(8)

<sup>14</sup> S 38I(7) – (8).

<sup>15</sup> S 38I(2)

<sup>16</sup> Division 4.

<sup>17</sup> S 38I(3)

## Human rights implications of the Act

The Human Rights and Equal Opportunity Commission has raised concerns in other forums that aspects of the Act may breach Australia's international human rights obligations,<sup>18</sup> in particular its obligations under the *International Covenant on Civil and Political Rights* to guarantee its citizens the right to a fair and public trial and the right to an effective remedy for human rights violations.

### Right to a fair and public trial

Article 14 of the ICCPR provides a right to a fair and public hearing. The right to a fair and public trial is recognised in Article 14 of the Covenant. It relates to both civil and criminal proceedings and recognises a right to natural justice and 'equality of arms',<sup>19</sup> or the right of parties be able to respond to the legal contentions and evidence adduced by other parties.<sup>20</sup>

In line with the principles set out above, article 14(1) provides that the public may be excluded from proceedings (in whole or in part), for reasons of '... national security ... [or] special circumstances'.

However, those exceptions are construed narrowly by the UN Human Rights Committee<sup>21</sup> to require that the measures taken by states parties must be limited to what is strictly necessary in proportion to the perceived threat to national security, or required by the special circumstance.<sup>22</sup> Where the 'special circumstances' exception is relied upon, courts must give reasons for holding a closed hearing.<sup>23</sup>

---

<sup>18</sup> See HREOC's submission to the Senate Legal and Constitutional Committee at: [http://www.humanrights.gov.au/legal/submissions/nat\\_secure\\_2005.html](http://www.humanrights.gov.au/legal/submissions/nat_secure_2005.html)

<sup>19</sup> The equal access to justice for both parties in a trial.

<sup>20</sup> See 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; *Äärelä v Finland* (179/1997), UN Doc CCPR/C/73/D/779/1997.

<sup>21</sup> The UN Human Rights Committee is the expert body with responsibility for considering the progress made in the implementation of the ICCPR. It considers reports prepared by States Parties on the legislative, judicial, administrative or other measures adopted to give effect to the ICCPR and the progress made by States Parties in that respect (articles 28(1), 40 (4) and 40(5)). It also considers individual complaints of human rights violations by states parties (article 41).

<sup>22</sup> Joseph S, "A rights Analysis of the Covenant on Civil and Political Rights" (1999) 5 *Journal of International Legal Studies* 57, 58.

<sup>23</sup> See *Estrella v Uruguay* (74/1980), UN Doc CCPR/C/18/D/74/1980.

As stated, the requirement for a closed hearing is triggered by the issue of a certificate by the Attorney-General. By removing the discretion to hold a closed hearing from the court, the Act adopts a ‘one size fits all’ approach and removes the discretion of the court to order greater or lesser restrictions, depending on the nature of the information said to require protection. This aspect of the Act is unlikely to satisfy the proportionality test.

By restricting the disclosure of information to a party’s legal representatives or the exclusion of a party’s legal representatives in certain circumstances, the Act compromises a person’s ability to respond to the legal contentions and evidence of the other parties and present a contrary argument, violating the ‘equality of arms’ principle at the heart of Article 14.

### **Right to an effective remedy for violations of human rights**

The Act allows the Court to stay proceedings where unfairness results from the inability to disclose relevant information to a party. This is clearly appropriate in relation to criminal proceedings.

However it provides much less comfort in the context of civil proceedings. Indeed in the context of civil trials it could create rather than ensure unfairness. Unlike criminal proceedings, a stay in civil proceedings could prevent litigants accessing an effective remedy for human rights violations involving issues of national security. For example, in proceedings relating to a person’s entitlement to a protection visa or proceedings concerning a decision to detain and deport a non-citizen.

Accordingly, the power of the Court to issue a stay in civil proceedings potentially compromises Australia’s obligation to provide an effective remedy for violations of a person’s human rights under article 2(3) of the ICCPR.