



**Australian Government**  
**Attorney-General's Department**

**Information and  
Security Law Division**

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Parliamentary  
& Constitutional  
Council

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16 July 2004

Phillip Bailey  
Acting Secretary  
Senate Legal and Constitutional Legislation Committee  
Parliament House  
Canberra ACT

Dear Mr Bailey

**Questions on Notice – National Security Information (Criminal Proceedings) Bill 2004**

I refer to your email of 8 July 2004 which attached the questions taken on notice at the public hearing of 5 July 2004 in relation to the National Security Information (Criminal Proceedings) Bill 2004.

Question 1 (Ms Jackson, p.29, *Proof Hansard*)

**CHAIR** – In its submission the Law Council makes a number of observations in relation to security clearance. They are observations they have made before; they are consistent in their position on this matter and the committee has not taken them up at great length previously. But they did ask one particular question, which pertains to the notice requirements in clause 22. I would appreciate it if you had a look at the Law Council's submission on that point at least and clarified on notice the matter they raised.

The answer to the Question 1 is as follows:

The Law Council at page 5 of their submission state:

*However we wish to qualify this support by requesting clarification from the committee that the notice requirements set out at clause 22 apply to all parties to the proceeding. They state that clause 22 currently states that if a prosecutor or defendant becomes aware that they will rely on security sensitive information, they must give the Attorney-General, the other person (if any) and the court notice in writing of the knowledge or belief. We interpret "other person" as applying to the "other party and/or their legal representative", consistent with further detail in the Explanatory Memorandum, but seek clarification on this point nonetheless.*

The Law Council's interpretation of Clause 22 is correct. "Other person" means the "other party and/or their legal representative".

Question 2 (Ms Jackson, p.29, Proof Hansard)

**CHAIR**—That would be helpful. I am still concerned about the chapter III issue raised by Mr Walker and referred to by Mr Rice. With the benefit of looking at the points that Mr Walker has made on the *Hansard*, would you possibly be able to respond to that on notice as well?

The answer to Question 2 is as follows:

Clause 27(3) of the National Security Information (Criminal Proceedings) Bill 2004 (the Bill) provides that the court may in its discretion exclude the defendant and or his legal representative from any part of a closed hearing where the information the subject of the certificate is disclosed and when the prosecutor argues for the exclusion of the information. It was not envisaged and the Bill does not provide that the defendant or his counsel would be excluded from the entire closed hearing. It is envisaged that the defendant would be able to address the court on matters relating to the Attorney-General's certificate and its effect on his ability to obtain a fair trial.

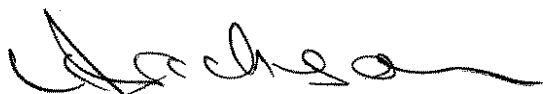
Clause 29 provides that in relation to the disclosure of information, a court is directed to consider whether there would be a risk to national security if the information were disclosed; whether the order would have a substantial adverse effect on the defendant's right to receive a fair hearing; and any other matters the court considers relevant. In making its decision, the court must give the greatest weight to whether there would be a risk to national security if the information were disclosed.

The intention of clause 29 of the Bill is that the court is directed to take account of the effect on the defendant's right to a fair hearing before making an order in relation to the disclosure of information as this may be relevant to determining whether particular information should be deleted or provided in summary form.

In light of the chapter III issues raised by Mr Walker, the Department has received further advice in relation to the Bill. That advice identifies that the intention of the Bill, that the courts will only exclude defendants and their legal representatives from hearings in limited circumstances, and will retain the power to stay proceedings if the defendant cannot be assured of a fair trial, is not entirely clear from the Bill in its present form. Some amendments to clauses 27 and 29 could be made to the Bill to clarify the intention and remove any doubt about its meeting the requirements of chapter III of the Constitution.

In relation to Ms Jackson's response to a question regarding the constitutional validity of the Bill, the Attorney-General's Department wishes to clarify that the Office of General Counsel considered a previous draft of the Bill and did not provide advice on the current version of the Bill. OGC was consulted on an earlier version of the Bill and was of the view that the basic model was not inconsistent with the Constitution. Upon close examination of the current version of the Bill, OGC recommend that the intention of the Bill, that the courts will only exclude defendants and their legal representatives from hearings in limited circumstances, and will retain the power to stay proceedings if the defendant cannot be assured of a fair trial, is not entirely clear from the Bill in its present form and that this should be clarified to avoid any doubt.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Maggie Jackson', written in a cursive style.

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