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26 August 2009

Dear Secretary,

Submission - Anti-Terrorism Laws Reform Bill 2009

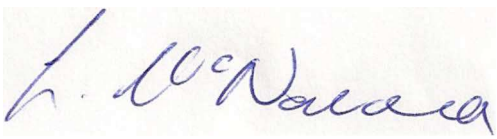
This submission addresses the Bill's proposed repeal of the *National Security Information (Criminal and Civil Proceedings) Act 2004* ('the NSI Act'). The submission draws significantly on my recent research into the operation and effects of the NSI Act.

I am an Australian legal academic and have been based at the University of Reading in the UK since September 2007. The relevant research commenced while I was a Senior Lecturer in the School of Law at Macquarie University, Sydney and was completed while in my current post at Reading.

At present, I hold a UK ESRC/AHRC Research Fellowship, undertaking a project which includes a deal of comparative work with Australia. The Fellowship is funded by a £309,000 UK Research Councils award (2009-12) to conduct a research programme titled, *Law, Terrorism and the Right to Know*.

I hope the submission is of some assistance.

Yours sincerely,



Lawrence McNamara

SUBMISSION REGARDING *ANTI-TERRORISM LAWS REFORM BILL 2009*

(Dr Lawrence McNamara, University of Reading)

1. Summary

The submission considers the Bill's proposal to repeal the *National Security Information (Criminal and Civil Proceedings) Act 2004* ('the NSI Act).

While the Bill may inevitably be overtaken by the recently released government discussion paper, it nonetheless provides a timely opportunity for consideration of the NSI Act. In particular, the issues raised in this submission are unaddressed and unresolved by proposals in the government discussion paper which proposes amendments that serve to conceal information from the public eye even more than is presently the case, despite stated commitments to democratic standards, accountability and maintaining public confidence in the laws.

First, the submission addresses the ways that the NSI Act limits open justice in terrorism cases. It is especially concerned with the ways and impinges on the public's right to know about matters relating to terrorism and national security.

This submission neither agrees with nor rejects the Bill's proposal to repeal the NSI Act. Either position would need to be informed by consideration of a wider range of matters relating to the Act, including the ways it affects the accused's access to evidence and the extent to which the Act is cumbersome in its operation. This submission does not address those matters but Senator Ludlam's second reading speech rightly raises troubling concerns.

Secondly, the submission argues that there is a strong case for amendments to give meaningful effect to open justice principles. Specifically, it argues that the NSI Act should be amended so that:

- When making orders relating the management of evidence, courts should be required to consider the effects on open justice.

- Media lawyers should, with security clearance no greater than that applying to defence lawyers, be able to be present in closed hearings and should be able to make submissions and receive statements.

- Media organisations should be able to lodge appeals in relation to the extent that the management of evidence affects open justice.

The submission is framed around the criminal proceedings aspects of the Act but the same concerns apply to the civil proceedings aspects.

2. The absence of open justice considerations in the NSI Act and the importance of open justice

The NSI Act established two key methods of evidence management:

(1) The prosecution and defence can reach an agreement and then this is given effect by the Court under section 22.

(2) The court makes an order under section 31.

Neither method provides any consideration of open justice. It might be raised under the 'any other matter' provision in section 31(7)(c), but the court is not compelled to consider it. This is a serious shortcoming of the Act.

There is a crucial public interest at stake in open courts. It is in the courts that information is elicited, exposed and tested. Affairs cannot be controlled by spin doctors who craft and shape information for media and public consumption. The rules of evidence will govern what is revealed, but these are applied by an independent judiciary. This is especially important when an arm of government is involved; court reporting is a crucial avenue for public knowledge about what governments do.

Notably, the Australian Law Reform Commission's *Keeping Secrets* report (ALRC 98) recommended that open justice be a consideration in national security information laws.[1]

3. Research into the effects of the NSI Act

In mid-late 2007, I conducted interviews with 19 journalists, media lawyers and criminal lawyers as part of a project that examined how counter-terrorism laws had affected media reporting on terrorism in Australia.

The most complete report of the research was published early this year as a major peer-reviewed article, 'Closure, caution and the question of chilling: How have Australian counter-terrorism laws affected the media?' (2009) 14 *Media & Arts Law Review* 1-35.[2]

In sum, the NSI Act has brought about a significant closure in access to information. This has occurred formally as a direct consequence of the Act and informally as a result of the way

[1] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC Report 98 (2004), Recommendation 11-19 and generally [7.15]-[7.41]; see also Recommendation 7-1 on non-party access.
[2] This article is available online at: http://ssrn.com/abstract=1371328. Other reports of the research can be found in: 'Reporting on terrorism cases: From open justice to closed courts' [2009] *Precedent* (No 92) 22-25; 'Anti-Terrorism Laws and the Australian Media' (2009) *Gazette of Law &Journalism* (www.glj.com.au, subscriber access only); 'Counter-terrorism Laws: How They Affect Media Freedom and News Reporting' (2009) 6(1) *Westminster Papers in Communication and Culture* 27-45; 'Counter-Terrorism Laws and the Media: National Security and the Control of Information' (2009) 5(3) *Security Challenges* 95-115.

that closure and secrecy has taken hold in security-related matters. The result is that information may be restricted even where its disclosure would not carry a risk of prejudice to national security. In its operation, the Act appears to be more expansive than the language of the Act requires (eg, ss 8 & 17).

Key findings of the research included:

3.1 NSI Act - Court orders

Orders under section 31 significantly limit open justice in two particular ways:

(a) The legislation does not identify open justice as a factor to be taken into account.

(b) While the court may allow media submissions regarding the way that evidence should be dealt with, it will be impossible to get to the heart of the issues because they are excluded from the court while the prosecution, defence and Attorney-General make submissions. Media lawyers objected strongly to being excluded because, being officers of the court, they argue that they would adhere to their obligations to the court and exclusion is neither just nor necessary.

3.2 NSI Act - Court confirmation of prosecution and defence agreements

Orders under section 22 may be far more restrictive than the court would order were disclosure issues contested under section 31. Journalists and lawyers saw section 22 agreements as excluding the media even more comprehensively with the experience being that, 'Instead of going through the process, [they] are trying to put a blanket order over the whole proceedings.'[3]

The cumbersome and complex section 31 procedures mean that the temptation to use section 22 is strong. For judges, an agreement avoids disruption to the trial. For the prosecution, security sensitive information is kept out of the public eye. And while the defence lawyers 'don't like using it [and] don't want to have to sign up to it', they have 'clients who have been in custody for a year or two. [A refusal] to sign up or challenge [to] the legislation means their trial is delayed and they're in custody for even longer.'[4]

3.3 NSI Act - Effects on court reporting

At July 2009 the NSI Act had been invoked in proceedings involving 38 defendants and in one control order application.[5] The nature of the legislation makes it difficult to know how much effect the NSI laws have had on particular cases. One lawyer's view was that the Act has not 'had any real impact' on reporting so far because it has mainly affected

[3] Quotation taken from research interviews.
[4] Quotation taken from research interviews.
[5] *National Security Legislation: Discussion Paper on Proposed Amendments*, Attorney-General's Department, Canberra, 2009, 172.

pre-trial hearings which would not have been reported in any case, but it has 'massive potential to impact on the media's ability to report'.[6] The overwhelming impression from the interviews is that there is great reason to be concerned that open justice in terrorism trials is in danger of disappearing. The frank observation by one lawyer was that, 'The routine order being sought is … that all security sensitive information be heard in closed court. That is now the default set of orders.'[7] The substance and operation of the laws gave rise to the perception that whereas suppression is 'not meant to be the norm' and a case must be made for matters to be suppressed, 'the terror rules almost make a different assumption – you've almost got to say why it is we *should* be allowed to publish. It almost reverses the onus.'[8]

3.4 NSI Act – context and informal effects – information management and effects on access to information

The formal NSI Act restrictions are compounded by informal effects. Journalists reported difficulties in obtaining information from courts and parties, even where that information is not subject to formal restrictions. Similarly, information from police and government sources was said to have become more limited; the perception was that fewer people have access to information sources are more vulnerable to prosecution than in the past.

One of the most important implications of these patterns is that the media are more reliant on official sources than they might otherwise be. This is troubling when those official sources are not seen as trustworthy, or are at least perceived as having an agenda that casts a shadow over the complexion or completeness of the information provided through official channels. The interviews revealed a severe lack of trust in official channels. Concerns included the use of after-hours applications for court orders and the aggressive pursuit of unwanted leaks being used to shut down access to information. The Allan Kessing prosecution has become emblematic of a widespread distrust and cynicism of government and police approaches to information. The effect is that journalists are faced with a veneer of openness that breeds distrust: 'I didn't get a sense we were being restricted in our reporting. Looking back on it, it was the opposite. The authorities knew what they had and didn't have, but didn't move to correct anything they saw was obviously wrong.'[9]

The combined effect of the NSI Act and practices of information management have had the effect of withholding information from the public eye in a way that is substantially at odds with democratic commitments to open justice and the accountability of government.

[6] Quotation taken from research interviews.
[7] Quotation taken from research interviews.
[8] Quotation taken from research interviews.
[9] Quotation taken from research interviews.

The formal effects of the Act and the context in which it operates both make the opening up of court proceedings vitally important. In particular, the impartiality and openness of court proceedings will serve to build trust rather than diminish it. In all, there is good reason to see reliable, careful openness as working in the interests of protecting national security rather than putting national security at risk. Accordingly, it is submitted that the following would be valuable amendments to the NSI Act.

4. Suggested changes to the NSI Act

Of the following, inclusion of open justice considerations should be of the very highest priority.

4.1 Consideration of open justice

(a) Prosecution and defence agreements about the management of evidence (NSI Act, Section 22)

Section 22 empowers a court to make an order that gives effect to a prosecution and defence agreements about how evidence should be managed. This section should be amended to require the court to take account of the effects on open justice when making an order.

(b) Factors to be considered when making orders about evidence management (NSI Act, Section 31(7) and 31(8)

Section 31(7) sets out the factors the court must consider when determining the way evidence is managed. This subsection should be amended to require the court to take account of the effects on open justice. Section 31(8) states that the greatest weight must be given to national security risks in the event that an order was contravened. This subsection should be repealed as it unnecessarily weights the balance against open justice before a balancing exercise has begun.

4.2 Media lawyers – rights to be present, make submissions, receive information

(a) Closed hearing requirements (NSI Act, Section 29(2))

Section 29(2) sets out who can be present at a closed hearing to determine the way evidence is managed. This subsection should be amended to make provision for the presence of lawyers from media organisations. If security clearance provisions are required then these should be no greater than those required for defence lawyers under section 39.

(b) Media rights to make submissions and receive statements

The Act should be amended to provide the media with a right to make submissions regarding evidence management (eg, ss 25, 27, 28), to receive statements (eg, s 32)

It is notable that in 2004 the ALRC recommended that media organisations should not have a right to make submissions.[10] However, since that time the operation of the Act has unfolded in an expansive manner and the ALRC's position should not be persuasive. The need for open justice protections is greater than the Commission seems to have anticipated.

4.3 Media organisations – rights to lodge appeals

Media organisations should be able to lodge appeals in relation to the extent that the management of evidence affects open justice (eg, section 33). This need not halt a trial unnecessarily. Rather, it a trial could proceed on the basis that the parties, but not the public, have access to information. Should an appeal succeed then it may be that the media could be given access to documents or records.

4.4 Civil proceedings

Amendments to the same effect as the above should be made to the provisions of the Act that concern civil proceedings.

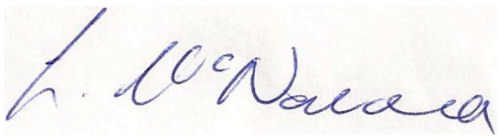
5. The NSI Act and the government discussion paper

The research interviews raised other concerns about the NSI Act, including the extent to which it is workable and fair. Many of Senator Ludlam's points in the second reading speech also emerged in the research interviews. A wider review of its operation would be desirable, especially in light of the fact that its operation appears to have effects far greater than those which strictly fall under the scope and objects of the Act.

The current government discussion paper does not address or resolve the concerns raised in this submission – indeed, it proposes amendments that serve to conceal information from the public eye even more than is presently the case, despite stated commitments to democratic standards, accountability and maintaining public confidence in the laws.[11]

I hope the above submission is of some assistance in the Committee's consideration of the Bill.

Yours sincerely,



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[10] *Keeping Secrets,* ALRC 98, [9.105].
[11] *National Security Legislation: Discussion Paper on Proposed Amendments*, Attorney-General's Department, Canberra, 2009, iii-iv.