



National Security Information (Criminal Proceedings) Amendment (Application) Bill 2005

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National Security Information (Criminal Proceedings) Amendment (Application) Bill 2005

Date Introduced: 9 February 2005

House: House of Representatives

Portfolio: Attorney-General

Commencement: Royal Assent

Purpose

The Bill has two purposes:

- to enable the *National Security Information (Criminal Proceedings) Act 2004* (the Principal Act) to be applied to the future parts of proceedings that commenced before 11 January 2005 (the date the Principal Act commenced operation), and
- to ensure that once a notice is given applying the Principal Act to particular criminal proceedings it applies to all subsequent parts of those proceedings and not just to the part then on foot.

Background

National Security Information (Criminal Proceedings) Act 2004

A National Security Information (Criminal Proceedings) Bill 2004 and a National Security Information (Criminal Proceedings) (Consequential Provisions) Bill 2004 were first introduced into the 40th Parliament in May 2004. Both were referred to a Senate Committee which reported on 30 August 2004. The Committee supported the Bills subject to a number of amendments being made.¹

The Bills lapsed when Parliament was prorogued for the 2004 election. New Bills, which adopted some of the Committee's recommendations, were introduced into the 41st Parliament on 17 November 2004. They passed on 8 December 2004 after being amended in both the Senate and the House of Representatives. The legislation commenced on 11 January 2005.

In brief, the Principal Act and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* have the following purposes:

to allow prosecutors and courts to use information the disclosure of which would be prejudicial to the national interest (national security information) in criminal

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proceedings while preventing broader disclosure of such information including, in some circumstances, disclosure to the defendant

to allow certain witnesses, whose mere presence might disclose national security information, to be excluded from criminal proceedings, and

to require that defence lawyers undergo security clearance before they can view national security information that might be relevant to a criminal trial.²

For a detailed discussion of the content of the legislation and its effects, readers of this Digest are referred to the Bills Digests for the:

- [National Security Information \(Criminal Proceedings\) Bill 2004](#); National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, *Bills Digest Nos. 25-26, 2004-05*
- [National Security Information \(Criminal Proceedings\) Bill 2004](#); National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, *Bills Digest Nos. 59-60, 2004-05*.

Section 6 of the Principal Act

The Bill repeals and replaces section 6 of the Principal Act, which deals with the application of the legislation. Subsection 6(1) currently provides that the Act applies to ‘federal criminal proceedings’ commenced on or after 11 January 2005 once the prosecutor gives the requisite notice to the court and the defendant.

A ‘federal criminal proceeding’³ is a ‘criminal proceeding’ for a Commonwealth offence or an extradition matter. ‘To avoid doubt’, section 13 lists matters which are ‘part of a criminal proceeding’.⁴ These include bail proceedings, committals, sentencing, appeals and proceedings prescribed by regulation.

As things stand, if a ‘federal criminal proceeding’, as defined, commenced before 11 January 2005 then the Act will not apply to any subsequent parts of that proceeding. For instance, if a person’s committal hearing commenced before 11 January 2005, then the Act would not apply to the trial, sentencing or any appeal even if these commenced on or after 11 January 2005.

Main Provisions

Item 1 of the **Schedule** amends subsection 6(1) of the Principal Act so that if the prosecutor gives the requisite notice, the Act applies from that point onwards to

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proceedings irrespective of whether they commenced before, on or after the day the section commences.

Item 1 also amends subsection 6(2) of the Principal Act. Subsection 6(2) presently provides that if, after proceedings commence, the prosecutor has given notice that the Principal Act applies then ‘this Act only applies to the part of the proceeding that takes place after the notice is given.’ As it stands, subsection 6(2) may suggest that new notices must be given at each stage of a criminal proceeding. **Item 1** puts it beyond doubt that once the prosecutor has given the notice, the Act will apply to all subsequent stages of that particular criminal proceeding.

Concluding Comments

As the Government states, the legislation is not ‘retrospective’ in its application to pre-11 January 2005 proceedings because it will only apply to future parts of those proceedings. The Bill does not change the application of the Act to any parts of pre-11 January 2005 proceedings that took place before 11 January.

It is the Government’s view that:

It was not intended that, simply because a person had been charged and a bail hearing had occurred before the commencement of the Act on 11 January 2005, the Act could not be applied to the committal or trial of a person some months or years later.⁵

It is also the Government’s position that without the amendments effected by the Bill there is a risk that ‘any attempt to apply the Act to future stages of these proceedings would be found incompetent’⁶ and that the amendments are ‘clarifications’ that will ensure that the Act is not ‘subject to misinterpretation.’⁷

Nevertheless, the operation of sections 6, 13 and 14 as they currently stand seems clear—to exclude from coverage all stages of ‘federal criminal proceedings’ if those proceedings (as defined) commenced before 11 January 2005. Any future parts of proceedings that commenced before 11 January 2005 will be covered by the Act with the amendments proposed in the Bill.

In debating the Bill, Parliament may wish to weigh up its potential impact on the protection of national security information on the one hand and on defendants in affected terrorism-related proceedings on the other.

The application of the Act means that a defendant’s witnesses can be excluded, lawyers already retained by them may need to be security cleared in order to provide effective legal representation, and defendants and their legal representatives may be excluded from closed court hearings held to determine whether non-disclosure and witness exclusion

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orders should be made. The need to obtain a security clearance for a lawyer already retained by a defendant will result in proceedings being adjourned with the consequence that a defendant may be imprisoned for a longer period while awaiting trial. The application of the Act may also affect how a defendant and their legal counsel have planned their trial or other proceedings—based on the understanding that the Principal Act does not apply to their case. Whether the amendments may unacceptably compromise a defendant's right to a fair trial is one matter that Parliament may wish to consider.⁸

Endnotes

- 1 Senate Legal and Constitutional Legislation Committee, [*Provisions of the National Security Information \(Criminal Proceedings\) Bill 2004 and the National Security Information \(Criminal Proceedings\) \(Consequential Amendments\) Bill 2004*](#), 19 August 2004.
- 2 Jacob Varghese, National Security Information (Criminal Proceedings) Bill 2004; National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, *Bills Digest Nos. 59-60, 2004-05*, 29 November 2004.
- 3 Section 14, Principal Act.
- 4 Emphasis added.
- 5 Attorney-General, Second Reading Speech, National Security Information (Criminal Proceedings) Amendment (Application) Bill 2005, House of Representatives, *Hansard*, 9 February 2005, p. 1.
- 6 Explanatory Memorandum, p. 1.
- 7 Attorney-General, *op. cit.*
- 8 See Varghese, *op. cit.* for a discussion of the legal protections that applied to national security information before the Principal Act commenced.

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