Secretary

Senate Legal and Constitutional Legislation Committee

Parliament House
Canberra ACT 2600

25 June 2004

Dear Secretary

Submission to Inquiry into the provisions of the National Security Information (Criminal Proceedings) Bill 2004 (Cth) and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth)

I am an Associate Lecturer at the School of Law and Legal Studies, La Trobe University. This letter provides a submission to assist the Senate Legal and Constitutional Legislation Committee ('the Committee') in its inquiry into the National Security Information (Criminal Proceedings) Bill 2004 (Cth) and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth). I am also prepared to appear before the Committee to give oral evidence if that should assist the Committee's inquiry.

My view is that these Bills, in their current form, should be rejected. If passed, they will severely undermine the right to a fair trial for four reasons.

First, these Bills are underpinned by a very broad notion of 'national security.' This concept is defined to mean 'Australia's defence, security, international relations, law enforcement interests or national interests'.[1]

Second, they propose granting the Attorney-General wide power to prevent the disclosure of 'national security' information in federal criminal proceedings. The

[1] National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 8.

Attorney-General can do so by issuing a certificate.[2] The decision whether or not to issue a certificate will be exempted from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[3] Moreover, the issuing of a certificate is deemed to be conclusive evidence that the pre-trial disclosure of such information is likely to prejudice 'national security'.[4]

Third, the Bills propose granting prosecutors with extraordinary power. They are, firstly, in a position to determine whether or not the relevant provisions apply because these provisions only operate if the prosecutor has served a notice.[5] Further, the prosecution is armed with the advantage of being able to disclose 'national security' information even when a ministerial certificate is in operation.[6]

Fourth, the Bills propose a security clearance requirement for the legal representatives of defendants that would significantly undermine the right to legal representation of defendants in 'national security' cases. While the substantive provisions of the Bill do not supply any criteria for the granting of security clearance, a note to the Bill states that such decisions will be governed by the *Australian Government Protective Security Manual.*[7] In the absence of a security clearance, disclosure of information that is likely to prejudice 'national security' will be illegal unless authorised by the Secretary of the Attorney-General Department.[8]

The requirement of the security clearance alone exposes their legal representatives to a 'subjective and invasive process'.[9] This process is all the more subjective and invasive because of the criteria listed in the *Protective Security Manual.* This manual lists the following as attributes that might indicate a person is suitable to obtain a security clearance: maturity, responsibility, tolerance, honesty and loyalty.[10] The application of such vague criteria would clearly depend upon the value judgments.

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[2] National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 24
[3] National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth).
[4] National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 25(1)-(2).
[5] National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 6(1).
[6] National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 16.
[7] Ibid cl 34(2) (Note 1).
[8] Ibid cl 41.
[9] Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information: Discussion Paper No 67* (2004) 142.
[10] Attorney-General's Department, *Commonwealth Protective Security Manual* (2000) D 30-33 quoted in Australian Law Reform Commission, above n 71, 142.

Further, such judgments to be meaningful would need to be made on the basis of intimate knowledge of the lawyer's life. All in all, it is not fanciful to think that the prospect of the security clearance process alone might deter some lawyers from representing defendants in 'national security' cases.

What makes this proposal even more egregious is that it will confer extraordinary power on the executive. As noted above, the prosecution is in a position to determine whether or not this process applies.[11] If the process applies, it is then controlled by the Attorney-General's Department, a body that is intimately connected with the prosecution. To make things worse, the process is governed by a policy document, *Australian Government Protective Security Manual.* Not being a statutory instrument, this document can be changed at the will of the government. More than this, this document is not publicly available. According to the Attorney-General's website, while the *Protective Security Manual* 'is not security classified . . . its availability will be restricted to government departments, agencies and contractors working to (sic) government'.[12]

In sum, this security clearance requirement, if enacted, will mean that the ability of defendants in 'national security' criminal proceedings is severely hampered with their lawyers or potential lawyers subject to security clearance process controlled by the executive branch of government on the basis of a secret document promulgating indeterminate and invasive criteria.

Thank you for reading my submission.

Yours sincerely,

(Joo-Cheong Tham)

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[11] National Security Information (Criminal Proceedings) Bill 2004 (Cth) cl 6(1).
[12] Attorney-General, *Protective Security Coordination Centre: Protective Security Manual (PSM),* available at http://www.ag.gov.au/ ; accessed on 7 June 2004.