Submission to the

**Senate Legal and Constitutional Legislation Committee**

regarding the

# INQUIRY INTO THE NATIONAL SECURITY INFORMATION (CRIMINAL PROCEEDINGS) BILL 2004 AND THE NATIONAL SECURITY INFORMATION (CRIMINAL PROCEEDINGS) (CONSEQUENTIAL AMENDMENTS) BILL 2004

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# 1. Introduction

Amnesty International's mission is to promote and defend all the human rights enshrined in the *Universal Declaration of Human Rights* and other international standards. Amnesty International is the world's largest independent human rights organisation, comprising more than 1.5 million members and supporters in over 150 countries and territories. Amnesty International is impartial and independent of any government, political persuasion or religious belief.

Since the tragic events of 11 September 2001 in the United States of America, many States have enacted measures and amended legislation regarding national security. As an independent and impartial global human rights organisation, Amnesty International is monitoring the enactment of such legislation and its impact on human rights.

Amnesty International Australia continues to closely monitor legislation introduced in Australia since September 2001 to counter "terrorism" and protect national security. Amnesty International Australia made submissions to and appeared before this Committee in May 2002 during its inquiry into the *Security Legislation Amendment (Terrorism) Bill* 2002 [No. 2]. Submissions were also made to the review of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002 to the Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional References Committee in 2002. Amnesty International recently made a submission to this Committee on the *Anti-Terrorism Bill* 2004.

## 2. Summary

If the proposed legislation is enacted as it stands, Amnesty International Australia is concerned that Australia may be in breach of international human rights obligations.

Amnesty International Australia's main concerns relating to the *National Security Information (Criminal Proceedings) Bill 2004* ("the Bill") are:

- The Bill breaches the right to a fair trial/ hearing;
- Vagueness of terms;
- Limits on accessing a lawyer of your own choice.

Amnesty International Australia objects to the Bill at two levels. While this submission addresses the shortcomings in the particular processes established by the Bill, Amnesty International Australia fundamentally objects to the regime that the Bill seeks to establish. The end result of the application of the provisions of the Bill would be to allow for a trial to be conducted and for possible conviction of the defendant on the basis of information that the defendant and the defendant's legal representative may not ever see or hear. Making information secret denies people facing extremely serious allegations and consequences the right to defend themselves effectively. The entire regime and the end goal of all the provisions discussed below would thereby breach the right to a fair trial. The rules of evidence and standard of proof in the criminal justice system have been prescribed in order to minimize the risk of innocent individuals being convicted and punished. It is unacceptable for governments to circumvent these safeguards. Thus Amnesty International Australia objects to this scheme in its entirety.

The measures adopted by the Australian Government post-September 2001 in relation to anti-"terrorism" laws, and the subsequent threat and/or erosion of civil liberties and human rights are of serious concern to Amnesty International Australia. The Australian Government has been active in introducing legislation to combat "terrorism" and to enhance national security. The Government first announced its intention to introduce anti-"terrorism" legislation in October 2001. Five bills were

introduced on 12 March 2002[1] and a sixth bill was introduced on 21 March 2002.[2] After various Committee inquiries and parliamentary debate, all bills were amended and passed in Parliament. In particular, the Committee process resulted in substantial amendments to the *Security Legislation Amendment (Terrorism) Bill* 2002 [No. 2] and to the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002.

Amnesty International Australia remains seriously concerned that the Government is continuing to introduce bills relating to security and terrorism in a piece-meal fashion. This year has already seen the introduction and passage of the *Criminal Code Amendment (Terrorist Organisations) Bill* 2003; the introduction of the *Anti-Terrorism Bill* 2004 including a public inquiry and the adoption of various amendments; the introduction of the Bill currently under consideration; and the introduction of the *Anti-Terrorism Bill (No. 2)* 2004 and the *Anti-Terrorism Bill (No. 3)* 2004. Considering and responding to these bills requires a great deal of time and energy. The task is further complicated by the short time frames set for the preparation of submissions.

## 3. The Bill

The Bill seeks to establish a process for strengthening "… the procedures for protecting national security information" and to "…provide a court which has found that sensitive security related information should not be disclosed with an alternative to simply dismissing the charge".[3] The provisions of this Bill will only apply to a federal criminal proceeding if the prosecutor gives notice in writing to the defendant and the court that the Bill applies to the proceeding.[4] At first instance, the Bill establishes a process for the Attorney-General to determine that particular information or witnesses may prejudice national security. Both the prosecutor and the defence are required to notify the Attorney-General and the court "… if they know or

[1] *Security Legislation Amendment (Terrorism) Bill*; *Suppression of the Financing of Terrorism Bill*; *Border Security Protection Amendment*; *Criminal Code Amendment (Suppression of Terrorist Bombing) Bill*; *Telecommunications Interception Legislation Amendment Bill*

[2] *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002

[3] Commonwealth, *Parliamentary Debate*, House of Representatives, 27 May 2004, p. 29129, Attorney General.

[4] Proposed s. 6(1)(b)

believe that they, or one of the witnesses they intend to call, will disclose during the proceeding information that may affect our national security".[5]

Upon receiving notification, the Attorney- General may issue a certificate preventing disclosure of the information[6] or precluding an individual from being called as a witness.[7] If the certificate is issued before the trial begins, the certificate is conclusive evidence during the pre-trial proceedings[8] and extradition proceedings[9] that disclosure of the information is likely to prejudice national security. The information cannot be disclosed contrary to the non-disclosure certificate.[10]

Once the matter gets to trial, there will be a closed hearing of the trial court.[11] The court will decide whether the information can be disclosed or whether the witness can be called. As a priority, the court is to consider whether disclosure of the information or calling of the witness would create a risk of prejudice to national security.[12] A secondary consideration is whether an order would have an adverse effect on the defendant's right to receive a fair hearing.[13] The defendant and his legal representative may be excluded from the closed hearing.[14]

If the court confirms that the information should not be disclosed, then the information may not be disclosed except in "permitted circumstances". "Permitted circumstances" include disclosure be the prosecutor in the course of his or her duties in relation to the proceeding.[15] This order by the court may preclude disclosure of the information to the defendant or their legal representative.

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[5] Commonwealth, *Parliamentary Debate*, House of Representatives, 27 May 2004, p. 29129, Attorney General.

[6] Proposed s. 24

[7] Proposed s. 26

[8] Proposed s. 25(1)

[9] Proposed s. 25(2)

[10] Proposed s. 38

[11] Proposed s. 25(3)

[12] Proposed s. 29(8)

[13] Proposed s. 29(8)(b)

[14] Proposed s. 27(3)

[15] Proposed s. 16

It is an offence with a penalty of two years imprisonment:

- to disclose information that is likely to prejudice national security once notice has been given to the Attorney-General;[16]
- to call a person as a witness once the Attorney-General has been notified that the person will disclose information by their mere presence and that is likely to prejudice national security;[17]
- to intentionally fail to notify the Attorney-General that the prosecutor or defendant knows or believes that he or she will disclose in a federal criminal proceeding or that a witness will disclose in giving evidence or by their mere presence information is likely to prejudice national security;[18]
- to disclose information in contravention of the Attorney-General's certificate;[19]
- to call a witness in contravention of the Attorney-General's witness exclusion certificate;[20]
- to contravene a court order;[21] and
- to disclose information to a legal representative of the defendant or a person assisting a legal representative of the defendant who has not been security cleared to a level considered appropriate by the Secretary.[22]

## 4. Amnesty International's Concerns

Amnesty International's main concerns relating to the *National Security Information (Criminal Proceedings) Bill 2004* are that:

**The Bill breaches the right to a fair hearing and trial**

Under international law, everyone is entitled to a fair hearing.[23] The right to a fair hearing encompasses all the procedural and other guarantees of fair trial laid down in

[16] Proposed s. 35

[17] Proposed s. 36

[18] Proposed s. 37

[19] Proposed s. 38

[20] Proposed s. 39

[21] Proposed s. 40

[22] Proposed s. 41

[23] *Universal Declaration of Human Rights* Article 10; *ICCPR* Art 14(1)

international standards, but is wider in scope. The right to a fair hearing lies at the heart of the concept of a fair trial. Article 14 of the *International Covenant on Civil and Political Rights* ("the *ICCPR*") states that,

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> > (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> >
> > (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> >
> > (c) To be tried without undue delay;
> >
> > (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

The right to a fair hearing is specified by a number of concrete rights, as listed in Article 14(3)(a-g). However, these rights are minimum guarantees. The right to a fair trial is broader than the sum of the individual guarantees, and depends on the entire conduct of the trial. The right to a fair trial applies at all stages of the proceedings and to all trials in all courts. This Bill may breach several specific provisions of the right to a fair hearing, as well as undermining the central requirement of equality between the parties.

An essential component of the right to a fair hearing is the principle of "equality of arms".[24] This principle firmly establishes the need for equality between the parties and is an overarching right that must be observed throughout the trial process. It means that both parties must be treated in a manner ensuring that they have a procedurally equal position during the course of the trial and are in an equal position to make their case.[25] This is particularly important in criminal trials where the prosecution has all the machinery of the state behind it. The defence must have a reasonable opportunity to prepare and present its case on equal footing to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information. Its requirements also include the right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. This principle would be violated, for example, if the accused was not given access to information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing where the prosecutor was present. This Bill proposes several such restrictions that would directly undermine the right to "equality of arms" and would remove the equality between the parties.

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[24] Also discussed in the ALRC Report 98 *Keeping Secrets: The Protection of Classified and Security Sensitive Information* 7.67- 7.69

[25] See European Court judgments in the cases of *Ofrer* and *Hopfinger*, Nos 524/ 59 and 627/59 Dec. 19.12.60, yearbook 6, p. 680 and 696.

The Bill may breach the right to prepare a defence, both pre-trial and during trial.[26] The right to prepare a defence means that the accused and their counsel must be granted access to appropriate information, including documents, information and other evidence that might help the accused prepare their case, exonerate them or, if necessary, mitigate a penalty. Such access is required in accordance with Principle 21 of the *Basic Principles on the Role of Lawyers* which states, "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time".

Specifically the Bill provides for restriction of information both at the pre-trial and trial stage. The Attorney-General may issue a certificate which serves as conclusive evidence for pre-trial proceedings that disclosure of the information is likely to prejudice national security. It is an offence to disclose this information. If the information is in the control of the prosecution, it may not be disclosed to the defendant and their counsel and would thereby impact upon their ability to prepare a defence. They will be unable to prepare a response to the information or to rely on the information in the preparation of the defence. Conversely if the information is actually in the possession of the defendant or their counsel and a certificate is issued by the Attorney-General, this will prevent the defendant and their counsel building and developing their case as they will be unable to rely on the information pre-trial and will be uncertain of its status at trial until the court has held a hearing on the certificate.

The Bill may breach the right to be present at trial and appeal.[27] Amnesty International believes that the accused should be present in court during a trial to hear the full prosecution case, to put forward a defence or assist their counsel in doing so, to refute or provide information to enable their counsel to refute evidence and to examine witnesses or advise their counsel in the examination of witnesses. If the court considers that the presence of the defendant and their legal representative is likely to prejudice national security, the Bill provides for the possible exclusion while the prosecutor gives details of the information concerned or argues why the

[26] *ICCPR* Article 14(3)(b)

[27] *ICCPR* Article 14(3)(d)

information should not be disclosed or why the witness should not be called to give evidence.[28] This would prevent the defendant from rebutting the evidence or from providing appropriate instructions to their legal representative. It would also prevent them from knowing the full details of the case against them. This would prevent the defendant from being able to hear the full prosecution case and would limit their defence in breach of international law.

The Bill may breach the right to call and examine witnesses.[29] The right to call and examine witnesses ensures that the defence has an opportunity to question witnesses who will give evidence on behalf of the accused and to challenge evidence against the accused. The questioning of witnesses by both the prosecution and the defence provides the court with an opportunity to hear evidence and challenges to that evidence. The Bill provides for the possibility of first a certificate from the Attorney-General[30] and then a court order preventing a party from calling a witness.[31] This would prevent the defendant from presenting their best case and will limit the ability of the defendant to mount a defence.

The Bill may breach the right to a public hearing. The right to a public hearing ensures that the public are able to know how justice is administered and what decisions are reached by the judicial system. This right is protected by Article 14(1) of the *International Covenant on Civil and Political Rights* (the *ICCPR*). While it is the case that the public's access may be restricted in certain cases, these are to be restrictively interpreted. One such case is for reasons of "national security in a democratic society". Given that the *ICCPR* carefully lists the grounds for exclusion, it is important to ensure that "national security" is clearly defined and limited.

The Bill provides for the use of closed hearings to determine whether disclosure of information should be restricted on the grounds of national security. National security is defined as " Australia's defence, security, international relations, law enforcement interests or national interests".[32] The Bill goes on to further define "security", "international relations", "law enforcement interests" and "national interests". These

[28] Proposed s. 27(3)

[29] *ICCPR* Article 14(3)(e)

[30] Proposed s. 26(2)

[31] Proposed s. 29(7)

[32] Proposed s. 8

definitions are unacceptably broad. “National security” incorporates an extraordinarily large area of issues and it is extremely difficult to delineate the limits of the definition. The application of this definition would allow for virtually any issue to be considered a matter of “national security” and thus to be subject to both a certificate of the Attorney-General preventing disclosure of the information pre-trial and a determination of the court preventing disclosure of the information at trial. This would result in a large number of closed hearings.

Making information secret denies people facing extremely serious allegations and consequences the right to defend themselves effectively. The rules of evidence and standard of proof in the criminal justice system have been prescribed in order to minimize the risk of innocent individuals being convicted and punished. It is unacceptable for governments to circumvent these safeguards.

**Vagueness of terms**

As discussed above, Amnesty International is concerned with the uncertainty created by the definition of “national security”. Amnesty International believes that it is important for there to be certainty in the law and for all criminal offences to be defined precisely so that people can know whether their conduct contravenes the law. This is particularly the case in relation to offences with penalties of imprisonment.

The Bill states that it is an offence to intentionally fail to notify the Attorney-General if the prosecutor or defendant knows or believes that in a federal criminal proceeding they will disclose information that relates to national security or that may affect national security and that disclosure is likely to prejudice national security.[33] It is also an offence if the prosecutor or defendant knows or believes that a witness will disclose information in their evidence or by their mere presence that may affect national security and the prosecutor or defendant intentionally fails to advise the court and the disclosure is likely to prejudice national security.[34]

Amnesty International is concerned that the definition of “national security” is so broad as to make it virtually impossible to know if information is going to relate to national security or affect national security and therefore it is virtually impossible to

[33] Proposed s. 37

[34] Proposed s. 37

know if one is committing an offence. Amnesty International is also concerned that this offence may unacceptably limit the issues that may be presented and discussed in court as an extremely broad range of issues may fall under the definition of "national security". This may impact on the ability to defend a criminal case

**Limits on accessing a lawyer of your own choice.**

The Bill creates the possibility of lawyers obtaining security clearances. A lawyer can only make an application for security clearance if the Secretary of the Attorney-General's Department gives written notice to the legal representative of the defendant that an issue is likely to arise relating to a disclosure of information in the proceeding that is likely to prejudice national security.[35] The trigger mechanism for the security clearance process is the written notice from the Secretary of the Attorney-General's Department. However there is no obligation on the Secretary to give such notice to the legal representative of the defendant.

If the legal representative does receive such a notice, then they may make an application for a security clearance by the Department at a level considered appropriate by the Secretary.[36] If the legal representative fails to apply for a security clearance within 14 days of receiving the notice, then the prosecutor may advise the court. The court may then advise the defendant of the consequences of engaging a legal representative who has not been given a security clearance at an appropriate level and recommend that the defendant engage a legal representative who has been given or who is prepared to apply for security clearance. The bill provides that it is an offence to disclose information that is likely to prejudice national security to a legal representative of the defendant or a person assisting a legal representative of the defendant if the person does not have security clearance at the level considered appropriate by the Secretary.[37]

Amnesty International is concerned that this may limit the ability of the defendant to choose their own lawyer. The right to choose your own lawyer is protected by Article 14(3)(d) of the *International Covenant on Civil and Political Rights* and Principle 1 of the *Basic Principles on the Role of Lawyers*. The defendant's chosen lawyer may not

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[35] Proposed s. 34(1)

[36] Proposed s. 34(2)

[37] Proposed s. 41

receive written notice from the Secretary that an issue is likely to arise relating to a disclosure of information that is likely to prejudice national security.  Further, their application for security clearance may be denied or may not be granted at a level considered appropriate by the Secretary in relation to the information. The defendant would then be unfairly prejudiced and, although they could technically retain their lawyer of choice, they would be placing themselves in a disadvantageous position. This limits the right to a lawyer of your own choice, as the defendant cannot be expected to place themselves at a disadvantage to exercise this right.

## 5. Conclusion

While recognising that the need to balance individual freedoms against anticipated threats to the general community is a complex process, Amnesty International Australia recommends that extreme caution be taken before the rights of individuals protected under Australia law are diminished. Amnesty International Australia is concerned that the proposed legislation breaches Australia's obligation to ensure that any measures taken in the interest of national security include safeguards for the protection of fundamental non-derogable human rights.

Amnesty International Australia fears that legislation such as the Bill threatens the protection of human rights. It is imperative that the legislature is scrupulous in its adherence to such principles during such challenging times. Amnesty International is concerned that the Bill could be used to give legislative legitimacy to what would otherwise be a contravention of international human rights standards.