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Enquiries ☎ (03) 9269 0234



6 April 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

GPO Box 4380 Melbourne 3001
350 Queen Street Melbourne 3000
DX 210646 Melbourne Vic
Tel (03) 9269 0234
Fax (03) 9269 0440
www.legalaid.vic.gov.au
ABN 42 335 622 126

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

National Security Information Legislation Amendment Bill 2005

I write to make a submission in relation to the above Bill on behalf of Victoria Legal Aid. VLA is Victoria's largest criminal law practice, employing 130 lawyers who practise criminal law from our twelve offices in metropolitan and rural Victoria. VLA also has a substantial civil law practice covering a broad range of areas, including immigration law, Social Security, and discrimination. In 2003-04 we provided the following services to our civil law clients:

- 7,115 advice sessions
- In-house legal representation in 1,013 cases.
- duty lawyer services in the Refugee Review Tribunal and several other state tribunals.

Overview

As you are aware, the Bill extends to civil proceedings many aspects of the regime for security sensitive information that now apply to federal criminal proceedings. The Bill provides for closed hearings to consider the disclosure of information that may prejudice national security. Only parties and their legal representatives who possess security clearances to an appropriate level may attend these closed hearings.

VLA is extremely concerned about these further proposed changes to the regulation of sensitive and classified information in legal proceedings. Changes to the present system of self and court-based regulation of lawyers jeopardise the fundamental and proven tenets of legal representation and the provision of a fair trial. Courts and tribunals operate from a basic presumption of being public and open. The transparency of the Australian system of justice and the level of community confidence in this system depends on such openness.

VLA's key concerns about the Bill are as follows:

- The definition of national security proposed in the Bill is unnecessarily broad in scope and is wide enough to cover normal civil litigation that has no relationship to terrorist activities.

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- The Attorney General has unlimited discretion in determining what constitutes national security.
 - The Bill provides extensive powers to the Government in terms of who may participate in legal proceedings, undermining the rights of parties.
 - The Bill limits the capacity of a lawyer to receive a comprehensive briefing from his or her client to discuss the subject matter of the proceeding as a result of the new offence of disclosure of information to a party who is not security cleared.
 - The Bill allows the Attorney General, if he is represented at a closed hearing, to determine what information parties to a civil hearing are able to obtain. This contravenes the doctrine of the separation of powers and presents an unacceptable conflict of interest for matters in which the government is a party.
 - The Bill exempts decision making by the Attorney General of judicial review via the amendments to the *Administrative Decisions (Judicial Review) Act 1977*. In effect the Bill increases the government's powers and reduces mechanisms to monitor the exercise of those powers. Such restrictions are in clear contravention of the principle of natural justice.
 - The Bill gives further extensive powers to the Attorney-General to influence civil proceedings, undermining the doctrine of the separation of powers. For example the Attorney General may issue a certificate to prevent witnesses from disclosing information by not allowing them to answer questions; issue a certificate to prevent information from being disclosed; issue a certificate to prevent a witness from being called and to close a hearing in a civil proceeding.

Security Assessment Process

VLA also has concerns about the security assessment process. A number of bodies including ASIO have the responsibility to carry out security assessments as to whether an applicant is a risk to national security. It makes an assessment from information gathered by its public and confidential sources as to whether the background of the applicant constitutes a risk to national security. In the event that an adverse security assessment is made on an applicant, the information that led to that assessment is generally not available to the decision-maker.

The highly restrictive provisions of the *Administrative Appeals Tribunal Act 1975 (Cth)*, such as Sections 39B and 46, mean that both the Administrative Appeals Tribunal and the Federal Court are restricted from disclosing information regarding the security assessment to the applicant if a certificate has been issued. This means that in no way can the material that discredits the applicant be reviewed for accuracy or relevance. Unfortunately, inconsistent material has been relied upon to make security determinations.¹

Security clearances for lawyers

VLA remains very concerned about the proposal that lawyers will need to be accredited in order to represent clients in certain cases where matters of classified or sensitive information are raised or likely to be raised. Security clearances for lawyers continue to have a number of serious implications for VLA.

¹ See the case of Mr Sultan, a Kuwaiti national seeking asylum, *Director General, Security v Sultan* (1998) 90 FCR 334.

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The security of sensitive information can be maintained under traditional arrangements. Lawyers are bound in their duty to the court to act in an appropriate manner and follow the directives of the bench. VLA believes that there are already sufficient stringent requirements to ensure that lawyers are competent to operate in sensitive areas of national security, and are answerable for contraventions of this duty. A requirement for security clearance for lawyers will seriously affect the provision of adequate and proper services by an organisation such as VLA.

I trust the above information assists the Committee. If you would like to discuss these issues further do not hesitate to contact me or Llewellyn Prain (Senior Policy and Research Officer) on (03) 9269 0138.

Yours faithfully

A handwritten signature in cursive script that reads "A. Parsons".

TONY PARSONS
Managing Director