



**AUSTRALIAN  
PRESS  
COUNCIL**

**SUBMISSION**

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**Australian Press Council Submission to the Australian Senate  
Legal and Constitutional Committee Inquiry into the  
*National Security Information (Criminal Proceedings) Bill 2004***

**Executive Summary**

The Australian Press Council recognizes the necessity of legislation to address the issues which arose in the *Lappas* case and acknowledges that the bill seeks to make a compromise between the need to protect security sensitive information and the importance of a fair system of justice in which the court retains a significant level of discretion. However, the Australian Press Council has concerns over certain aspects of the proposed legislation, in particular the broad scope of the definition of “national security”, and the potential for the bill to restrict the public’s right to be informed in relation to matters of legitimate public concern. The Council is also concerned that the bill, in its current form, may be unfair to defendants. The Press Council proposes several amendments to the bill which aim to address these concerns, including a revised definition of “national security”, the insertion into the bill of an offence for issuing a certificate for inappropriate purposes, and defences for disclosure of information in the public interest.

**Australian Press Council Submission to the Australian Senate  
Legal and Constitutional Committee Inquiry into the  
*National Security Information (Criminal Proceedings) Bill 2004***

The Australian Press Council expresses its gratitude for being given the opportunity to comment on the *National Security Information (Criminal Proceedings) Bill 2004*. Although the Council has made a number of criticisms of the proposed legislation, we accept that legislation is necessary in order to address the issues which arose in the *Lappas* case, and we recognise that the bill represents a sincere attempt to reconcile the need to protect security sensitive information, on the one hand, and the aim of providing the court with sufficient discretion to facilitate fair hearings, on the other.

The Press Council has a number of concerns about the content of the *National Security Information (Criminal Proceedings) Bill*. Foremost among those concerns is the breadth of the definition of "national security" which is set down in sections 8 to 12 of the bill. This definition extends to include Australia's economic interests, Australia's political relations with other countries and Australia's scientific or technological interests. The sweeping nature of this definition has the potential to include within its scope a broad range of types of information which not only relate to matters of public interest but which are appropriate matters for public debate. Just a few examples would be contracts for government tenders, analysis or forecasts of the Australian economy, proposed trade agreements with foreign governments, planned changes to Australia's telecommunications infrastructure, or reports of mismanagement within Australia's immigration detention centres.

Anything which falls within this definition may be the subject of a certificate issued by the Attorney-General under section 24 of the bill, provided that the Attorney-General "expects" that the information may be disclosed in a federal criminal proceeding. There is no requirement that the expectation must be soundly based. Thus the Attorney-General has the power to restrain a wide range of information, subject only to a court determination under section 29. The Press Council proposes that the definition of "national security" be narrowed so as to exclude information relating to matters which ought rightfully be the subject of public debate.

A second mechanism which would address the council's concerns regarding the breadth of the definition of "national security" would be to insert a provision into the proposed legislation which makes it an offence to issue a certificate for an inappropriate purpose. Such inappropriate purposes would include the concealing of incompetence, misconduct or corruption. The Attorney-General should also be prohibited from making a determination on the issuing of a certificate if he or she has a conflict of interest. If the information concerns the policies or actions of a current government the decision as to whether to issue a certificate should be made by an independent officer, not by a member of the cabinet. When a judge is required to decide whether or not to make orders under section 29 of the bill, a relevant consideration would be that the certificate was issued either inappropriately or for an inappropriate purpose.

A second area of concern is the reliance on in camera proceedings. While the Council recognizes that in camera proceedings may be necessary in certain instances for the protection of security sensitive information, it believes that the media should be given standing to address the court as to whether or not the court should be closed to the public. In determining whether or not to proceed in camera the court should be required to weigh the risk of prejudice to national security against the public interest in having a proceeding heard in public.

Although the bill makes no specific reference to the media there may be instances where disclosure of information to the media or publication of that information may constitute a breach of the proposed legislation. Although the Press Council accepts that the existence of statutory prohibitions on the disclosure of certain information may be necessary, the Council believes that adequate defences should be provided to protect whistleblowers and others who disclose information where such disclosure is in the public interest. A section should be inserted into the bill which states that, where an individual is prosecuted for disclosing information to the media in breach of the legislation, it is a defence if the public interest in the disclosure outweighs the risk of prejudice to Australia's security. It should also be a defence that a certificate was inappropriately issued in relation to the information, or that the certificate was issued for an inappropriate purpose. Similar defences should apply to the publisher of such information.

There are certain aspects of the bill which, while having no direct effect on the media, raise concerns about the fairness of the proposed legislation to defendants whose prosecutions involve security sensitive information. In section 29(9) of the bill the court is required to give greater weight to the risk of prejudice to national security than to the risk of unfairness to the defendant. The notion that an accused may be subjected to an unfair trial in order to protect national security is extremely disturbing. It would be preferable if this provision were removed, or reworded so as to require the court to give equal weight to both national security and to fairness to the accused.

In certain instances the bill appears to be biased in favour of the prosecution. In section 16, which defines "permitted circumstances" in which information may be disclosed with impunity, the prosecutor is given authority to disclose information in the course of his or her duties but no mention is made of the defendant's counsel. Neither does that section make any reference to solicitor-client privilege. Similarly, in s 27 the court is granted the power to exclude the defendant or the defendant's counsel from the proceedings while the prosecutor addresses the court but no provision is made for the exclusion of the prosecution. The implied assumption is that the prosecution can always be trusted but that defence counsel cannot, and that fairness to the accused should be as a rule be sacrificed to the aim of protecting security sensitive information. This apparent bias against defendants would pose a significant threat to the ability of defence counsel to adequately defend their clients.

In spite of the council's concerns that the bill is too broad in its scope and that it has the potential to cause unfairness to defendants, we acknowledge that the bill makes a genuine endeavour to address a significant risk to the security of sensitive information without unduly hampering judicial discretion to hear and determine prosecutions in a fair and effective manner. The Council requests that, before the bill is passed by the senate,

significant amendments are made in order to protect the right of the public to be informed on matters of public interest and to ensure that defendants receive a fair hearing.

**Summary of Amendments to the *National Security Information (Criminal Proceedings) Bill 2004* Suggested by the Australian Press Council:**

1. The definition of "national security" in the bill is too broad and gives the Attorney-General the ability to conceal information which should be the subject of public debate (such as information relating to the Australian economy, scientific research, government contracts etc). The definition of "national security" should be narrowed.
2. The media should be given standing to address the court on the question of whether a hearing or portion of a hearing is to be held in camera.
3. The media should be given the right to apply for a review of a certificate issued by the Attorney-General under the bill.
4. It should be an offence to issue a certificate for inappropriate purposes (i.e. to prevent scrutiny of government decisions or actions, to conceal misconduct or conceal incompetence).
5. The Attorney-General should be prohibited from determining whether a certificate should be issued where the information involves a potential conflict of interest.
6. Where information concerns the policies or actions of the current government the decision as to whether to issue a certificate should be made by an independent person and not by a member of the cabinet.
7. Before closing proceedings to the public the court should be required to determine if the need to protect sensitive information is outweighed by the public interest in hearing the matter in public.
8. The bill should include defences: where information is disclosed to the media in breach of the proposed legislation, or where that information is published, it should not be an offence if the public interest in the disclosure or publication outweighs the risk of prejudice to national security; or if the Attorney-General has issued a certificate inappropriately or for inappropriate purposes.
9. That section of the bill which requires a court to weigh national security more heavily than fairness to the accused should be removed.