Committee Secretariat,
Senate Legal and Constitutional Committee,
Department of the Senate,
Parliament House,
Canberra, ACT 2600
Australia
27/3/05
To:legcon.sen@aph.gov.au

Dear Committee Secretariat,
Regarding: National Security Information Legislative Amendment Bill, 2005,(a mouthful here abbreviated to NSILAB)in which you have invited responses from interested organisations, please note that this is a submission from and on behalf of the Australian Civil Liberties Union,(ACLU) PO Box 1137, Carlton, Vic. 3053, by Geoff. Muirden, Research Officer, dated 27/3/05.

Since this submission may be deemed "lengthy" I enclose a summary of what I say in the submission below:
1. There is the danger that the legislation (NSILB) is an attempt to put roadblocks in the way a whistleblower, or a detainee such as Mamdouh Habib, who claims to have been tortured, can expose abuses;

2. The trick is to have the Attorney General, or one of his sidekicks, declare an intended disclosure as a breach of "national security" which the civil court is supposed to accept and which prohibits exposure;

3. The danger is that "national security" is an all-purpose term having the status of a mantra that can be chanted to "justify" refusal to release details. But it can also serve to prevent disclosure of abuses which the government and its agencies do not want revealed.

4.This policy contrasts with the historical example of Eureka in 1854 where the Eureka miners, who would now be called "terrorists", were sent for judgement but, because they had trial by jury and details were released to the public, who supported them, the accused were released. This compares adversely with the present system where such safeguards are crushed and an autocratic system is installed instead, which would not only crush the "rebels" but also prevent reform of abuses that they fought against. Despite this, the present system is laughably called "democracy!"which shows a vivid imagination on the part of some.

5. To reduce possible abuses, an agency independent of the government and its agencies, should assess any claim of the Attorney General to disallow evidence as breaching national security, so that it does not ALSO breach personal freedoms at he same time(or what remain of them);

6.This system comes at a time when the US and others are coming under scrutiny for torture and abuse of power which is, of course, denied. But mechanisms for forcing disclosure, such as Freedom of Information, and interested reform institutions, assist in providing this information. This should be the case also in Australia.

These are some of the key points. A more detailed submission is below:
The ACLU and many other civil libertarian and hjuman rights bodies view with concern the way in which our "elected respresentatives" in a so-called "democracy" have sold out the body of traditional freedoms in favour of a move towards an absolute and autocratic state in which what remains of freedom will be destroyed.The Senate should be concerned to reaffirm what centuries of judicial moves designed to preserve freedom have produced, including trail by jury and the right to be silent, one in which the rights of the accused deserve consideration and in which it is the duty of the State to prove that the accused

is guilty, where the accused is deemed innocent until proven guilty. This is precisely the sort of situation that should be energizing a Senate Committee right now, and it is not.

Civil liberties are under great threat as a result of existing ASIO, AFP and allied legislation which denies basic rights and asserts the rights of government agencies to dominate and arrest citizens apparently at will. As Lord Acton said, "power corrupts, and absolute power corrupts absolutely". Yet it is this absolute power which is aimed at, that will make the State itself into an organization that terrorises its own citizens, all in the name of "fighting terrorism". That is the grim irony of it.

I have, in a separate place, written about the way in which the martyrs at Eureka in 1854, who were accused of what would now be called "terrorism", were hauled before a court accused of treason and were exonerated, because details were revealed in court under trial by jury, and the accused were all released, partly under pressure from the public, who saw the abuses the accused had suffered and wanted to reform them.

If there were a "Eureka" now, the accused would be dubbed "terrorists", would be denied trial by jury, innocent until proven guilty, and their grievances not remedied. Checks and remedies against abuse of government power are now removed and arbitrary arrest is the order of the day. Yet it is still fashionable to call our system "democratic"! Some people have vivid imaginations!

The intent of the present bill, the National Security Information Legislation Amendment Bill 2005, is to expand the draconian provisions of the existing legislation . Under the terms of this Bill the Attorney-General is to extend his power into civil proceedings to demand the non-disclosure of certain evidence or testimony that may endanger "national security."

Some of us suspect that it is not mere coincidence that these moves are being pushed at a time when Mamdouh Habib, who has alleged that torture was practised on him, would like to take action to reveal the details of treatment handed out to him when under detention for "security" reasons. This also comes at a time when there are allegations of torture from US guards in Guantanamo Bay, Afghanistan and elsewhere, for example,
http://www.nytimes.com/2005/03/12/politics/12detain.html?
where it was said: "John Sifton, a researcher on Afghanistan for Human Rights Watch, said the
documents substantiated the group's own investigations showing that beatings and stress positions were widely used, and that "far from a few isolated cases, abuse at sites in Afghanistan was common in 2002, the rule more than the exception."

Also http://www.latimes.com/news/opinion/editorials/la-ed-torture11mar11,0,4002618.story?coll=la-news-comment-editorials in which it is pointed out that
"In 2002, federal agents arrested Maher Arar, a Syrian-born Canadian engineer, at John F. Kennedy Airport in New York because his name appeared on a terrorist watch list. Although Arar insisted that he was not a terrorist, the U.S. delivered him to Syrian interrogators. After months in a windowless room and regular beatings with thick electric cables, he said, he confessed to anything they wanted just to stop the torment. A year later, Arar was released without charges."

In the US, the American Civil Liberties Union, (which is independent of the Australian Civil Liberties Union,) has filed a lawsuit against US Secretary of Defence Donald Rumsfeld:

"The ACLU(i.e. American Civil Liberties Union) and Human Rights First last week filed a lawsuit charging that Defense Secretary Donald Rumsfeld bears direct responsibility for the torture and abuse of detainees in U.S. military custody. This is the first federal court lawsuit to name a top U.S. official in the ongoing torture scandal in Iraq and Afghanistan.

"Secretary Rumsfeld bears direct and ultimate responsibility for this descent into horror by personally authorizing unlawful interrogation techniques and by abdicating his legal duty to stop torture," said Lucas Guttentag, lead counsel in the lawsuit and director of the ACLU's Immigrants' Rights Project. "He gives lip service to being responsible but has not been held accountable for his actions. This lawsuit puts the blame where it belongs, on the Secretary of Defense."

Another American Civil Liberties Online report said: "Army files obtained by the ACLU reveal previously undisclosed allegations of abuse by U.S. soldiers in Iraq and Afghanistan. Among the documents are reports that a detainee who was beaten and seriously injured was forced to drop his claims in order to be released from custody.
Read Torture FOIA Documents
(This could happen also in Australia)

Does this have any relevance to the question of whether the Attorney General should intervene to prevent details sensitive to "national security" in Australia in civil proceedings or, for that matter elsewhere?

Absolutely. On an interview in ABC Radio National, 15 Feb.,2005, http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1302287.htm there was an interview with Mamdouh Habib, which said, among other things,according to Professor Sarah Joseph,
Director, Castan Centre for Human Rights Law, Monash University "There are a number of detainees at Guantanamo Bay, including Mamdouh Habib, who have raised allegations of torture. I don't know the exact evidence in that regard, but torture does give rise to causes of action under the Alien Tort Claims Act, so I see no reason why Mamdouh Habib as an individual could (not?)sue. I suspect it's possible that a class action could be being planned in that regard."

This background is one in which attempts are being made, to bring the US to accountability as to its arrest and treatment of detainees,and that includes the accountability of the top official, the Defence Secretary, whereby responsibility lies.

In Australia, there should be mechanisms to hold the Attorney General of Australia liable for abuses of power under his jurisdiction, but it is the nature of such departments to attempt to cover up their abuses of power and try and block and if possible, also discredit whistleblowers who have the temerity to expose such abuses of power. This occurs in the U.S. and elsewhere,and there is no reason to think that Australia is exempt. It should therefore be a required part of the NSILAB to hold the Attorney General accountable for any claims of abuse and not plead a "breach of national security" in civil proceedings, which invite a coverup bigger than Watergate and an easy "out". There is no inherent reason to believe that the Australian government or the judiciary in Australia are so noble that they would hesitate to commit and to cover up abuses. There must be checks and balances to reduce the chances of there doing so.

There seems to be little or nothing in the Bill that allows for accountability on the part of the government or its agencies.On the contrary, the evidence shows the opposite: an attempt to make a mantra out of the words "national security" as if, once these mystic words are uttered, this justifies all. It

does not. The burden of proof should be on the Attorney General to prove in what way release of any information will breach "national security".

The likelihood is that the NSILB is being pushed to prevent Habib or any other whistleblower disclosing in a civil court any details of torture, "illegal behaviour" (if such a category exists where any abuse of power is "justified") or any unjustified arrest or abuse. This is, some of us suspect, the underlying purpose of the NSILB.

This comes at a time when vigorous attempts are being made to uncover abuses of power in the US system, but there seems no such push to uncover abuses in the Australian context. The Attorney General no doubt wishes to stand by "our American allies", or our "British allies" or whatever, but there is a higher duty, ignored in the Bill, to criticise such commitment if it involves abuses of human rights or unjust power.

If Habib or a whistleblower were to produce evidence of torture or other abuse of power in a civil court, the Attorney General could insist that such mention was a breach of "national security", the catchall phrase that "justifies anything", and he is not obliged to "please explain." Under these circumstances a coverup, such has already been shown to occur under US control, is inevitable. The Attorney General will never admit to any abuse of power under his department. If he is given the sole "say" as to what is admissable as evidence and to exclude "whistleblower" exposure of abuses, he will do so.

At this point, the admonition of the Administrative Review (Bulletin) #56,2004 of the Administrative Review Council is beneficial:"Judicial review is in essence an accountability mechanism designed to provide a check on the power of the executive branch of government. Given that, the executive should not be able to finely calibrate its level of accountability to suit the needs of the day. Executive government ought not be the sole determiner of its own level of accountability to the courts, to parliament, and ultimately to the Australian people. If government is to be accountable solely on terms of its own choosing, that accountability is virtually meaningless. To put it bluntly, judicial review should, on occasion, be inconvenient for the executive if it is to be an effective accountability mechanism. An independent and impartial review of the legality of administrative action is one of the essential elements of a developed democratic society. Ultimately.and taking into account the decline in the doctrine of ministerial responsibility.it is one of the few devices left to ensure that the scope of executive activity remains consistent with legislative intent. It is fundamental that the executive branch be kept within the lawful range of its statutory and other powers. Were this not the case, there would be little substance to the requirement for the democratic assent of parliament."

The part that may be farcical about this comment is its assertion of "democracy" in a Parliament and a judiciary that is becoming less and less "democratic" and more and more autocratic, but if any remnants of democracy still exist, they should be protected.

Thus, I would suggest that, instead of the Attorney-General being chosen as the "authority" to decide what is admissable under "national security", a body independent of the Attorney General and the government be chosen to judge this matter in criminal, civil and administrative matters. The Attorney General would be permitted to make submissions to such an independent body,but would not be the sole arbiter.

In addition, there would be provision for appeal against
exclusion of evidence, (but not under such draconian conditions as to make this well-nigh impossible),and assistance in appealing against such exclusion. "National security" must not become a magic talisman pronounced as some

infallible mantra, but must itself be shown to be justified, and not used as a possible coverup.

In Canada, the "dissident", Ernst Zundel, was arrested and held for over two years without trial, before being deported to Germany. Claims were made that he was a "threat to national security" and evidence showing that this was unjustified, including an appeal against the judge's decision, were all ignored by "Justice" Blais, who refused to recuse himself under evidence of bias. Before we say "it can't happen here", we should consider the possibility that "it is in process of happening here" as safeguards against abuse of power are thrown into the trash can. The issue is not whether or not you endorse the beliefs of Ernst Zundel: the issue is, the extent to which such abuses of power can be prevented and abuses of power on the part of government or judiciary can be prevented or punished.

In the US, part of the evidence against abuse of power comes from Freedom of Information sources, which should also be made available in Australia.

Mr Ruddock tells us in the Second Reading, that a self-represented litigant involved in a civil suit in a Commonwealth matter would be able to apply for financial assistance to apply for a lawyer to attend a closed hearing. It remains to be seen what the terms of such assistance are,and how adequate they are to meet costs,which are no doubt excessive.He tells us that the court must give reasons to the parties or their lawyers for motives to exclude information. This raises the possibility that the mantra of "national security" will be chanted on such an occasion and this will be held to be "all-sufficient".Items that are "swept under the carpet" can be abuses that are concealed.

Provision should be made for safeguards against abuse of power on the part of the government agencies or the judiciary, and proper appeal.

Geoff. Muirden, Research Officer, Australian Civil Liberties Union, PO Box 1137, Carlton, Vic. 3053.