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)

0. Introduction

This submission relates to the Committee's current inquiry into the National Security Information (Criminal Proceedings) Bill 2004 ('the Principal Bill') and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 ('the Auxiliary Bill'). If passed, these two Bills would bring about radical changes to the existing law relating to criminal evidence and procedure. These changes have the potential drastically to undermine the right of accused persons to a fair trial. I therefore believe that these changes should be opposed.

The stated object of the Principal Bill is to 'prevent the disclosure of information in federal criminal proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing this disclosure would seriously interfere with the administration of justice.'[1] This is not a full statement of the purpose of the legislation. A full statement may be found in the Attorney-General's Second Reading speech in support of the Principal Bill:

> The government has an obligation to protect Australia's national security and the information that may damage that security.
>
> At the same time, the government has an equally important obligation to enforce Australia's criminal laws, including the laws that protect our security.
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> We must ensure that those who break the law do not escape punishment.
>
> A recent criminal trial demonstrated that a conflict between these obligations may arise during prosecutions in relation to Commonwealth security offences, such as terrorism and espionage.
>
> In these cases, the Commonwealth may face the unpalatable decision of whether to risk disclosing sensitive information relating to national security or to protect this information by abandoning a prosecution, even where the alleged crimes could themselves have grave consequences for our national security…
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> [The Principal Bill] will provide a court which has found that sensitive security related information should not be disclosed with an alternative to simply dismissing the charge.[2]

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[1] Clause 3 (1). Unless noted otherwise, all references are to clauses of the Principal Bill.

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, p 29129.

The purpose of the Bill, as the statement of the Attorney-General makes clear, is to permit the prosecution and conviction of individuals on the basis of information which, for reasons of national security, is not itself tendered in evidence against them at trial.

The existing law on public interest immunity in relation to criminal trials has evolved through such cases as *Sankey v Whitlam*[3] and *Alister v The Queen*.[4] *Sankey* concerned an application by a defendant to have documents central to the prosecution excluded on ground of public interest immunity.[5] *Alister* concerned a defendant's request for access to documents claimed to be of exculpatory value, which the prosecution sought to exclude on grounds of public interest immunity.[6] However, the state of affairs with which the Principal Bill is intended to deal is quite different from either of these. The Principal Bill is intended to deal with circumstances such as those which arose in *R v Lappas*.[7] In *Lappas*, certain documents were essential to the prosecution case; however, the prosecution also wished to keep those documents secret, on national security grounds. The prosecution therefore sought to lead in evidence copies of the documents with all substantive content blacked out, accompanied by a general description of the content of the documents, and oral evidence purporting to demonstrate that a certain construction could placed on the text which would permit an inference to be drawn, the drawing of which was essential to the prosecution case.[8] In rejecting this means of proceeding, Gray J noted that

> Presumably, there could be no cross-examination on whether that interpretation accurately reflected the contents for that would expose the contents. Nor could a person seeking to challenge that interpretation give their own oral evidence of the contents for that also would expose those contents. The whole process is redolent with unfairness.[9]

In the end, the particular charge which depended upon adducing this particular evidence was stayed,[10] although other charges proceeded, and resulted in Lappas's conviction.[11]

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[3] (1978) 142 CLR 1 (hereafter '*Sankey*').

[4] (1984) 154 CLR 404 (hereafter '*Alister*'). Although the issue of public interest immunity in Commonwealth law is now governed by s 130 of the *Evidence Act 1995* (Cth), this legislation is largely a restatement of the existing common law: *Laws of Australia*, EVIDENCE 16.7 'Privilege and Public Interest Immunity', [5]; see also the discussion by von Doussa J in *Chapman v Luminis Pty Ltd* (2000) 100 FCR 229, 246.

[5] See, for example, the discussion at (1978) 142 CLR 1, 19, 46-7 (Gibbs CJ).

[6] See, for example, the discussion at (1984) 154 CLR 404, 414-6 (Gibbs CJ).

[7] [2001] ACTSC 115 (hereafter '*Lappas*'). The Attorney-General referred to this decision in his Second Reading speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, p 29129.

[8] [2001] ACTSC 115, [2], [8 -10].

[9] Ibid [14].

[10] Ibid [30].

It is this sort of procedure, 'redolent with unfairness', which the Principal Bill seeks to permit: the possibility of prosecution upon the basis of evidence that is not disclosed in full to, and hence is unable to be properly tested by, the defence. If this were achieved, it would constitute a radical change to Australian criminal procedure.

1. The operation of the Principal Bill

1.1 The regime for controlling the disclosure of information

The Principal Bill would achieve its objective by introducing a complex regime governing the disclosure of information believe to have implications for national security ('the Regime'). This regime has four interrelated steps. It is necessary to set out these steps in some detail, in order to point out the grave potential for injustice that they create.

1.1.1 The first step of the Regime

The discretion lies with the prosecutor to invoke the operation of the Regime.[12]

1.1.2 The second step of the Regime

Once the prosecutor has invoked the Regime, a number of obligations are placed both on the prosecutor and on the defendant.

Each is obliged to notify both the court and the Attorney-General if he or she believes that he or she will, during the course of the proceeding, disclose information relating to or affecting national security, or call a witness who will disclose such information merely by his or her presence.[13] The notice to the Attorney-General must include a description of the information or, if the information is contained in a document, a copy of or extract from the document containing the information.[14]

Each is also obliged to notify the court if he or she believes that a witness, in answering a question, will disclose information relating to or affecting national security. In this case, the witness's answer to the question will have to be given in writing, and this written answer

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[11] A summary of the proceedings against Lappas is given in Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information*, Discussion Paper No 67 (2004), Appendix 4.

[12] Clause 6 (1) (b).

[13] Clause 22 (1).

[14] Clause 22 (2).

shown to the prosecutor. If the prosecutor believes that giving this answer in the proceeding will disclose information relating to or affecting national security, the prosecutor will then have to advise the court of this belief, and notify the Attorney-General.[15]

Once the Attorney-General has been notified, the court must adjourn proceedings,[16] so that matters can proceed to the next step.

To intentionally fail to give the notice which one is obliged to give, either to the court or to the Attorney-General, is an offence punishable by up to two years in prison.[17] And if, subsequent to notice being given to the Attorney-General:

- the prosecutor or defendant discloses the information in question; or,
- the prosecutor or defendant calls the witness in question; or,
- the witness whose evidence is in question discloses the information in question,

and if such disclosure is likely to prejudice national security, then the discloser commits an offence punishable by up to two years imprisonment.[18] An exception applies to the prosecutor, who does not commit an offence if he or she discloses the information in question, provided that the disclosure takes place in the course of carrying out his or her duties.[19] An exception also applies to members of the staff of the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service or the Defence Signals Directorate, all of whom may disclose the information in the course of their duties.[20]

There is an alternative route to the third step of the Regime. The Attorney-General may act independently of any notice received from the prosecution or defence, if her or she for any reason expects that information of the relevant sort will be disclosed, either by the prosecution or defence, or by the mere presence of a witness.[21]

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[15] Clause 25.

[16] Clauses 22 (3), 23 (7).

[17] Clause 37.

[18] Clauses 35, 36.

[19] Clause 16 (a) (definition of ‘permitted disclosure’) in conjunction with clauses 35 (1) (d), (2) (d).

[20] Clause 16 (b) together with *Intelligence Services Act 2001* (Cth), s 3 (definition of ‘staff member’).

[21] Clauses 24 (1) (a) (ii), 26 (1) (a) (ii).

1.1.3 The third step of the Regime

The third step is reached once the Attorney-General has been given notice of the possibility of the disclosure of information of the relevant character, or, in the absence of notice, expects such disclosure to occur. The Attorney-General may take one of a number of actions.

The Attorney-General may decide that no further steps will be taken. In this case, he or she must inform the court of this decision. He or she must also inform the relevant party or parties of this decision:

- if it is the prosecutor who is likely to disclose the relevant information, or to call a witness whose mere presence would constitute disclosure – the prosecutor;
- if it is the defendant who is likely to disclose the relevant information, or to call a witness whose mere presence would constitute disclosure – the defendant;
- if it is a witness's answer to a question which has been judged by the prosecution to constitute disclosure – the prosecution, the defence and the witness.[22]

In the case of information that would be disclosed by way of a document, the Attorney-General may issue a *non-disclosure certificate*. The certificate must describe the information the disclosure of which is threatened, and must prohibit the witness, or the prosecution, or the defence, as appropriate, from disclosing that information. This certificate may be accompanied by:

- a copy of the document with the information deleted, which copy may be disclosed; or,
- a copy of the document with the information deleted, but with a summary of the deletions attached, which copy and summary both may be disclosed; or,
- a copy of the document with the information deleted, but with a statement attached of the facts that the deleted information would, or would be likely, to prove, which copy and statement both may be disclosed; or,

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[22] Clauses 24 (5), (6), 26 (6)

- by nothing.[23]

In the case of information that would not be disclosed by way of a document, the Attorney-General may likewise issue a *non-disclosure certificate*. The certificate must describe the information the disclosure of which is threatened, and must prohibit the witness, or the prosecution, or the defence, as appropriate, from disclosing the information. This certificate may be accompanied by:

- a written summary of the information, which summary may be disclosed; or,
- by a written statement of the facts that the information would, or would be likely, to prove, which statement may be disclosed; or,
- by nothing.[24]

In those cases in which the information would be disclosed by a witness's answer to a question, it is not clear how the Attorney-General is to give a description of the information, given that clause 23 provides that only the prosecutor and the court are permitted to see the witness's written answer.

In the case of a witness whose mere presence would threaten disclosure, the Attorney-General may instead issue a *witness exclusion certificate*, stating that the witness must not be called.[25]

The Auxiliary Bill is intended to amend the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to ensure that decisions by the Attorney-General to grant a certificate are not subject to review under that act upon an application by the defendant.[26] Furthermore, the Principal Bill would make it is an offence, punishable by up to two years imprisonment, to disclose information or to call a witness in contravention of a non-disclosure or witness exclusion certificate.[27] Therefore, the power of the Attorney-General to issue a certificate

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[23] Clause 24 (2).

[24] Clause 24 (3).

[25] Clause 26 (3).

[26] National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, Schedule 1, Item 1. The Explanatory Memorandum to the Auxiliary Bill describes this as a 'limitation' on jurisdiction (Explanatory Memorandum, National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, p 2; the Attorney-General, in his Second Reading speech in support of the Auxiliary Bill, does not canvass this consequence of amending the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to include a certificate decisions within the definition of 'related criminal justice process decision' (Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, p 29130).

[27] Clauses 38. 39.

gives the Attorney-General an extensive power to determine the course of a criminal proceeding, so long as the certificate stands.

1.1.4 The fourth step of the Regime

It is following the issuing of a certificate by the Attorney-General that the fourth and final step of the Regime comes into play: the determination of the effects on the proceeding of the issuing of that certificate.

The Attorney-General must provide to the court a copy of any certificate issued,[28] any summary or statement attached to it,[29] and, if the information is contained in a document, that document.[30] The Regime does not explain how the Attorney-General is to provide the document to the court if it is not in his or her possession; presumably, the Attorney-General would provide to the court the copy of or extract from the document that had been provided to him or her by the relevant party pursuant to clause (22) (2) (c).

If the proceeding is a criminal trial, then at the pre-trial stage any certificate issued by the Attorney-General stands.[31] Furthermore, a non-disclosure certificate is conclusive evidence, in pre-trial proceedings, that disclosure of the information in question is likely to prejudice national security.[32]

Once the matter comes to trial – or if a certificate is issued during the course of the trial – then the trial must be adjourned (or, if it has already been adjourned, the adjournment must continue), in order to permit the court to respond to the issuing of the certificate.[33] During this hearing, the court may order that defendant, and/or the defence counsel, be excluded from that part of the hearing in which the prosecutor gives details of the information concerned, or argues as to why it should not be disclosed, or why a witness should not be called, if the court considers that their presence is likely to prejudice national security. The Attorney-General has a right of intervention in such a hearing.[34]

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[28] Clauses 24 (4) (a), 26 (3).
[29] Clauses 24 (4) (b), (c).
[30] Clause 24 (4) (b).
[31] It is only once the trial itself commences that the court must consider the certificate: clauses 25 (3), 26 (4).
[32] Clause 25 (1).
[33] Clauses 25 (3), 26 (4), 29 (1).
[34] Clause 28.

In the case of a witness excluded by a certificate of the Attorney-General, the court may permit or prohibit the calling of the witness.[35]

In the case of information subject to a non-disclosure certificate, the court must first determine whether the information in question is admissible as evidence.[36] It should be noted that this may require the court to consider whether the information is apt to be protected under the traditional doctrine of public interest immunity, given effect to by s 130 of the *Evidence Act 1995* (Cth); for it is a consequence of a determination that information not be adduced as evidence on such grounds, that the evidence is deemed inadmissible.[37]

If the court determines that the information is admissible, the court may then make one of several possible orders.

The court may permit disclosure of the information, or prohibit it.[38]

In the case of a document, the court may permit disclosure of:

- a copy of the document with the information deleted; or,
- a copy of the document with the information deleted, but with a summary of the deletions attached; or,
- a copy of the document with the information deleted, but with a statement attached of the facts that the deleted information would, or would be likely, to prove.[39]

If such an order is made, evidence of the contents of the document may be adduced by tendering the copy, or the copy and summary, or the copy and statement.[40]

In no case is the court bound by the Attorney-General's certificate.[41] However, in reaching its decision, the court must consider whether, having regard to the Attorney-General's certificate, permitting the disclosure of the information, or the calling of the witness, would

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[35] Clause 29 (7).

[36] Clause 29 (6).

[37] *Evidence Act 1995* (Cth), s 134. The inadmissibility of the evidence in *Lappas*, which followed upon the Crown successfully establishing its claim of public interest immunity, was a crucial factor in the failure of the prosecution in that case: [2001] ACTSC 115, [15].

[38] Clause 29 (2), (4), (5).

[39] Clause 29 (2).

[40] Clause 29 (5).

[41] Clause 29 (2) states this explicitly in relation to non-disclosure certificates. Clause 29 (7) makes this clear by implication with respect to witness-exclusion certificates.

risk prejudice to national security.[42] The court must also consider whether its order would have a substantial adverse effect on the defendant's right to receive a fair hearing, as well as any other matter the court considers relevant.[43] However, it is the first of these consideration to which the court must give the greatest weight.[44] The court must also, in reaching its decision, have regard to the object of the regime set out in clause 3 (and quoted above).[45]

In the case of an extradition hearing, if a non-disclosure certificate is issued by the Attorney-General, the court must go through the same process as for a trial.[46] However, in an extradition hearing, unlike in the case of a trial, the issuing of a non-disclosure certificate by the Attorney-General is conclusive evidence that disclosure of the information in question is likely to prejudice national security.[47] The status of a witness-exclusion certificate in an extradition hearing is less clear. Section 26 (4) sates that

> The court must:
>
> (a) if the certificate is given to the court before the trial begins …
>
> (b) if the certificate is given to the court after the trial begins …

and makes no reference to extradition hearings, leaving it unclear whether the reference to 'the trial' is meant to exclude the case of extradition hearings (resulting in the witness exclusion certificate standing) or is intended, rather, to refer in adiition to the commencement of other sorts of hearings that are not pre-trial hearings, such as extradition hearings.

Once a court has given an order in relation to a certificate issued by the Attorney-General, it is an offence, punishable by up to two years imprisonment, to contravene that order.[48]

1.2 The security clearance regime

If the prosecutor has invoked the Regime in respect of a particular federal criminal proceeding,[49] then it is an offence, punishable by up to 2 years imprisonment, for anyone to disclose information that is likely to prejudice national security to any legal representative of

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[42] Clause 29 (8) (a).
[43] Clause 29 (8) (b), (c).
[44] Clause 29 (9).
[45] Clause 3 (2).
[46] Clause 25 (4).
[47] Clause 25 (2).
[48] Clause 40.
[49] Clause 6 (1) (a)

the defendant, or to any person assisting a legal representative of the defendant.[50] The offence is not committed if the disclosure has been approved by the Secretary of the Attorney-General's Department, or is in accordance with conditions that have been approved by the Secretary, or if the individual to whom disclosure has been made has been given a security clearance considered appropriate by the Secretary in relation to the information.[51]

Before or during a proceeding in which the Regime has been invoked, the Secretary of the Attorney-General's Department may give notice to any legal representative of the defendant, or to any person assisting a legal representative of the defendant, that in the course of the proceeding an issue of disclosure is likely to arise.[52] The giving of such notice entitles the person receiving it to apply to the Secretary for a security clearance, although there is no obligation that it be granted.[53] Security clearances are granted pursuant to the *Australian Government Protective Security Manual*,[54] a policy document issued by the Attorney-General's Department. The document 'is not security classified but its availability will be restricted to government departments, agencies and contractors working to government.'[55]

The Principal Bill imposes no obligation on the Secretary of the Attorney-General's Department to give such notice, nor to grant the security clearance if an application is made.

2. Objections to the Regime

2.1 Undermining the right to a fair trial

The fundamental objection to the Regime, and hence to the Principal Bill, is that it would seriously undermine the right of an accused person to a fair trial. As a party to the *International Covenant on Civil and Political Rights*, Australia is obliged to ensure a fair trial to all accused persons.[56] This right includes (but is not limited to) the right:

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[50] Clause 41

[51] Clause 41 (c).

[52] Clause 34 (1).

[53] Clause 34 (2).

[54] Note 1 to clause 34 (2).

[55] Website of the Attorney-General's Department, <http://www.ag.gov.au/www/protectivesecurityHome.nsf/HeadingPagesDisplay/Protective+Security+Manual?OpenDocument>, accessed on 30 June 2004.

[56] Article 14 (1).

- To a fair and public hearing by a competent, independent and impartial tribunal;[57]
- To have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing;[58]
- To be tried without undue delay;[59]
- To be tried in one's own presence, and to defend oneself in person or through legal assistance of one's own choosing;[60]
- To examine, or have examined, the witnesses against one and to obtain the attendance and examination of witnesses on one's behalf under the same conditions as witnesses against one.[61]

That the Regime would have undermine the right to a fair trial can be seen at each of its four steps. The Regime certainly threatens each of the five particular aspects of that right mentioned above; but the threat it poses to the right to a fair trial is not limited to these aspects of that right.

2.1.1 Step one

At the first step, it is the prosecutor who has discretion to invoke the Regime.[62] Furthermore, the Regime permits the prosecutor to do so once a proceeding has already commenced.[63] A defendant may be intending to lead certain evidence, or to call certain witnesses in order, to rebut the prosecution's case. By enabling the prosecutor to invoke the regime once the defence has already committed to a certain strategy, the regime gives the prosecution the power to pull the rug out from under a defendant.

This power, vested by the Regime in the prosecutor, clearly undermines the capacity of the defendant to prepare his or her defence.

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[57] Article 14 (1).
[58] Article 14 (3) (b).
[59] Article 14 (3) (c).
[60] Article 14 (3) (d).
[61] Article 14 (3) (e).
[62] Clause 6 (1) (b).
[63] This possibility is expressly contemplated by clause 6 (2).

2.1.2 Step two

At the second step, the Regime imposes obligations of notice on the defence.[64] By obliging the defendant to give notice if he or she believes that information of a certain character will emerge in evidence, these in effect oblige the defence to disclose detailed information to the prosecution about the substance of its case, and its expectations about the likely course of argument. For example, if a defendant gives notice that a witness's answer to a question is likely to affect national security, this may enable the prosecution to draw inferences, which otherwise they would not be in a position to draw, about the nature of the testimony anticipated by the defendant.

The unfairness to the accused of the obligation to give notice is even greater in the circumstance where it is the defendant who gives notice that a witness's answer will disclose information of the relevant character. In such a circumstance, the Regime ensures that the prosecutor gains access to a written answer to the relevant question, although the defendant does not.[65] This is not consistent with the right of the accused to have access to witnesses against him or her, and to have access to those witnesses able to testify in his or her defence.

This undermining, by the Regime, of the rights of the accused is only compounded by the fact that, once notice of the possibility of disclosure has been given to the Attorney-General, it is an offence for the defendant to disclose the information,[66] but not for the prosecutor, who may disclose the information in the course of his or her duties.[67] Such a disparity in the rights accorded to prosecution and defence is manifestly unfair. Combined with the provision for a witness's answer being available to the prosecutor, but not the defendant, it is doubly so. When such a circumstance has arisen, the trial will have been adjourned; nevertheless, the prosecutor is permitted to disclose the information in the course of his or her duties. The prosecutor is thus permitted to continue to work on the prosecution case, including preparing a response to the testimony of a witness who has not yet been heard by the defence. In the meantime, even if the defendant is able to anticipate what the information may be, they are prohibited from disclosing it, if that disclosure is likely to prejudice national security.

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[64] Clauses 22, 23.

[65] Clause 23 (5).

[66] Clause 35.

[67] Clauses 16 (a), 35 (1) (d), (2) (d).

It is also of concern that the prohibition on disclosure subsequent to notice being given does not apply to staff members of ASIO, ASIS or the DSD. If such an individual is appearing as a witness at a trial, the Regime creates the possibility that, knowing what question they are to be asked, they are then able to discuss their answer to that question in the course of their duties (which may include discussion of the information with the prosecution) even though, at the same time, the defendant has not been informed of the answer.

That these grossly unfair possibilities are permitted by the Regime shows clearly that the Regime is inconsistent with the right to a fair trial.

2.1.3 Step three

At the third step, the proceeding must be adjourned until the Attorney-General takes some action.[68] The Regime does not impose any limit on the time the Attorney-General may take to consider a matter. On its own, this creates scope for unfairness to the accused, increasing the time during which his or her future is uncertain, and (if he or she is innocent) the time in which her liberty is restricted.

In addition to these general concerns, however, it is quite possible to envisage circumstances in which the Attorney-General's capacity to delay proceedings by delaying his or her decision-making process is open to abuse. As was noted above, during this time it is not an offence for the prosecution to disclose any information in question in the course of his or her duties. This creates the possibility of deliberate delay on the part of the Attorney-General, in order to give the prosecution the time to develop its case in response to information it believes is going to be disclosed, or in response to the written answer of a witness to which the prosecutor, but not the defence, has had access.

Independently of the possibility of delay, and of abuse of the power to delay a criminal proceeding, there is a general unfairness in the executive government, acting through the Attorney-General, being empowered to exercise a significant degree of interference in the conduct of a criminal trial, by issuing non-disclosure and witness exclusion certificates. This unfairness is only increased by the vesting in the Attorney-General, by clauses 24 and 26, of the power to issue a certificate even in the absence of notice being given by either the prosecutor or defendant.

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[68] Clauses 22 (3), 23 (7).

Again, this general concern is amplified by consideration of possibilities for abuse. For example, it is possible to envisage the Attorney-General intervening of his own accord, and issuing certificates in cases in which, although there is no genuine threat to national security, such intervention would advance the cause of the prosecution. This possibility is particular significant at the pre-trial stage, as the legislation does not permit the court to hold a hearing prior to trial to consider the certificate, and the Auxiliary Bill would remove from the defendant the right to challenge the decision to issue a certificate under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Ultimately, it does not matter whether or not such abuses actually occur. The Attorney-General is a politician, and a senior member of the Cabinet, and even if he or she acts at all times with complete propriety, the mere fact that the Regime gives rise to the possibility of political interference in the criminal process, in turn gives rise to the possibility of a perception of unfairness to the defendant. And the defendant is entitled not simply to the fact of, but also to the unequivocal appearance of, justice having been done.

2.1.4 Step four in relation to pre-trial matters

In pre-trial matters, the Attorney-General's certificate stands. This has the potential to significantly impede the capacity of an accused to defend himself or herself during committal proceedings, and to prepare his or defence in anticipation of trial. The Attorney-General has the power, by issuing certificates, to prevent the defence from gaining access to documents, or from calling witnesses at a committal or bail hearing.

When considering these consequences, it is important to keep in mind the range of circumstances in which the Regime might operate in future. A defendant might be accused, for example, of training with a terrorist organisation. At a bail hearing, he or she may wish to produce, as evidence of his or her lack of criminal intent, documents or witnesses who will demonstrate that he or she acted at the request of, or with the acquiescence of an Australian intelligence agency, or of an intelligence agency of a country allied with Australia. Under the Regime, it is likely that the defendant would be obliged to give notice prior to producing such evidence, and the Attorney-General would then be able to issue a certificate which precluded the evidence from being produced, with the consequence that the accused is not able to make out his or her case for bail.

The likelihood of such adverse implications for the fairness of pre-trial proceedings would be even greater for any individual charged with an espionage or similar offence, for it is likely

that a great many of the relevant witnesses and documents which the defendant might want to produce or gain access to at the pre-trial stage would be apt to be barred by a certificate from the Attorney-General.

2.1.5 Step four in relation to trial: the hearing

As explained above, once a matter comes to trial, the issuing of a certificate triggers a hearing by the court to determine how to respond. In reaching its decision, the court must give the greatest weight to the question whether, having regard to the Attorney-General's certificate, permitting the disclosure of the information or the calling of the witness would risk prejudice to national security.[69] It must also consider whether its order would have a substantial adverse effect on the defendant's right to a fair hearing, and have regard to the object of prevent disclosure of information likely to prejudice national security except to the extent that prevent disclosure would seriously interfere with the administration of justice.[70]

The weighting of considerations mandated by the Regime puts the Attorney-General's certificate at the top, and renders the questions of a *substantial adverse effect* on the defendant's right to a fair trial, and of *serious interference with the administration of justice*, lesser matters. It is thus apparent that the method of court response to a certificate that is mandated by the Regime risks compromising the right of the accused to a fair trial.

In this respect, the Regime marks a substantial departure from the existing law of public interest immunity. In *Alister*, Gibbs CJ observed that

> in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial … Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done.[71]

These unhappy implications for the accused's right to a fair trial are, once again, compounded by further features of the Regime.

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[69] Clauses 29 (8) (a). (9).

[70] Clauses 3, 29 (8) (b).

[71] (1984) 154 CLR 404, 414-5. Justice Brennan made similar remarks about the significance of disclosure in the context of an accused's right to lead evidence of their innocence at 455-7. Further references are given in Suzanne McNicol, *Law of Privilege* (1992), 402, n 181.

First, the Attorney-General is given yet further power to determine the course of proceedings. Not only is the court, in considering its response to the issuing of a certificate, obliged to give the greatest weight to the certificate itself; the Attorney-General is allowed to intervene as of right.[72] On the other hand, the accused has no right to call the Attorney-General to cross-examine him or her on the matters stated in the certificate.

Second, as was noted above, the Principal Bill provides for the exclusion of the defendant, and/or the defendant's lawyer, from crucial elements of the hearing at which the court reaches a decision in relation to a certificate issued by the Attorney-General.[73] It is impossible for the defendant, or his or her lawyer, to make an effective case for disclosure of information, or for the calling of a witness, if they are prevented from hearing the details of the information concerned, or from hearing the prosecution arguments to the contrary.

2.1.6 Step four in relation to trial: the implications of the court's order

As was stated in the introduction to this submission, the ultimate purpose of the Principal Bill is to create an alternative to the outcome in *Lappas*. The Regime seeks to do this by permitting the court to allow the tendering in evidence, in lieu of a document, a copy from which the sensitive information has been deleted, with the copy accompanied perhaps by a summary of the deleted information, or a statement of the facts that the deleted information would prove, or would be likely to prove.[74]

When one considers this possibility, there is no getting around the observation made by Gray J in *Lappas*: such a procedure is 'redolent with unfairness'.[75] It removes from the accused the right to fully test the evidence against him or her. This element of the Regime also undermines the impartiality of the judiciary. By inviting the court to summarise the information deleted from a document, or to issue a statement of the facts that the deleted information would prove, or be likely to prove, the Regime invites the court to become a participant in the proceedings before it, and to substitute its own judgement on matters of fact for the judgement of the jury. This aspect of the Regime in fact raises the possibility of unconstitutionality under section 80 of the *Constitution*, which provides that trial on indictable offences shall be by jury. But even if this worry is put to one side, it would seem to

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[72] Clause 28.

[73] Clause 27 (3).

[74] Clauses 29 (2), (3).

[75] [2001] ACTSC 115, [14]

be difficult for the defendant – or, for that matter, the prosecutor – to have confidence in the court's direction to the jury on the consideration of evidence, some of which has itself been formulated and presented by the court.

The Regime also permits the court to exclude a witness from being called,[76] or to prevent a witness from answering a question,[77] or to have a copy of a document admitted into evidence with sensitive information deleted, and with no summary of the information, or statement of the facts the information might prove, attached.[78] In such a case, the Principal Bill gives no reason to suppose that the existing common law would not continue to apply, and in particular that if, under such circumstances, it would be unfair to the accused for the trial to proceed, then the court would have the power to stay the prosecution.[79]

Given the protection of Commonwealth judicial power from legislative and executive interference provided by Chapter 3 of the *Constitution*, it is ultimately impossible for the Parliament to pass a law compelling the judiciary to take a different approach in circumstances such as *Lappas*. The Regime invites the judiciary to do so, but it cannot mandate that result. However, in the process of issuing the invitation, the Regime, in the many ways discussed above, undermines in fundamental ways the right of the accused to a fair trial. Both the Principal Bill and the Auxiliary Bill should therefore be opposed.

2.2 Breadth of definition of 'national security'

The combined effect of clauses 8, 9, 10, 11 and 12 of the Principal Bill is that 'national security' means:

- the defence of Australia;[80]
- the protection of, and of the people of, the Commonwealth, the States and the Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system,

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[76] Clause 29 (7).
[77] Clause 29 (4).
[78] Clause 29 (2) (d).
[79] The inherent power of courts to stay proceedings in order to prevent an abuse of process, or a trial which is unfair to the accused, is discussed by the High Court in *Barton v The Queen* (1980) 147 CLR 75; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Dietrich v The Queen* (1992)177 CLR 292. To the extent that a court is exercising Commonwealth judicial power, Chapter 3 of the *Constitution* prevents the Parliament from withdrawing this power to stay such proceedings.
[80] Clause 8.

and acts of foreign interference, whether directed from, or committed within, Australia or not, and the carrying out of Australia's responsibilities to any foreign country in relation to such matters;[81]

- political, military and economic relations between Australia, and foreign governments and international organisations;[82]
- economic, technological or scientific interests important to the stability and integrity of Australia;[83]
- avoidance of disruption to national[84] and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;[85]
- protection of the technologies and methods used to collect, analyse, secure or otherwise deal with criminal intelligence, foreign intelligence or security intelligence;[86]
- protection and safety of informants and of persons associated with informants;[87]
- ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's[88] government and government agencies.[89]

This is a remarkably broad definition of 'national security'.[90] Its breadth has two implications.

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[81] Clauses 8, 9; *Australian Security Intelligence Organisation Act 1979* (Cth), s 4, definition of 'security'.

[82] Clauses 8, 10.

[83] Clauses 8, 12.

[84] It is not clear whether the intention of the Bill's drafter is that this refers only to Australian efforts, or to the efforts made by any nation.

[85] Clauses 8, 11 (a).

[86] Clauses 8, 11 (b).

[87] Clauses 8, 11 (c).

[88] It is not clear whether the intention of the Bill's drafter is that this refers only to the Australian government and its agencies, or those of any nation.

[89] Clauses 8, 11 (d).

[90] For example, it is far broader than the instances of 'matters of state' listed in s 130 (4) of the *Evidence Act 1995* (Cth).

2.2.1 Range of criminal proceedings in which the Regime might be invoked

This broad definition of 'national security' determines the implications of a decision by the prosecutor to invoke the Regime.[91] While it may be natural enough to suppose that this decision would only be made in the case of a trial for an espionage or 'terrorism' offence, the Regime imposes no such limits on the prosecutor's exercise of discretion. And the breadth of the definition of 'national security' shows that there is no reason to suppose such limits to be observed. Two examples can easily be given; many more can be imagined.

Suppose that an individual is being charged with an offence, and some of the crown evidence is photographic. Suppose, further, that the defendant wishes to challenge the veracity of the photographic evidence, by leading evidence about technical limitations or flaws in the camera used to take the photographs. Such evidence could (in the terminology of the Regime[92]) relate to or affect national security, because it could relate to or affect technologies and methods used to collect, analyse, secure or otherwise deal with criminal intelligence. In such a case, if the prosecutor invoked the regime, all the obligations of notice to the Attorney-General would flow. It is not to the point that a court might, in holding its hearing once the matter comes to trial, decide to admit the evidence in question. In the meantime, the defendant will have suffered all the unfairnesses described above.

As a further example, imagine an individual being charged under section 70.2 of the *Criminal Code Act 1995* (Cth) (the offence of bribing a foreign public official). The defendant may seek to lead evidence about the true origin, or nature, of the payments in question. It is easy to imagine that such evidence might affect or relate to economic relations between Australia and the foreign government in question. Once again, therefore, the regime would be apt to be invoked.

2.2.2 Efficacy of the Regime in relation to information within the scope of the public interest immunity doctrine

As was noted above, if information is subject to public interest immunity under section 130 of the *Evidence Act 1995* (Cth), then section 134 of that Act renders it inadmissible. Consequently, if such information has to be considered by a court under step four of the

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[91] Pursuant to clause 6 (1).

[92] Clauses 22 (1) (c), 23 (1) (b), (6).

Regime, the court is likely to be unable to make an order in relation to the information.[93] This means that the information will not be presented as evidence, and there will be no possibility of a summary or statement being tendered in its place. In such circumstances, then, the result in *Lappas* would be unchanged.

This likely inefficacy of the Regime in relation to information within the scope of the tradition doctrine of public interest immunity highlights a second implication of the breadth of the definition of 'national security': it is only in relation to criminal proceedings involving information which falls outside the scope of the traditional doctrine, but falls within the far broader definition of 'national security' provided by the Principal Bill, that step four of the Regime is likely to result in an outcome different from the status quo. But these would surely be matters in which such an outcome is least justified.

2.3 Undermining the integrity of the prosecutor's office

In *Sankey*, the High Court made it clear that, under the traditional doctrine of public interest immunity, it is ultimately the court's responsibility to determine what information is excluded, on public interest grounds, from a criminal trial. Section 130 of the *Evidence Act 1995* (Cth) preserves this principle:

> (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
>
> (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).

The Regime, however, does not.

Under the Regime, it is the prosecutor who has the power, at the first step, to invoke the Regime. This creates a temptation to do so not in the interests of justice, nor in the interests of national security, but in the interests of securing a conviction.

The Regime also exposes the prosecutor to political pressure from the Attorney-General, who may wish the regime to be invoked, so as to be able to exercise his or her power to issue certificates.

Indeed, in places the drafting of the Principal Bill displays an underlying presumption that the Regime is simply another weapon in the prosecutor's arsenal. Thus, clause 27 (3) reads

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[93] Clause 29 (6).

> The court may, if it considers that the presence of the defendant or any legal representative of the defendant is likely to prejudice national security, order that the defendant or the legal representative, or both, are not entitled to be present during any part of the hearing in which the prosecutor:
>
> (a) gives details of the information concerned; or
>
> (b) argues why the information should not be disclosed, or why the witness should not be called to give evidence, in the proceeding.

This seems to presume that it will always be the prosecutor who will be in possession of the information. The possibility that it may be the defendant who is seeking to tender a document as evidence, and who therefore may be the only one in a position to give details of the information concerned, does not seem to be contemplated.

A similar presumption, that the Regime is a tool solely for the prosecutor, is displayed in that part of clause 24 identified above, which obliges the Attorney-General to provide to the court a document respecting which he or she has issued a non-disclosure certificate. The drafter appears to have neglected the possibility that the document in question may be in the sole possession of the defendant.

An even more disturbing presumption is displayed by that part of clause 24 identified above, which obliges the Attorney-General to attach to a non-disclosure certificate a description of information contained in a witness's answer to a question. The Regime seems to making one of two assumptions: either that all such witnesses will be agents of the government, whose testimony is already known to the Attorney General; or alternatively, that the prosecutor is simply free to inform the Attorney-General, a senior member of the political arm of government, of the contents of a witness's testimony in an ongoing criminal proceeding, which testimony has not yet been disclosed to the defendant. Either assumption is quite obviously a very disturbing one for the Principal Bill's drafters to have made.

It is a major achievement of contemporary Australia to have de-politicised the practice of criminal prosecution. In all the ways described above, the Principal Bill would undo that achievement, and in the process fundamentally undermine the integrity of the prosecutor's office.

3. Objections to the security clearance regime

As was noted above, the Principal Bill would make it an offence, once the Regime has been invoked, to disclose to the legal representative of a defendant, or to a person assisting that person, information the disclosure of which is likely to prejudice national security.[94]

The purpose of this provision is a little difficult to discern. It does not prevent disclosure in the course of giving evidence.[95] Nor does it prevent disclosure by the prosecution in the pre-trial phase of a proceeding, as such disclosure would be a 'permitted disclosure', occurring in the course of the prosecutor carrying out his or her duties.[96] Nor does it prevent disclosure by the prosecution to the defendant in the course of a hearing held under step four of the Regime, as this would also be a 'permitted disclosure'. The provision cannot prevent disclosure of information by the court to the defendant's lawyer, as Chapter 3 of the *Constitution* protects courts exercising Commonwealth judicial power from such parliamentary interference.

The principal effect of this provision, then, would seem to be to limit the capacity of the defendant's lawyer to receive a briefing from his or her client, or to discuss the subject-matter of the trial with possible witnesses and others. Disclosure in such circumstances would not be 'permitted disclosures'. This is manifestly contrary to the right of an accused to be able to prepare an adequate defence, with the assistance of counsel of his or her choice.

The breadth of the definition of 'national security' means that this provision has the potential to produce this consequence in a wide range of criminal proceedings, going well beyond those involving espionage or 'terrorism'.

The Principal Bill does make provision for the granting of security clearances to defendants' lawyers. However, this is far from sufficient to overcome the objections to clause 41.

First, the right of a defence lawyer to apply for a security clearance is triggered only by the giving of notice by the Secretary of the Attorney-General's Department;[97] and there is no obligation that such notice be given.

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[94] Clause 41.
[95] Clause 41 (a).
[96] Clauses 16, 41 (a).
[97] Clause 34 (1).

Second, the granting of security clearances is made subject to a document, the *Australian Government Protective Security Manual*,[98] which is a policy document issued by the Attorney-General's Department. The document is not publicly available; although 'not security classified, … its availability will be restricted to government departments, agencies and contractors working to government.'[99] As a policy document, it is subject to variation by the executive government at any time, free of any legislative, judicial or public oversight.

Third, the possession of a security clearance is a defence to a charge under clause 41 only if the level of clearance is 'considered appropriate' by the Secretary of the Attorney-General's Department.[100] Such language as 'considered appropriate' is inexcusably vague in a statue creating an offence punishable by up to two years imprisonment; and, given that a defendant and his or her lawyer have no way of predicting what the Secretary of the Attorney-General's Department may or may not consider appropriate from time to time in relation to various pieces of information, this exception manifestly fails to overcome the burden the provision would place on communication between a defendant and counsel.

4. Other objections to the Principal Bill

In addition to the objections which have been made above, which focus on ways in which the Principal Bill would fundamentally undermine the right of an accused to a fair trial, in a very wide range of circumstances, and would also undermine the integrity of the prosecutor's office, there are number of other objections to be made to the drafting and structure of the Principal Bill.

4.1 Overly vague purposes and justification

First, the justification provided for elements of the Bill is exceedingly vague or even irrelevant. For example, the Explanatory Memorandum, referring to the definition of 'criminal proceeding', states that

> The *Extradition Act 1988* has been included to prevent information from being disclosed in extradition proceedings; for example, where the proceedings involve a terror suspect.[101]

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[98] Note 1 to clause 34 (2).

[99] Website of the Attorney-General's Department, <http://www.ag.gov.au/www/protectivesecurityHome.nsf/HeadingPagesDisplay/Protective+Security+Manual?OpenDocument>, accessed on 30 June 2004.

[100] Clause 41 (c) (i).

[101] Explanatory Memorandum, National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, p 2.

The Principal Bill makes no reference to the status of a defendant as a 'terror suspect', or the commission of a 'terrorist offence'. The discretion of the prosecutor to invoke the regime in relation to any criminal proceedings is unfettered. This reference to 'terror suspects' does nothing, then, to justify the regime that the Principal Bill would actually create. If it is the intention of the Parliament to introduce laws that would control the release of information at extradition hearings involving those accused of terrorism offences, then a Bill should be introduced that would achieve that specific result.

Similarly, as noted above, the Attorney-General in his second reading speech refers to his disappointment with the outcome in the *Lappas* case as a reason to support the Bill. But as the discussion above has demonstrated, it is quite possible that the Regime would not lead to a different outcome in such a case. What it would do is fundamentally undermine the accused's right to a fair trial.

4.2 Excessive complexity

In its report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, the Australian Law Reform Commission noted that the United States *Classified Information Procedures Act* has been criticise on the grounds that it

> is not always intuitively easy to use and could have been drafted to articulate more clearly the process to be followed.[102]

The same could certainly be said of the Principal Bill and the Regime that it establishes. It is not a simple matter, when reading the legislation, to determine the precise character of the powers vested in, and obligations placed on, the various person to whom reference is made.

Indeed, in the outline of the Regime provided above, several points of doubt and ambiguity were identified, both in relation to the Attorney-General's duty to provide certain material to a court, and in the need for a court, in the context of an extradition hearing, to hold a hearing in relation to the Attorney-General's issuing of a witness exclusion certificate.

4.3 Apparent errors of drafting

The Bill appears to contain several errors of drafting. Some, such as the reference to 'prosecutor of defendant' where what is meant is 'prosecutor or defendant'[103] are minor,

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[102] Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information*, Report No 98 (2004), [11.90]

although still undesirable in a Bill dealing with such serious matters. At least one, however, is more serious, introducing further needless complexity into an already complex piece of legislation.

Clause 24 (1) states that it applies if

> (a) (i) the Attorney-General is notified under section 22 that the prosecutor or defendant knows or believes that the prosecutor or defendant or another person will disclose information in a criminal proceeding; [or,]
>
> (ii) the Attorney-General for any reason expects that any of the circumstances mentioned in paragraphs (22) (1) (a) to (c) will arise under which the prosecutor or defendant or another person will disclose information in a federal criminal proceeding; [and],
>
> (b) paragraph 26 (1) (a) (about the mere presence of a witness constituting disclosure) does not apply.

When one turns to clause 22 (1), one sees that the only person by whom disclosure is contemplated, other than the prosecutor or the defendant, is a witness whose mere presence will disclose information of the relevant source. Thus, given the exception to clause 24 stated by clause 24 (1) (b), it seems that there is no person, other than the prosecutor or the defendant, with respect to which the circumstances mentioned in paragraphs 22 (1) (a) to (c) can arise. The reference to disclosure by 'another person' is pointless.

This pointless complexity also affects the definition of 'potential discloser' in clause 24 (6). The definition of 'potential discloser' includes either the prosecutor, or the defendant, if one or the other is the person threatening to disclose: clause 24 (6) (a). It includes both the prosecutor and the defendant, as well as the witness, if it is a witness's answer which has been judged by the prosecutor to constitute disclosure: clause 24 (6) (c). Clause 24 (6) (b) states that if notice has been given to the Attorney-General pursuant to clause 22, and if the disclosure is threatened by a person other than the prosecutor or defendant, then both that person and either the prosecutor or defendant are potential disclosers. No indication is given how it is to be determined which of the prosecution or defendant is the potential discloser, but as in any event there seems to be no possibility of disclosure by other persons being relevant under clause 24, this particular provision again seems unnecessary.

[103] Clause 29 (7) (b).

5. Conclusion

The Principal Bill is open to a large number of serious objections.

The Principal Bill would undermine the right of an accused to a fair trial, by:

- at the first step of the Regime, giving the prosecutor the power to invoke the Regime at any time during a proceeding, thus pulling the rug out from under the defendant;
- at the second step, obliging the defendant to disclose to the prosecutor significant information about his or her likely arguments in defence;
- at the second step, permitting the prosecutor to have access to a witness's answer to a question, and permitting the prosecutor to use and disclose that information in the course of his or her duties, at a time when the defendant has not yet been provided with the answer in question;
- at the second step, permitting a staff member of ASIO, ASIS or the DSD to disclose information that he or she is being called upon to provide as a witness, at a time when the defendant has not yet been provided with that information;
- at the third step, permitting an adjournment of unspecified duration while the Attorney-General considers how to respond to any notice he or she has received;
- at the third step, permitting the executive government, through the Attorney-General, to interfere in a substantial manner in the course of a criminal proceeding, and even in the absence of any notice being given by the prosecutor or the defendant;
- at the third step, creating the possibility of political interference in criminal trials, and therefore undermining the right of an accused that justice be seen to be done;
- at the fourth step, allowing the Attorney-General to interfere extensively in the pre-trial stage of a criminal proceeding, by issuing certificates that prevent a defendant from leading the information crucial to his or her argument;

- at the fourth step, obliging the court, in deciding how to deal at trial with the issuing of a certificate by the Attorney-General, to give the greatest weight to that certificate;
- at the fourth step, giving the Attorney-General a right to intervene in such a hearing, although no right to call the Attorney-General is vested in the defendant;
- at the fourth step, giving the court the power to exclude the defendant, and/or the defendant's lawyer, from crucial parts of such a hearing;
- at the fourth step, giving the court the power to admit into evidence, in lieu of a document, a summary of information contained in that document, or a statement of the facts the information contained in the document would prove, or be likely to prove, thereby both removing the defendant's fundamental right to test the evidence against him or her, and undermining the impartiality of the court;
- through the security clearance regime, undermining in a drastic fashion the right of a defendant to prepare his or her defence with the assistance of counsel of his or her choice.

Furthermore, the Principal Bill would introduce a definition of 'national security' which is far broader then the existing definition of 'matters of state' under the *Evidence Act 1995* (Cth), thereby giving the Regime a scope for application far beyond the context of espionage or 'terrorism' trials. And the Principal Bill would also undermine the integrity of the prosecutor's office.

Given these many serious objections, and in light of its excessive complexity and insufficient justification, the Principal Bill should be opposed. As the amendments that would be made by the Auxiliary Bill are contingent upon the Principal Bill being passed, it should also be opposed.