

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

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Question No. 71

Senator Stott Despoja asked the following question at the hearing on 31 October 2005:

The *National Security Information Legislation Amendment Act 2005* (NSI Act) gives to the Attorney the power to issue a certificate that a civil proceeding in a court touches on "national security information" and to thereby cause the court to be closed and for certain procedures to be put in place. All courts are vested with a discretion to close their proceedings to the public, whether in their inherent jurisdiction or by virtue of their rules of procedure. Courts quite properly do so in limited circumstances.

- (a) Can the Department explain how, in relation to the NSI Act, it is consistent with the doctrine of separation of powers that the Attorney should be in a position to direct a judge to close a court room?
- (b) Why is it not considered appropriate to seek leave to intervene to make submissions as to why a court should take the extraordinary measures of closing the court room for reasons of national security?
- (c) Why does the Attorney require an un-reviewable, non-compellable discretion to close the court?
- (d) Can the Department explain what "national security information" is?
- (e) How can legal practitioners, self-represented litigants and judges be certain of the scope of the term?
- (f) Wouldn't the recent deportation of Scott Parkin indicate the apparent elasticity of the term 'national security'?

The answer to the honourable senator's question is as follows:

a) If the Attorney-General issues a certificate under the Act, the court is required to hold a closed hearing only in relation to those aspects of a proceeding where the issue of whether and in what form information that may affect national security may be given in evidence needs to be discussed with the court. In all other respects the hearing will be open and transparent. It is not a closed court. A security-cleared legal representative is always present during a closed hearing. The court is also required to provide written reasons for making an order, in relation to the disclosure of information, which is made available to the parties. Security-cleared legal representatives may also have access to the record of a closed hearing. The court retains its discretion to stay the proceedings after the closed hearings if it considers that it will affect the defendant's right to a fair trial.

b) It is the Government's responsibility to ensure that all appropriate steps are taken to protect Australia's national security and the information that may damage that security. Where matters of national security need to be discussed a closed hearing is considered the most appropriate means of achieving this. The new measures will not prevent parties from receiving a fair hearing. In deciding what order to make, the court must consider whether the order would have a substantial adverse effect on the defendant's right to a fair trial, and any other relevant matters. The court retains its power to stay the proceedings if it considers that a hearing would not be fair even after the court has made an order in relation to the disclosure of the information.

c) As above.

d) 'National security' is defined to mean Australia's defence, security, international relations or law enforcement interests' (section 8). Security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979* (section 9). International relations means political, military and economic relations with foreign governments and international organisations (section 10). Law enforcement interests (section 11) includes interests in the following:

- avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence
- protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence
- the protection and safety of informants and of persons associated with informants, and
- ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

(e) The definition is consistent with the definition used under the Protective Security Manual (the PSM) but adds 'law enforcement interests' as a component and removes the reference to 'national interests'. The PSM sets out guidelines and minimum standards in relation to protective security for all Australian Government agencies so it is appropriate to use this as a guide. The definition is necessarily broad to cover all the circumstances where matters of national security may arise. The definition of 'national security' is not intended to be so broad that the proposed regime applies to any issue remotely connected to national security.

The Act places several filters on the information before it gains the full protection of the Act. Firstly the Act defines the meaning of 'security', 'international relations' and 'law enforcements interests'. Secondly section 6A of the Act provides a 'trigger provision' which prevents the Bill from applying to every case where there is some small piece of information which comes within the definition of 'national security'. If for some reason the matter proceeded without the trigger, normal public interest immunity would have to

be relied on. Thirdly, for the Act to apply, the Attorney-General must issue a certificate in relation to the information. In order to issue a certificate, the Attorney-General must be satisfied that the information is likely to prejudice national security. Finally, the definition of 'national security' is subject to judicial oversight. The Act provides that in deciding what order to make, the court must consider whether there would be a risk of prejudice to national security if the information were disclosed or disclosed otherwise than in accordance with the Attorney-General's certificate.

(f) The recent deportation of Scott Parkin does not indicate apparent elasticity in the term 'national security.' ASIO is responsible for providing security assessments under Part IV of the *Australian Security Intelligence Organisation Act 1979*. Security assessments are concerned with whether it would be consistent with the requirements of 'security' for certain action to be taken (in this case, cancellation of Mr Parkin's visa). 'Security' is a precisely defined term, and includes protection of the people of Australia from all forms of 'politically motivated violence,' which is also precisely defined. It includes:

“acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of government, whether in Australia or elsewhere”.

While it therefore follows that in no circumstances could an adverse security assessment be issued on the basis of non-violent advocacy, protest or dissent, the Act also specifically provides that ASIO cannot limit the right of persons to engage in lawful advocacy, protest or dissent, and that the exercise of that right shall not, of itself, be regarded as prejudicial to security (section 17A).