

Submission to Inquiry into the provisions of
National Security Information (Criminal Proceedings) Bill 2004
(‘the Bill’) and

and

National Security Information (Criminal Proceedings)
(Consequential Amendments) Bill 2004 (‘the Consequential Bill’)

About AMCRAN

The Australian Muslim Civil Rights and Advocacy Network (AMCRAN) is an organisation dedicated to preventing the erosion of the civil rights of Australia's 300,000 Muslims, and providing a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education to increase awareness of civil rights issues, and communicating with the media. It actively collaborates with both Muslim and non-Muslim organisations within the community to achieve its goals.

We welcome the opportunity to make a submission in respect of the Bills, noting however the short time frame within which submissions are to be received. This submission, therefore, only addresses our main concerns with the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (‘the Bills’), but we are prepared to appear before the Committee to elaborate further if it would assist the Committee.

AMCRAN is opposed to the substance of the Bills, and are of the view that they should be rejected. This is because they infringe the following three legal principles:

- Avoidance of broad, subjective and discretionary laws.
- Separation of the executive and jurisprudential arms of government.
- Right to fair trial.

We discuss the three problems in turn, and outline potential amendments to the Bills that could remedy the problems, or at least, lessen their effects. As mentioned above, our preference is to reject the bill, however, the recommendations are worthy of consideration if the committee is not in a position to recommend opposition.

Avoidance of subjective, broad and discretionary laws

The term ‘national security’ is defined in the legislation as: ‘Australia’s defence, security, international relations, law enforcement interests or national interests’.¹ Of these terms, only security and law enforcement interests are given any objective definition.

The net effect of the use of these terms is that they result in very broad coverage. For example, almost any matter involving a non-Australian citizen could be covered by the definition of ‘international relations’, namely ‘political, military and relations with foreign governments and international organisations.’²

The subjective and broad nature of the definitions results in the government having wide discretionary powers over which cases they apply. The height of injustice is this unequal application of the law. In practice, this has been shown to be problematic when the powers are placed in the hands of the purely executive arms of government. For example, in the context of the NSW consorting laws, the police and the prosecution were granted

¹ National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 8.

² National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 11.

broad discretion whether or not to prosecute.³ Commentators were of the view that ‘the degree of discretion granted to police and the extremely wide net cast by this offence create an extremely fertile ground in which corrupt conduct and practices can flourish.’⁴ Consequently, the NSW government has largely replaced consorting laws with non-association laws that are much less open to discretion.

The same issues arise with respect to the security clearance requirements for legal representatives for defendants. The Bill does not make clear what standards or factors are to be taken into account, although there is suggestion that the criteria will be based upon that in the Australian Government Protective Security Manual (‘PSM’), which is only available to government departments, agencies and contractors working for the government. We object to the reliance on the PSM as security clearance criteria on three grounds. The first is the unavailability of the document to the general public; secondly, there is evidence to suggest that the PSM is constantly being reviewed and changed; and thirdly, the descriptions used in the PSM also seem to be vague and subjective, such as: maturity, responsibility, tolerance, honesty and loyalty.⁵ The combination of these three factors gives the net result that it is difficult for a legal representative to know whether or not he or she will be provided security clearance.

Separation of the executive and jurisprudential arms of government

The concept of separation of the powers of the government⁶, which dates back to the French Revolution, is one of the foundations of democracy. However, under the regime proposed by the Bills, it is the Attorney-General, part of the representative and executive arms of government, who issues a certificate, the issuing of which is conclusive evidence that the information relates to ‘national security’. Furthermore, such a decision is not

³ See generally Alex Steel, ‘Consorting in New South Wales: Substantive Offence or Police Power?’ (2003) 26(3) *University of New South Wales Law Journal* 567.

⁴ Steel at pp 598 - 599.

⁵ Attorney-General’s Department, *Commonwealth Protective Security Manual* (2000) D 30-33 quoted in Australian Law Reform Commission, above n 71, 142.

⁶ *L’Esprit de Lois*, Montesquieu, 1748.

reviewable under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*⁷. Aside from the obvious and very serious consequences of an absence of judicial review, there is an additional issue: there is a conflict of interest between the political issues involved in being an Attorney-General, and involvement in particular cases at law. There is already evidence from the parliamentary library showing, for example, that the issue of which organisations are proscribed by the Attorney-General has, as a consequence of political motivations, become subjective and arbitrary⁸.

The Attorney-General's ability to intervene in proceedings, as if he or she is a party to the hearing under clause 28 of the Bill, and also his or her power to appeal against any order of the court made as authorised by clause 33, are deeply worrying and unprecedented, in that they allow someone from the executive and representative arms of government to interfere directly with the judicial proceedings of an individual case, and indeed grant him the right to lodge appeals separately and additionally to the right of the prosecution to lodge appeals.

Right to fair trial

Under clause 23 of the Bill, it is proposed that where a witness is expected to disclose information which may affect national security, the Court must hold a closed hearing at the request of either the prosecutor or the defendant, at which the witness would give a written answer to the court, which is to be shown to the prosecutor alone.

The closed hearing provision under clause 27 that allows the court to order that the defendant or his or her legal representative, or both, not to be present at the hearing will effectively prevent a defendant from being present at his own trial and he would not be given the opportunity to respond or argue against the disclosure or otherwise of the disputed information. One of the most important aspects of the concept of a fair trial is

⁷ National Security Information (Criminal Proceedings)(Consequential Amendments) Bill 2004 (Cth).

⁸ *The Politics of Proscription*, Research Note No. 63, 21 June 2004, Parliamentary Library.

that the defendant has the opportunity to see the evidence that is being used against them and has a right to respond to that evidence. Under the Bills, a defendant's right to a fair trial will be limited.

Further, a defendant should have the freedom to choose the best available legal counsel to assist in his defence. However, the criteria for security clearance is so subjective and broad that it is not clear, for example, that a specialist lawyer in anti-terrorism laws, and someone who has represented other clients charged with terrorism offences, would pass this security clearance. To require security clearance as proposed under the Bill means that the defendant will not be able to choose a legal representative based solely on the normal criteria, such as familiarity or expertise in this area of the law, but rather, may be forced to choose a legal representative for the reason that he or she is prepared to apply for security clearance.

Suggested amendments to the bill

As previously mentioned, we are of the view that the Bills should be rejected. However, if the Bills are to be moved, then we would suggest the following amendments.

1. The definition of national security must be defined more carefully in the legislation so as not to be (a) as subjective as they currently are or (b) as broad as they currently are. The comprehensive definition of law enforcement issues⁹ in the legislation could be a model for such definitions.
2. Because of the concerns in relation to the separation of powers, it is not appropriate that the Attorney-General decides whether an issue is a matter of 'national security'. As argued above, the Attorney General's decisions may be subject to political interference. For this reason, an independent third party should make such decisions. One suggestion would be to expand the role of the Inspector-General of Information and Security (IGIS) to cover this role. This

⁹ National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 11.

would still allow for the protection of sensitive information, but not violate the separation of powers principle. The Attorney-General, for example, could apply to the IGIS for such a certificate, rather than he himself being the source.

3. The Attorney-General's decisions and certificates should be made open to judicial review.
4. That the requirements of a security check for legal counsel be defined in the legislation, and not on the basis of PSM, given that it is not a public document, is frequently amended, and is not subject to judicial investigation.
5. That an 'all-or-none' rule be introduced into evidence gathered from witnesses who it is believed will say things prejudicial to national security; i.e. either both the prosecution and the defence should see the testimony, or neither of them should see the testimony. It is against the principles of fair trial for only one party to be able to see testimony.