Criminal Bar Association

Lex Lasry QC
Chairman

2 July 2004

Mr Phillip Bailey
Acting Secretary
Legal & Constitutional Committee
Australian Senate
Parliament House
Canberra ACT 2600

Dear Sir

Re: Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004
&
National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004

Thank you for your letter of the 18th June 2004.

The Criminal Bar Association of Victoria takes part in discussions about these matters as a member of the National Criminal Law Committee which operates under the auspices of the Law Council of Australia. When the Law Council of Australia made detailed submissions on these topics to the Australian Law Reform Commission, we contributed to that submission. It is regrettable that this legislation was introduced before the final report of the ALRC was made public.

We have been provided with a draft of the submission to you from the Law Council of Australia through the National Criminal Law Committee which is in similar terms to the submission it made to the Australian Law Reform Commission Inquiry. Since we have already discussed the matter in detail with them, it is sufficient to indicate that we agree with their submissions and support them.

In addition, however, some matters arising from the bill are worthy of further comment. For example, we notice that in the second reading speech of the Attorney General for this bill, the case of *Lappas* in 2001 is referred to. The Minister suggests in the course of his speech that

> *"In that same case, defence counsel's refusal to undergo a security clearance posed a further problem for the protection of the documents."*

As it happens, I was counsel for Mr Lappas in the last of those trials, the ACT Court of Appeal and before the High Court in that case. I note in passing that the transcript of the proceedings before the High Court on the security issues makes for very interesting reading. It demonstrates the dangers of over-reaction[1].

It is true that at trial I, my junior and my instructing solicitor declined to undergo a security clearance. However, no significant problem was posed in relation to the protection of the documents and indeed much of the documentation that we were entitled to see did not require to be protected. The mechanism employed in that case for ensuring the protection of those documents which were classified by way of undertaking worked admirably and avoided the need for the invasive process of a security clearance.

As we have previously submitted, criminal defence lawyers are well used to dealing with confidential information in a variety of circumstances. It is not uncommon for information to be disclosed to counsel in a criminal trial on the basis they not disclose the information, sometimes even to their client. There is no evidence whatsoever that indicates that the experience of courts or disciplinary tribunals demonstrate that

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1 See *Lappas v The Queen* [2004] HCATrans 46 (10 March 2004)

requirements of confidentiality are regularly breached by counsel in those circumstances. If there had been any evidence to that effect it might have lent some weight to the proposal currently before the Committee. In our submission the present disciplinary and court controlled processes are entirely adequate for the purpose sought to be met by section 34 of the Bill.

Under the proposed scheme, and in particular under section 34 of the Bill, it is quite conceivable that during a Federal criminal proceeding (which may have been underway for some months) a notice might be given that an issue was likely to arise in relation to disclosure of information which was in the opinion of the Secretary of the Attorney-General's department likely to prejudice national security. At that point in the case, unlike the judge or jury, the defence lawyer would then be required to obtain a security clearance in order to be in a position to be aware of the proposed disclosure. It is not then difficult to see how difficulties might arise for the future conduct of the trial.

The legal representative may be given a security clearance but only after a substantial delay whilst the court, including the jury, waited for the process to be completed. If the defendant's counsel takes the view that they are not willing to apply for a security clearance as occurred in the Lappas case then the Court is apparently expected to give advice to the defendant about the consequences and a court is required to make a recommendation that the defendant engage a legal representative who has been given or is prepared to apply for such a security clearance. This particular part of the Bill might be described as the "Lappas clause". If the trial has already been underway for several months when this problem arises, in our submission this scheme is completely impractical. It would be out of the question for some other lawyer to take over and the likelihood is that the trial would have to be terminated and a new trial held.

Alternatively, without these requirements the problem is able to be solved by the Court simply requiring that at a point where a disclosure is necessary in the course of the case which effects national security, counsel then engaged would be entitled to be appraised of the information simply after making a formal undertaking of confidentiality to the court and potentially to relevant government departments. A breach of those undertakings would of course be punishable either as a contempt or by

some other aspect of the criminal law which protected that information. It would mean that in those circumstances the trial would not be required to be adjourned and certainly there would be little or no exposure to the risk that the jury would have to be discharged.

In our submission, the measures in the bill are a massive overreaction to the *Lappas* case in the absence of evidence suggesting that lawyers are unable to keep the confidences that they are required to keep in particular circumstances.

We otherwise support in prospect the submissions of the Law Council of Australia on this Bill.

Yours sincerely,

Lex Lasry QC
Chairman