SUBMISSION TO INQUIRY INTO THE PROVISIONS OF THE NATIONAL SECURITY INFORMATION LEGISLATION AMENDMENT BILL 2005

0. Introduction

This submission relates to the Committee's current inquiry into the National Security Information Legislation Bill 2005 (Cth) ('the Bill'). If passed, this Bill would bring about significant change to the existing rules that govern the use of national security information in proceedings other than federal criminal proceedings. For the reasons put forward in this submission, I believe that these changes should be opposed.

To understand the possible adverse impact of the Bill upon the rule of law in Australia, two matters need to be born in mind:

- The new regime that the Bill would introduce;
- The range of court proceedings likely to be affected by that regime.

In summary, the Bill would extend the existing regime that applies to the use of national security information in federal criminal proceedings – pursuant to the *National Security Information (Criminal Proceedings) Act 2004* (Cth) ('the Act') – to all other Australian court proceedings, with the exception of the prosecution of State and Territory offences.[1] However, on certain points of detail regime that would be introduced by the Bill differs from that of the existing Act. These points of difference will be highlighted in what follows.

Before discussing the operation of the Bill in detail, however, I will canvass the second issue mentioned, namely, the range of proceedings likely to be affected by the Bill; for the truly objectionable character of the Bill is best seen when this is kept in mind.

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[1] Sections 13 and 14 of the Act, together with schedule 1, item 11, clause 15A. Unless noted otherwise, all references are to the Bill.

1. Court proceedings likely to be affected by the Bill

1.1 Discretionary character of Bill's application

It is a ground of objection to the existing Act that the regime it creates comes into operation only when the prosecutor gives notice to that effect.[2] This is one of the many features of the Act which threatens the politicisation of the prosecutor's office.[3]

If anything, however, the Bill is worse. It would give to the Attorney-General – one of the most senior political figures in the country – the power to determine whether or not the Bill's regime would apply to any given matter.[4] This would open the door to both the appearance of, and the fact of, political interference in the administration of justice. In a matter where the Commonwealth, or one of its officers, was a party to the suit, it would seem almost possible to avoid the appearance of bias in any decision made by the Attorney-General to give notice that the Bill applies.

The fact that a decision taken under clause 6A would be excluded from review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) only makes this worse: this amendment would preclude a party to the proceeding is from challenging the Attorney-General's decision to interfere in the matter.[5]

1.2 Breadth of definition of 'national security'

The Act defines 'national security' very broadly, as meaning any of the following:

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[2] Section 6(1) of the Act.

[3] See the discussion in my submission to the Committee's inquiry into the provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, Submission 13, pp 20-1 <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/national_security /submissions/sublist.htm>.

[4] Schedule 1, item 7, clause 6A(1)(b). Subclauses (2) to (4) make provision for an alternative Minister to be appointed by the Attorney-General to exercise this power, in the event of the Attorney-General being a party to the proceeding in question.

[5] Schedule 1, item 30, clause 9B.

- The defence of Australia;[6]

- The protection of, and of the people of, the Commonwealth, the States and the Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, and acts of foreign interference, whether directed from, or committed within, Australia or not, and the carrying out of Australia's responsibilities to any foreign country in relation to such matters;[7]

- Political, military and economic relations between Australia, and foreign governments and international organisations;[8]

- The avoidance of disruption to national[9] and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;[10]

- The protection of the technologies and methods used to collect, analyse, secure or otherwise deal with criminal intelligence, foreign intelligence or security intelligence;[11]

- The protection and safety of informants and of persons associated with informants;[12]

- Ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's[13] government and government agencies.[14]

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[6] Section 8 of the Act.

[7] Section 8 and 9 of the Act together with the definition of 'security' in section 4 of the *ASIO Act*.

[8] Sections 8 and 10 of the Act.

[9] It is not clear whether the intention of the Act is that this refers only to Australian efforts, or to the efforts made by any nation.

[10] Sections 8 and 11(a) of the Act.

[11] Sections 8 and 11(b) of the Act.

[12] Clauses 8, 11(c).

This broad definition of 'national security' determines the implications of a decision by the Attorney-General to invoke the Bill's regime pursuant to clause 6A.

It may seem natural to suppose that the Attorney-General would only make this decision in the case of a 'terrorism'-related matter; the Bill, however, imposes no such limits on the exercise of the Attorney-General's discretion. And the breadth of the definition of 'national security' shows that there is no reason to suppose such limits to be observed. One example can easily be given; many more can be imagined. Suppose A, an Australian company, is suing B, a foreign company, in relation to a large commercial deal connected to a government procurement by country C. It is quite likely that in such a matter one or both parties might seek to lead evidence that would be relevant to economic relations between Australia and country C. Under the definition in the Act, this would be national security information, and the proceeding would be subject to interference by the Attorney-General in all the ways to be discussed below, with the concomitant possibilities of actual or perceived political interference in the administration of justice.

1.3 Proceedings in which the Bill's regime is likely to be invoked

Having noted that the application of the Bill would not be limited to so-called 'terrorism' matters, there nevertheless is no doubt that it is these matters in particular that the Act might affect (although, somewhat oddly, such matters were not mentioned by the Attorney-General in his second reading speech; he referred only to accident compensation and family law proceedings[15]).

It is generally acknowledged that many of the powers granted to the government as consequences of the changes to Australia's security legislation since September 11 2001 are not consistent with Australia's traditional rule of law values. The *Criminal Code* (Cth) and the *Charter of the United Nations Act 1945* (Cth) give the government the power to criminalise involvement with certain organisations or

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[13] It is not clear whether the intention of the Bill's drafter is that this refers only to the Australian government and its agencies, or those of any nation.

[14] Sections 8 and 11(d) of the Act.

individuals without needing to prove anything in court about their aims or activities, while Division 3 of Part 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (‘*ASIO Act*’) permits the executive to compulsorily question, and in some circumstances to detain, individuals who are not suspected of any criminal conduct.

At every point, the adverse consequences of this legislation for the rule of law in Australia have been said to be ameliorated by the inclusion of safeguards, including various rights to the review of executive decision-making in relation to ‘terrorism’. Some examples, to which the Bill might be applied, are the following:

- An application to a federal court for a remedy in relation to a questioning or detention warrant issued pursuant to section 34D of the *ASIO Act*;

- An application for review of a decision taken by the Attorney-General to list an organisation as a terrorist organisation pursuant to section 102.1 of the *Criminal Code* (Cth);

- An application for review of a decision by the Attorney-General to refuse de-listing of an organisation listed as a terrorist organisation pursuant to section 102.1(17) of the *Criminal Code* (Cth);

- An application for review of a decision taken by the Minister for Foreign Affairs to list an entity, and individual or an asset pursuant to Part 4 of the *Charter of the United Nations Act 1945* (Cth);

- An application for review of a decision by the Minister for Foreign Affairs to refuse to revoke the listing of a person or entity pursuant to section 17 of the *Charter of the United Nations Act 1945* (Cth).

The Bill threatens to undo these safeguards. To see how this is so, it is necessary to consider the operation of the Bill.

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[15] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 2005, p 1.

2. The operation of the Bill

Once the Attorney-General has decided to invoke the Bill, a number of consequences follow.[16]

2.1 Offence to disclose information for the purposes of a proceeding

Once it has been invoked by the Attorney-General, the Bill makes it an offence for anyone to disclose, for the purposes of a civil proceeding, to any party to that proceeding, or their legal team, any information whose disclosure would be likely to prejudice national security.[17]

The offence is not committed if one of the following exceptions applies:

- The disclosure takes place in the course of giving evidence;[18]
- The person to whom the disclosure has been made has been give a security clearance by the Attorney-General's Department at a level considered appropriate by the Secretary of that Department in relation to the information in question;[19]
- The disclosure is by a party to the proceeding who has been given a security clearance by the Attorney-General's Department at a level considered appropriate by the Secretary, and takes place in the course of the proceeding;[20]
- The disclosure is by a member of the legal team of a party to the proceeding, who has been given a security clearance by the Attorney-General's Department at a level considered appropriate

[16] For ease of exposition this subsection will use the indicative rather than the subjunctive to discuss the Bill's provisions.

[17] Schedule 1, item 27, clause 46G.

[18] Schedule 1, item 27, clause 46G(a).

[19] Schedule 1, item 27, clause 46G(c)(i).

[20] Schedule 1, item 27, clause 46G(a) together with schedule 1, item 12, clause 16(aa).

by the Secretary, and takes place in the course of his or her duties;[21]

- The disclosure is by an employee, officer or Minister of the Commonwealth, and takes place in the course of his or her duties in relation to the proceeding;[22]

- The disclosure is by an officer of the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service or the Defence Signals Directorate, and it takes place in the course of his or her duties;[23]

- The Secretary of the Attorney-General's Department has approved the disclosure (perhaps subject to conditions).[24]

The effects of this offence are several. Because of the complexity of the exceptions, not all of them obvious. They are certainly more complex than the superficially analogous section 46 of the Act, the main function of which seems to be to prevent the defendant from discussing the case with members of his or her legal team unless they have been given security clearances.

First, the general effect of the offence is to inhibit all parties to the proceeding in the preparation of their cases, by making it an offence for anyone to disclose certain information to them.

Second, where the information being sought by one of the parties is in the possession of the Commonwealth, the information will generally be obtainable despite the offence, because officers of the Commonwealth are permitted to disclose information in the course of their duties in relation to a civil proceeding (which one

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[21] Schedule 1, item 27, clause 46G(a) together with schedule 1, item 12, clauses 16(ac), 16(ad).

[22] Schedule 1, item 27, clause 46G(a) together with schedule 1, item 12, clause 16(ab).

[23] Schedule 1, item 27, clause 46G(a) together with section 16(b) of the Act together with the *Intelligence Services Act 2001* (Cth) s 3 (definition of 'staff member'). Section 16(a) of the Act, permitting disclosure by a prosecutor in the course of his or her duties in relation to a federal criminal proceeding, will typically not be relevant.

[24] Schedule 1, item 27, clauses 46G(c)(ii), 46G(c)(iii).

assumes would include complying with court orders for the disclosure of information).

Third, in the event that the Commonwealth is a party to a proceeding, it will easily be able to overcome the general inhibitory effect of the offence as far as it is concerned. The Commonwealth has a ready supply of security-cleared personnel, and through its control of the security clearance procedure is able to generate more of these if required. The Commonwealth is also in a good position to have the Secretary of the Attorney-General's Department approve disclosures.

Fourth, any party who does not have a security-cleared legal team may well be prevented from adequately discussing their case with their legal team.

Fifth, even where a party does have a security-cleared legal team, he or she may disclose the information in the course of the proceeding only if he or she has been security-cleared, or if he or she is giving evidence. This could well limit the discussion of the information with other parties to the proceeding, thus inhibiting his or her ability to seek discovery, negotiate a settlement or otherwise manage the proceeding effectively. These potential difficulties would also apply to the members of a party's legal team who had not been security-cleared.

What is the point of this offence and its complex exceptions? In particular:

- Why is it acceptable for party A to disclose certain information to party B, in the context of a pre-trial hearing, provided that either party A or party B has been security-cleared, but not if neither has been?[25]

- Why is it acceptable for a lawyer to discuss sensitive information with a client only if either the lawyer, or the client, is security-cleared, but not if neither has been?[26]

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[25] This would be the effect of schedule 1, item 12, clause 16(aa) together with schedule 1, item 27, clause 46G(c)(i).

[26] This would be the effect of schedule 1, item 12, clause 16(ac) together with schedule 1, item 27, clause 46G(c)(i).

- Why are Commonwealth officers permitted to disclose information in the course of their duties to any party, security-cleared or not, but others who are in possession of sensitive information are not? The Explanatory Memorandum is unhelpful. It states, wrongly, that Commonwealth officers are exempted from the offence only when they are parties to the proceeding.[27]

If the intention of the offence is to prohibit any disclosure to those without security clearances, then it fails to achieve this goal (as the three examples above demonstrate). This goal would in any event be undesirable, interfering as it would with lawyer-client relations to an even greater extent than does the existing Bill. The Bill does make provision for the granting of security clearances to parties' lawyers: during a proceeding in which the Bill's regime has been invoked, the Secretary of the Attorney-General's Department may give notice to any party or any member of their legal team that in the course of the proceeding an issue of disclosure is likely to arise,[28] and the giving of such notice entitles the person receiving it to apply to the Secretary for a security clearance.[29] However, this is far from sufficient to overcome the objections to the offence's impact on lawyer-client relations, and more generally on the efficient conduct of legal proceedings.

First, the right of an individual to apply for a security clearance is triggered only by the giving of notice by the Secretary of the Attorney-General's Department;[30] and there is no obligation that such notice be given, nor to grant the security clearance if an application is made. Nor is the issuing of such notice by the Secretary of the Attorney-General's Department a necessary condition of prosecution under clause 46G; like the rest of the Bill, the application of clause 46G is triggered simply by the giving of notice by the Attorney-General pursuant to clause 6A(1)(b).

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[27] Revised Explanatory Memorandum, National Security Information Legislation Amendment Bill 2005, p 9.

[28] Schedule 1, item 24, clause 39A(1).

[29] Schedule 1, item 24, clause 39A(2).

[30] Schedule 1, item 24, clause 39A(1).

Second, the granting of security clearances is made subject to a document, the *Australian Government Protective Security Manual*,[31] which is a policy document issued by the Attorney-General's Department. The document is not publicly available; although 'not security classified, … its availability will be restricted to government departments, agencies and contractors working to government.'[32] As a policy document, it is subject to variation by the executive government at any time, free of any legislative, judicial or public oversight.

Third, the possession of a security clearance creates an exception to a charge under clause 46G only if the level of clearance is 'considered appropriate' by the Secretary of the Attorney-General's Department.[33] Ignoring the inexcusable vagueness, in a statute creating a criminal offence, of the phrase 'considered appropriate', a party and his or her legal team have no way of predicting what the Secretary of the Attorney-General's Department may or may not consider appropriate from time to time in relation to various pieces of information. More generally, the whole security clearance regime, vesting as it does in the Secretary of the Attorney-General's Department virtually unfettered discretion to determine the legality of a wide range of disclosures, is wide open to politicisation and abuse. It certainly risks undermining the integrity, or at least the appearance of the integrity, of those lawyers who are subject to it – particularly in matters where such a lawyer has to represent a client who is suing or being sued by the Commonwealth.

2.2 Obligations to notify the Attorney-General in relation to possible disclosures, and further non-disclosure obligations

Clauses 38D and 38E of item 22 of schedule 1 of the Bill are quite similar to sections 24 and 25 of the Act. Once the Attorney-General has triggered the Bill's regime, any party to the proceeding has an obligation to notify the Attorney-General if he or she

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[31] Note 1 to schedule 1, item 24, clause 39A(2).

[32] Website of the Attorney-General's Department <http://www.ag.gov.au/www/protectivesecurityHome.nsf/HeadingPagesDisplay/Protective+Security+Manual?OpenDocument>.

[33] Schedule 1, item 27, clause 46G(a) together with schedule 1, item 12, clauses 16(aa), 16(ac), 16(ad), and also schedule 1, item 27, clause 46G(c)(i).

knows or believes that, during the course of the proceeding, information relating to or affecting national security will be disclosed:

- By the party himself or herself;[34]
- By the evidence of a witness that he or she intends to call;[35]
- By the mere presence of a person whom he or she intends to call as a witness.[36]

Given the Act's broad definition of 'national security', this is a potentially onerous obligation.

The party must inform the court, the other parties, and the witness (if appropriate) that notice has been given,[37] and the notice must be accompanied by either:

- A copy of or extract from the document containing the information;[38]
- Where the information is not contained in a document, a description of the information.[39]

In addition, if any party knows or believes that, during the course of the proceeding, information relating to or affecting national security will be disclosed by a witnesses answer to a question, he or she is obliged to advise the court.[40] The court must then have the witness give the answer to the question in writing, and show that answer to the Attorney-General.[41]

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[34] Schedule 1, item 22, clauses 38D(1)(a), 38D(1)(b).

[35] Schedule 1, item 22, clause 38D(1)(c).

[36] Schedule 1, item 22, clause 38D(1)(c).

[37] Schedule 1, item 22, clause 38D(4).

[38] Schedule 1, item 22, clause 38D(3)(c).

[39] Schedule 1, item 22, clause 38D(b).

[40] Schedule 1, item 22, clauses 38E(1), 38E(2).

[41] Schedule 1, item 22, clauses 38E(3), 38E(4), 38E(5).

A party who does not notify the Attorney-General when obliged, whose notice is not accompanied by the right document or description, or who does not advise the court or the other parties as required, in a circumstance in which disclosure of the information in question would be likely to prejudice national security, commits an offence.[42]

Once the Attorney-General has been notified by a party, or by the court, of the possibility of disclosure, then the proceeding must be adjourned while the Attorney-General considers how to respond to the notice.[43] Furthermore, if disclosure of the information would be likely to prejudice national security it becomes an offence for:

- The party who gave notice to the Attorney-General to disclose the information in question;[44]
- A witness whose evidence is in question to disclose the information in question;[45]
- The party who gave notice to the Attorney-General about the possibility of disclosure resulting from the mere presence of a witness to call that witness.[46]

However, this offence is not committed if the disclosure takes place in permitted circumstances, that is, if:

- The disclosure is by a party to the proceeding who has been given a security clearance by the Attorney-General's Department at a level considered appropriate by the Secretary, and takes place in the course of the proceeding;[47]

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[42] Schedule 1, item 27, clause 46C.

[43] Schedule 1, item 22, clauses 38D(5), 38E(5), 38E(6).

[44] Schedule 1, item 27, clause 46A(1).

[45] Schedule 1, item 27, clauses 46A(1), 46A(2).

[46] Schedule 1, item 27, clause 46B.

[47] Schedule 1, item 27, clauses 46A, 46B together with schedule 1, item 12, clause 16(aa).

- The disclosure is by a member of the legal team of a party to the proceeding, who has been given a security clearance by the Attorney-General's Department at a level considered appropriate by the Secretary, and takes place in the course of his or her duties;[48]

- The disclosure is by an employee, officer or Minister of the Commonwealth, and takes place in the course of his or her duties in relation to the proceeding;[49]

- The disclosure is by an officer of the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service or the Defence Signals Directorate, and it takes place in the course of his or her duties;[50]

Again, the precise purpose of this complex list of exceptions is not clear: for example, why exempt only security-cleared parties and lawyers? However, one clear consequence of these exceptions is that, in the event that the Commonwealth is a party to an action, it will have a distinct advantage over the other party, in that it will be able to disclose the information in question for the purposes of working on its case, while other parties may well not be able to do so.

2.3 Attorney-General's certificates: the process

The non-disclosure obligation lapses once the Attorney-General decides what action to take in response to the notice received from either a party or the court;[51] however, the Attorney-General has the power to give rise to new non-disclosure obligations through the issuing of certificates.

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[48] Schedule 1, item 27, clauses 46A, 46B together with schedule 1, item 12, clauses 16(ac), 16(ad).

[49] Schedule 1, item 27, clauses 46A, 46B together with schedule 1, item 12, clause 16(ab).

[50] Schedule 1, item 27, clauses 46A, 46B together with section 16(b) of the Act together with the *Intelligence Services Act 2001* (Cth) s 3 (definition of 'staff member'). Section 16(a) of the Act, permitting disclosure by a prosecutor in the course of his or her duties in relation to a federal criminal proceeding, will typically not be relevant.

[51] Schedule 1, item 27, clauses 46A(1)(c), 46A(2)(c), 46B(b).

Clauses 38D to 38F of item 22 of schedule 1 of the Bill, which set the parameters for the Attorney-General's response, are very similar to sections 26 to 28 of the Act. The Attorney-General may decide that no further steps will be taken. In this case, he or she must inform the court of this decision. He or she must also inform the relevant person or persons of this decision:

- If it is a party who is likely to disclose the relevant information, or to call a witness whose mere presence would constitute disclosure – that party and that party's lawyer;

- If it is a witness's testimony which a party believes is likely to disclose the relevant information – that witness, the relevant party, and that party's lawyer;

- If it is a witness's answer to a question which has been judged by the prosecution to constitute disclosure – that witness, the parties and the parties' lawyers.[52]

In the case of information that would be disclosed by way of a document, the Attorney-General may issue a *non-disclosure certificate*. The certificate must describe the information the disclosure of which is threatened, and must prohibit the party, the party's lawyer, and the witness if applicable, from disclosing that information. This certificate may be accompanied by:

- A copy of the document with the information deleted, which copy may be disclosed; or,

- A copy of the document with the information deleted, but with a summary of the deletions attached, which copy and summary both may be disclosed; or,

- A copy of the document with the information deleted, but with a statement attached of the facts that the deleted information would,

[52] Schedule 1, item 22, clauses 38F(7), 38F(9), 38H(9).

or would be likely, to prove, which copy and statement both may be disclosed; or,

- Nothing.[53]

In the case of information that would not be disclosed by way of a document, the Attorney-General may likewise issue a *non-disclosure certificate*. The certificate must describe the information the disclosure of which is threatened, and must prohibit the party, the party's lawyer, and the witness if applicable, from disclosing the information. This certificate may be accompanied by:

- A written summary of the information, which summary may be disclosed; or,
- A written statement of the facts that the information would, or would be likely, to prove, which statement may be disclosed; or,
- Nothing.[54]

In either case, it is an offence to disclose the information in contravention of the Attorney-General's certificate.[55] However, disclosure is permitted in the same permitted circumstances as were set out on p 12 above.[56] Again, the logic of this list of exceptions is unclear.

In the case of a witness whose mere presence would threaten disclosure, the Attorney-General may instead issue a *witness exclusion certificate*, making it an offence for that the witness to be called.[57]

The Bill also permits the Attorney-General to interfere in a proceeding and issue certificates of his motion, without the need for notice from either party or the court. It is sufficient that the Attorney-General for any reason expect that information of the

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[53] Schedule 1, item 22, clauses 38F(2), 38F(9).

[54] Schedule 1, item 22, clauses 38F(3), 38F(9).

[55] Schedule 1, item 27, clause 46D.

[56] Schedule 1, item 22, clauses 38F(2), 38F(3).

[57] Schedule 1, item 22, clauses 38H(1), 38H(2), schedule 1, item 27, clause 46E.

will be disclosed which will prejudice national security, whether by either party, a witness's evidence, or the mere presence of a witness.[58] Furthermore, the Bill amends the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to preclude a party to the proceeding is from challenging the Attorney-General's decision to issue a certificate.[59] Given the broad definition of 'national security', this is a wide-ranging power for the Attorney-General to interfere in a proceeding if he or she so desires.

The Attorney-General must provide to the court a copy of any certificate issued,[60] and of any summary or statement attached to it.[61] In addition, in the case of a non-disclosure certificate, if the information is contained in a document, and the Attorney-General's certificate is accompanied by a copy of the document from which the information has been deleted, then the court must also be provided with both the original document and the redacted copy.[62] In a case in which the Attorney-General does not possess the original document, presumably her or she would provide to the court the copy of or extract from the document that had been provided to him or her by the relevant party pursuant to clause 38D(3)(c).

Once a certificate has been issued, the proceeding is adjourned (or if it was already adjourned, that adjournment continues), and the court must hold a closed hearing in accordance with the Bill's provisions to decide how to respond to the Attorney-General's certificate.[63]

2.4 Attorney-General's certificates: objections

The power that the Bill would vest in the Attorney-General, to issue a certificate in relation to the disclosure of information or the calling of witnesses in a court proceeding, is highly objectionable.

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[58] Schedule 1, item 22, clauses 38F(1)(a)(ii), 38F(1)(c), 38H(1)(a)(ii), 38H(1)(b).

[59] Schedule 1, item 30, clause 9B.

[60] Schedule 1, item 22, clauses 38F(5)(a), 38H(4).

[61] Schedule 1, item 22, clauses 38F(5)(b), 38F(5)(c).

[62] Schedule 1, item 22, clause 38F(5)(b).

First, it gives the Attorney-General scope to interfere with proceeding to which the Commonwealth is otherwise not a party. Indeed, in some cases – namely when he or she sees a witness's written answer to a question pursuant to clause 38E(5) of item 22 of schedule 1 – the Attorney-General may be better informed than the parties as to the direction the proceeding is taking! The Attorney-General, by making certain disclosures illegal, or by prohibiting the calling of certain witnesses, has the potential to exercise considerable influence on the preparation by either side of its case. This potential is compounded by the fact that it is the Attorney-General who decides (pursuant to clause 6A) whether or not the Bill's regime is invoked in a given proceeding, and also by the Attorney-General's power to intervene and issue certificates of his or her own motion.

Second, the Bill does not establish a time period in which the Attorney-General must come to a decision in relation to any notice given to him or her by the parties or the court of a potential disclosure of information relevant to national security. This creates the possibility of delay in proceedings – some of which, as we shall see in the second part of this submission, may be extremely urgent.

Both these matters – the Attorney-General's power to intervene, and the delay in proceedings consequent upon such intervention – give rise to the real possibility of abuse. The Attorney-General may intervene and issue certificates in such a way as to favour one party over another, or may delay reaching a decision for such a length of time that one or the other party's interest in the litigation is defeated. This possibility of abuse is particularly objectionable in relation to matters to which the Commonwealth is a party. Furthermore, in such matters the Attorney-General's decision to intervene could favour the Commonwealth in additional ways, for it will typically be the case that non-disclosure obligations, whether prior to or subsequent to the issuing of a certificate, do not apply to Commonwealth officers doing their job in relation to a proceeding to which the Commonwealth is a party (for the reasons

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[63] Schedule 1, item 22, clauses 38^(3), 38H(6).

discussed at length in 2.1 above, and more briefly in 2.2 and 2.3 in relation to permitted disclosures).[64]

In the final analysis, it does not matter whether such abuse actually occurs. The Attorney-General is a politician, and a senior member of the Cabinet. Even if he or she acts at all times with complete propriety, the mere fact that the Bill would give rise to the possibility of political abuse – whether by way of interference in proceedings to which the Commonwealth is not a party, or by use of the regime to advantage the Commonwealth in those matters to which it is a party – may potentially undermine confidence in, and the appearance of legitimacy of, the administration of justice in Australia.

The provisions of the Bill which oblige the Attorney-General to report to the Parliament on certificates issued[65] is not sufficient to meet these concerns. The prospect of a report to the Parliament in twelve months time is little consolation to today's aggrieved litigant. This provision also fails to address an equally fundamental source of concern about abuse, namely, the Attorney-General's power to activate the entire regime pursuant to clause 6A.

2.5 Closed hearings: the procedure

The rules governing the closed hearing that follows the issue of a certificate by the Attorney-General are set out in clauses 38I to 38K and 38M to 38S of item 22 of schedule 1 of the Bill. Again, these are quite similar to sections 29 to 30, 32 to 34 and 36 to 38 of the Act.

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[64] Similar concerns about abuse were expressed in relation to the Act, for example in my submission: above n 3, pp 13-1; and by the Australian Press Council: Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, pp 16-7 (Inez Ryan). The Committee accepted the force of some of these concerns in its Report: Senate Legal and Constitutional Committee, *Report on the Provisions of the* National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (2004), p 19.

[65] Schedule 1, item 28, clause 47.

Like the Act, the Bill permits the Attorney-General to intervene in a closed hearing on behalf of the Commonwealth.[66] This is quite significant to the operation of the Bill: unlike the Act, which assumes that the prosecutor as well as the Attorney-General may be involved in making the case against disclosure of information on national security grounds,[67] the Bill assumes that the Attorney-General will take sole responsibility for that task.[68] Consistently with this assumption, the court may order the exclusion of any party, or that party's lawyer, from the closed hearing, if the information would be disclosed to them and that disclosure would be likely to prejudice national security.[69] However, such exclusion is not permitted if the party or the lawyer has been given a security clearance at the level considered appropriate by the Secretary of the Attorney-General's Department,[70] and the act also gives all parties the right to make submissions in response to the Attorney-General's arguments for non-disclosure.[71]

In some ways these provisions are less objectionable than those of the Act: although they still raise the prospect of one party to the proceedings being excluded from a hearing at which another is able to see certain evidence discussed, at least they do not generate any systematic bias against any particular party (unlike the Act's bias against defendants). These provisions nevertheless are still objectionable. They do permit a party to a matter to be excluded from a hearing at which the admission of evidence potentially crucial to the matter is to be discussed. This would probably amount to a violation of Australia's obligations under the *International Covenant on Civil and Political Rights*, Article 14(1) of which states:

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[66] Schedule 1, item 22, clause 38K.

[67] This is implied by several provisions of the Act, including sections 25(5) and 25(6), which give the prosecutor responsibility for notifying the Attorney-General if a witness's testimony will disclose national security information, and section 29(3), which contemplates that the prosecutor may give details of the information during argument as to why it should not be disclosed.

[68] Schedule 1, item 22, clause 38I(3) contemplates that it will be the Attorney-General alone who will argue why the information should not be disclosed.

[69] Schedule 1, item 22, clauses 38I(3)(a), 38I(3)(b).

[70] Schedule 1, item 22, clause 38I(3).

[71] Schedule 1, item 22, clause 38I(4).

> In the determination … of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

And in a case in which the Commonwealth is a party, all the objections to the analogous provisions of the Act are raised: the Commonwealth is guaranteed a privilege, in relation to access to and argument concerning the admission of evidence, from which another party may be excluded.

The exception for security-cleared lawyers and parties is inadequate to meet these objections for all the reasons already canvassed: it is entirely subject to executive discretion, both as to the granting of a clearance, and the determination of adequacy of any clearance, and is open to all the possibilities, and appearances, of politicisation and abuse that have already been discussed.

There are other aspects of the closed hearing procedures which also are objectionable, though less so. The Bill restricts access to the record of the hearing to those parties and lawyers who have been granted security clearance at the level considered appropriate by the Secretary of the Attorney-General's Department.[72] This is an impediment to parties exercising their rights of appeal. The Bill also, in a sense, gives the Attorney-General two bites at the cherry: not only can he or she influence access to the record by the indirect means of granting or withholding security clearances, but he or she can seek to have the record varied if he or she believes that access by a party or their lawyer to the record – even if security-cleared – would result in disclosure of information which would be likely to prejudice national security.[73] The Attorney-General has a similar power to seek a variation in the courts statement of reasons for any order given as a result of the closed hearing.[74] These powers of the Attorney-General to seek to have a court vary its record or its statement of reasons are quite contrary to the separation of executive and judicial authority that it an accepted and valuable part of Australian government. At least where courts vested with Commonwealth jurisdiction are concerned, they may also

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[72] Schedule 1, item 22, clause 38I(9)(a).

[73] Schedule 1, item 22, clause 38I(7).

[74] Schedule 1, item 22, clause 38M(3).

raise difficulties in relation to the protection of judicial independence by Chapter 3 of the Constitution.

2.6 Closed hearings: possible orders

The Bill gives the court a number of options as to the outcome of the closed hearing. Again, the court's obligations and powers under clause 38L of item 22 of schedule 1 are quite analogous to those vested in it under section 31 of the Act.

In the case of a witness excluded by a certificate of the Attorney-General, the court may permit, or may prohibit, the calling of the witness.[75]

In the case of information subject to a non-disclosure certificate, the court may permit disclosure of the information, or prohibit it (again, subject to the same confusing list of permitted circumstances of disclosure as were set out on p 12 above).[76] In the case of a document, the court may permit disclosure of:

- A copy of the document with the information deleted; or,
- A copy of the document with the information deleted, but with a summary of the deletions attached; or,
- A copy of the document with the information deleted, but with a statement attached of the facts that the deleted information would, or would be likely, to prove.[77]

If such an order is made, evidence of the contents of the document may be adduced by tendering the copy, or the copy and summary, or the copy and statement.[78] It should be noted that, in a case where the Attorney-General's non-disclosure was not accompanied by a redacted version of the document, the Attorney-General has no

[75] Schedule 1, item 22, clause 38L(6).

[76] Schedule 1, item 22, clause 38L(2), 38L(4), 38L(5).

[77] Schedule 1, item 22, clause 38L(2).

[78] Schedule 1, item 22, clause 38L(3).

obligation to provide the court with a copy of the document in question;[79] the Bill does not make it clear, in such a case, how the court is to make its determination on the treatment of the document in question.

It should be noted that the court's order following a closed hearing does not come into force until it ceases to be subject to appeal;[80] in the meantime, the Attorney-General's certificate remains in force.[81]

In reaching its decision at the closed hearing, the court is not bound by the Attorney-General's certificate.[82] However, the court must consider whether, having regard to the Attorney-General's certificate, permitting the disclosure of the information, or the calling of the witness, would risk prejudice to national security.[83] The court must also have regard to the object of the legislation set out in section 3 of the Act,[84] namely

> to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.[85]

The court must also consider whether its order would have a substantial adverse effect on the substantive hearing in the proceeding, and must consider any other matter it considers relevant.[86] However, it is the first of these consideration to which the court must give the greatest weight;[87] that is, the questions of a *substantial*

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[79] Clause 38F(5)(b) of item 22 of schedule 1 limits the Attorney-General's obligation to provide the court with a copy of the document to those cases where clause 38F(2)(a), that is, cases where the Attorney-General's certificate is accompanied by a copy of the document with information deleted. It does not extend to those cases where clause 38F(2)(b) applies, that is, where the Attorney-General simply describes the information and states that it must not be disclosed.

[80] Schedule 1, item 22, clause 38O(a). In the Federal Court this is 21 days: *Federal Court Rules 1979* order 52.

[81] Schedule 1, item 22, clauses 38F(6)(b), 38H(5)(b).

[82] Clause 31(2) states this explicitly in relation to non-disclosure certificates. Clause 29(6) makes this clear by implication with respect to witness-exclusion certificates.

[83] Schedule 1, item 22, clause 38L(8)(a).

[84] Section 3(2) of the Act.

[85] Section 3(1) of the Act, as it would be amended by item 3 of schedule 1.

[86] Schedule 1, item 22, clauses 38L(7)(b), 38L(7)(c).

[87] Schedule 1, item 22, clauses 38L(8).

adverse effect on the substantive hearing in the proceeding, and of *serious interference with the administration of justice*, are to be secondary considerations. This is obviously a significant departure from the existing test in relation to public interest immunity found in section 130 of the *Evidence Act 1995* (Cth), itself largely a restatement of the existing common law[88] stated by the High Court in the cases of *Sankey v Whitlam*.[89] In particular, it makes it considerably more likely that the information in question will be excluded from evidence.

2.7 Closed hearings: further thoughts

Two principal objections to the Act as it currently stands are:

- That it allows a criminal trial to go ahead in circumstances where the accused may not have seen, or had a chance to test, all the evidence against him or her;
- That it invites the court to substitute its own judgement for that of the jury on certain matters of fact (for example by preparing and/or endorsing a statement of the facts that a documents would be likely to prove).

These objections do not apply so strongly to the Bill. In Australia it is relatively uncommon for non-criminal litigation to involve a jury. It is typically the court that is responsible for making determinations of fact. However, this same thought makes the closed hearing seem somewhat pointless. If the court in the closed hearing is to hear arguments for and against the significance of the information, and is to oversee the process of introducing redacted documents, summaries and so forth into evidence, then why can it not just take all this into account in reaching its final determination at trial? In short, the Act as it exists prevents disclosure of national security information to juries. What risk of disclosure is the Bill intended to prevent?

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[88] *Laws of Australia*, EVIDENCE 16.7 'Privilege and Public Interest Immunity', [5]; see also the discussion by von Doussa J in *Chapman v Luminis Pty Ltd* (2000) 100 FCR 229, 246.

[89] (1978) 142 CLR 1. Further references relating to the law of public interest immunity are given in Suzanne McNicol, *Law of Privilege* (1992), 401-2.

2.8 A stay as the court's last resort in the interests of justice

These doubts about the utility of the closed hearing in a typical non-criminal trial are compounded by a further provision of the Bill. Analogously to the existing provision of the Act in relation to criminal matters, the Bill explicitly states that

> An order under section 38L does not prevent the court from later ordering that the civil proceeding be stayed on a ground involving the same matter, including that an order made under section 38L would have a substantial adverse effect on the substantive hearing in the proceeding.[90]

That is, the Bill identifies a stay of proceedings as the court's 'procedure of last resort' for ensuring the fair and proper administration of justice.

In the criminal context, the analogous provision is section 19(2) of the Act. There is a clear logic to section 19(2): in a criminal trial the default position is that the accused is innocent and should go free. This is a natural consequence of our liberal democratic intuition that the state is the servant of the individual, and not vice versa, and thus that the burden of criminal proof lies on the prosecution, to establish guilt beyond reasonable doubt.

In a non-criminal matter, however the parties typically meet as equals in a way that the citizen and the state do not; there is no sense that either plaintiff or defendant is entitled, by default, to be free of obligations to the other. It is true that, in a civil suit, it is the plaintiff who bears the initial burden of proof on the balance of probabilities; but this is often quite easily discharged. In some cases, indeed, such as a typical suit for false imprisonment or for a writ of habeas corpus, the real burden may lie upon the defendant: once the plaintiff has made out the fact of restraint, the burden will be on the defendant to show the lawfulness of that restraint.

It is therefore far less clear that, when non-criminal matters are considered, there is a sensible default position. The Bill nevertheless creates one – for the defendant in a civil suit, a stay is as good as a win, and so by making a stay the last resort in the interests of justice, the Bill establishes as the default position a victory for the

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[90] Schedule 1, item 13.

defendant. But it is far from clear that such an outcome is always consistent with the interests of justice.

Consider the following scenario, which seems to be what the Bill intends:

- The court becomes aware that national security information is likely to be an issue at trial;
- The court holds a closed hearing, in which the national security information is considered;
- The court reaches a decision that the information is to be excluded, or admitted only in a limited way;
- In its capacity as a court of law, the court reaches the conclusion that the substantive proceeding will be adversely affected in a substantial way if, in its capacity as a tribunal of fact, the court adheres to its self-imposed limit;
- The court therefore decides to stay the matter, in effect giving victory to the defendant.

This seems absurd. Why can the court not simply apply the law in the light of all the information that has been presented to it in the course of the proceeding, including during the closed hearing?

3. Undermining the administrative law safeguards in 'anti-terrorism' legislation

This section argues that the Bill does not simply open the door to absurdity, but in fact would significantly undermine some of the safeguards that have been regarded as crucial to the legitimacy of much recent 'anti-terrorism' legislation. To see how this is so, it is necessary to first note the many ways in which the Bill would advantage the Commonwealth in the context of litigation involving national security information.

The first section of this submission identified several issues relating to the Bill's application:

- *The Bill operates solely at the discretion of the Attorney-General (or another Commonwealth Minister nominated by him or her)*;

- While the breadth of the definition of 'national security' means that a decision to invoke the Bill's regime might have implications for a wide variety of proceedings, the Bill is likely to be particularly relevant for a number of 'terrorism' matters – *matters in which the Commonwealth would be the defendant to an action seeking review of an administrative decision.*

The second section of this submission identified several issues relating to the Bill's operation:

- The Bill gives the Attorney-General a wide-ranging power to interfere in the course of proceedings, and in particular to control (at least temporarily) the parties' access to information – *including when the Commonwealth is a party*;

- In several places, the Bill makes a party's effective participation in litigation dependent upon the issuing of a security clearance by an officer of the Commonwealth Government, to a level that that same officer considers appropriate – *unless the party in question is the Commonwealth, for whom no problem is likely to arise*;

- When a court is deciding whether or not national security information is to be allowed to be disclosed in the course of a proceeding, it must allow the Attorney-General to intervene to argue for the protection of the information – *even if the Commonwealth is a party*;

- When a court is deciding whether or not national security information is to be allowed to be disclosed in the course of a proceeding, it must give the greatest weight to considerations of whether – *having regard to a certificate issued by the Attorney-General, a senior Minister of the Commonwealth* – disclosure of the information would risk prejudice to national security;

- The Bill grants the court the power to stay proceedings as a last resort in the interests of justice – *but when a plaintiff is seeking a declaration from the court that an administrative decision was unlawful, then a stay of the matter is as good as a win for the Commonwealth*.

The significance of the italicised points is this: in any suit to which the Commonwealth is a party, and in which involves national security information, the Bill grants the Commonwealth significant advantages in relation to the litigation. In a situation in which the Commonwealth wishes to lead national security information as evidence, the Attorney-General can refrain from invoking the Bill's regime, or can refrain from issuing certificates. In a situation in which the other party wishes to lead national security information as evidence, however, the Attorney-General can use the powers vested in him or her by the Bill to impede their argument for their case.

In many cases, it is possible to envisage the exercise of these advantages making it impossible for a person suing the Commonwealth to make out their case. Consider the example of a suit seeking a declaration that an individual's detention pursuant to a warrant issued under s 34D of the *ASIO Act* is unlawful. To begin with, it is apparent that simply by invoking the Bill's regime, the Attorney-General (or other Minister of the Commonwealth, given that the Attorney-General is likely to have been named as a party to the suit) may be able to delay the matter – through the obligatory adjournments that result – such that a remedy in fact becomes pointless (given that such detention is capped at 7 days maximum[91]).

But put this concern to one side. Suppose that the plaintiff wishes to argue that his or her detention is unlawful, because the Attorney-General was not satisfied that reasonable grounds existed or believing that, if not detained, he or she may not appear before the prescribed authority for questioning.[92] This would typically require the plaintiff to lead information about the beliefs of the Attorney-General, ASIO

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[91] *ASIO Act* section 34HC.

[92] This is one of the conditions that must be satisfied for the lawful consent by the Minister to a request by the Director-General of Security that a detention warrant be issued under section 34D of the *ASIO Act*: *ASIO Act* section 34C(3)(c)(ii).

briefings given to him or her, and so on. It is easy to imagine that the Bill would result in the plaintiff being prevented from calling the witnesses and leading the evidence necessary to make out this case.

In such a situation, the court might well take the view that the withholding of this crucial evidence would have a substantial adverse effect on the substantive proceeding. If this were so, the Bill gives the court the power to stay the matter. But for the Commonwealth as a defendant, then for it a stay is as good as a win:

- In the context of detention pursuant to a warrant issued under s 34D of the *ASIO Act*, where what is sought is an order that an individual's detention is unlawful, a stay would result in the person remaining in detention;

- Similarly, in the context of an application for the review of a decision relating to the listing of an organisation, a stay would result in the organisation remaining on the relevant list.

The Bill therefore threatens to undo many of the administrative law safeguards that have been included in recent 'national security' and 'anti-terrorism' legislation. For this reason alone, it deserves to be opposed.

4. Conclusion

The central points of this submission can be briefly summarised:

- The Bill has no clear purpose when it comes to protecting information, given its confused definition of permitted circumstances of disclosure, and the typical absence of juries in non-criminal trials;
- The Bill would apply to a wide range of proceedings, but the most obvious are applications for review of ‘terrorism’-related administrative decisions;
- In such proceedings, the Bill would make it far more likely that the Commonwealth would win, either because certain crucial evidence is excluded on national security grounds, or because the matter ends up being stayed by the court;
- Therefore, the only clear effect of the Bill would be to undermine many of the safeguards that were introduced to ameliorate the conflict between recent ‘anti-terrorism’ legislation and fundamental rule of law values.

The Bill should therefore be opposed.