To: Secretary Owen Walsh,
Senate Legal and Constitutional Legislation Committee,
The Senate,
Parliament House, Canberra A.C.T. 2600.
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Submission to Parliamentary Inquiry into the provisions of
The National Security Information Legislation Amendment Bill 2005

Preamble
What is NATIONAL SECURITY?
Nowhere is it defined in this Bill. Is it defined in any other Bill? Who defines national security for Australian citizens? Is it solely defined by the Attorney-General at will as required from time to time? It would seem so in this Bill. It appears to us to be a thoroughly illusionary concept invoked to promote fear and danger in the minds of our politicians, the media and the citizens of this country.

We consider that this Bill provides the Attorney-General with far too much discretionary power, bordering on the absolute, to intervene in civil proceedings. Are we to assume that the Attorney-General accepts information provided by ASIO and/or other government security intelligence operatives gained by secret means about which not even our elected representatives are permitted to know? (Refer to public hearing in Melbourne{Thursday, 2 May 2002} on the ASIO Legislation Amendment [Terrorism] Bill 2002 when a member of the Parliamentary Joint Committee was asked if he, Kim Beazley MP, knew what methods were used by ASIO to obtain information from suspects. He replied that even though Committee members had asked on numerous occasions they were not permitted to be told.)

The means used to obtain information that the Attorney-General construes to be a risk to national security may well cause the information to be false. We are reminded of the recent publicity given to the treatment of inmates of military prisons in Iraq and various interrogations of Mamdouh Habib and detainees in Guantanamo Bay. Of course, we keep being told that Australian forces (and we include other government security operatives) never use such tactics as were described.

Nevertheless, bullying is very much a part of a broad section of the Australian public and evidenced in road rage, racist assaults, gay and lesbian assaults and hate crimes arising generally from prejudice to name a few areas of current bullying. Who is to say bullies are not inducted into and trained in such interrogation methods by bullies within ASIO and other government security intelligence agencies?

We think that there needs to be a review of the methods used to obtain information that could be termed at risk due to the manner in which it is gathered and construed to be prejudicial to some secret form of national security.

Specifics Relating to
the National Security Information Legislation Amendment Bill 2005

Schedule 1 –Amendments Part 1: Amendment of the National Security Information (Criminal Proceedings) Act 2004.
Item 10: The definition of “disclose” in Section 7 indicates to us the unfairness of the Executive Government, acting through the Attorney-General, to interfere not just in a criminal proceeding but also now in a civil proceeding implying that it distrusts its judiciary.
Clause 38D says that a party in a civil proceeding must notify the Attorney-General that the party has a belief there could be a “disclosure” which may relate to national security. Such notification could occur before or during the proceeding. The court must then adjourn if it is already in session or, if before the substantive hearing, parties must confer together and then await the decision of the Attorney-General on the issue of a certificate of non-disclosure for a closed hearing.
To us this means that the executive government of the day can very easily turn an ordinary civil proceeding into a criminal one by means of its new offences, simply because a party is unaware of a secret national security definition that forbids disclosure or calls a particular person as a witness who is the subject of a certificate from the Attorney-General.
This Bill is all about ASIO and the Certificates of Non-Disclosure issued for ASIO by the Attorney-General. ASIO has a history of making recommendations to the government of the moment, primarily targeting unpopular and powerless minorities. We offer the following as an example.
In 1964, ASIO issued a secret report to the Menzies Cabinet that “homosexuals were people with serious character defects who could not be trusted to be employed in positions which afforded access to highly classified information.” Cabinet records show that the Menzies Government backed ASIO’s recommendation (The Australian 2.1.95).
Prejudice can so easily be used to support a secret definition of national security.
The buzzword of the day is “terrorism” now probably built-in to national security. We really have no way of knowing, nor how sensitive information has to be for the Attorney-General to consider it prejudicial to national security. Yet in the words of John North, president of the Law Council of Australia, as recently as 21st March this year, “terrorism prosecutions were rare and the existing criminal justice system was equipped to deal with them,” so we maintain there is absolutely no need for this Bill to extend existing criminal legislation into civil proceedings.

Item 22
The fact that Item 22 inserts a new Part 3A into the Act to deal with the protection of information, the disclosure of which in civil proceedings, is likely to prejudice national security, does appear to restrict civil proceedings severely.
Despite Subclause 19(3) and Subclause 19(4) there are very few if any mechanisms to ensure that the parties to the proceedings receive a fair hearing where national security is invoked by the Attorney-General with non-disclosure certificates to force the court into a closed hearing.
Restrictions to a fair hearing include the Attorney-General’s civil witness exclusion certificate: Subclause 38H says that the mere presence of a certain witness and its disclosure is likely to prejudice national security. Subclause

38H(2) states that the certificate be given to the relevant party or its legal representatives stating that it must not call the person as a witness in the proceeding.
Further: Preventing witnesses from disclosing information by not allowing them to answer questions: Clause 38E(2), 38E(3), 38E(4), 38E(5) and 38E(6) requires the witness to give the court a written answer and that the court adjourn the civil proceeding. The court must provide the written answer to the Attorney-General and remain adjourned until such time as the Attorney-General gives the court a certificate or advice.
In a closed hearing, ordered by the Attorney-General, Subclause 38I(3) gives the court a discretion to exclude from part of a closed proceeding a party, a party's legal representative and a court officer who have not been given an appropriate security clearance. They are excluded because they are considered not trustworthy persons to hear the information the Attorney-General may present –shades of Menzies 1964. The information the Attorney-General will give is likely to contain classified information in arguing either why the information should not be disclosed or why a witness should not be called. The other parties to the proceeding and any of their legal representatives [Subclause 381(4)] must be given the opportunity to address the court on these arguments. But how can they when they have been excluded from hearing the arguments presented by the Attorney-General? Can there ever be a fair hearing for the accused unless the evidence is heard and tested in court?
The Bill allows the Attorney-General if he was represented at the closed hearing, to request that the record be varied, subclause 381(7). The Bill gives him that right if he considers that giving even a security-cleared legal representative access to the record would disclose information and that disclosure is likely to prejudice national security. Subclause 381(5) requires the court to make and maintain a sealed record of the hearing, which it must make available to an appeal or review court. Subclause 381(6) requires the court to give a copy of the record to the Attorney-General. Does that sealed record contain the original version or the doctored (varied) version? Subclause 381(8) says that where the court makes a decision on whether or not to vary the record that the Attorney-General considers to be not appropriate, there is at least a decision that can be quickly appealed under clause 38Q. So, the Attorney-General wins either way which goes to prove to us that we are getting very close to a police state which has little or no respect for the rights of its citizenry.
The Act supposedly does not affect a court's power to control the conduct of a civil proceeding. Subclause19(3) and (4) say so and give examples: the court retains the power to stay or dismiss a proceeding, to exclude persons from the court or to make suppression orders; and the other: even if the court considers the effect on the substantive hearing in deciding whether to make an order under section 38L, the court will not be prevented from later staying the proceeding on the ground that the substantive hearing would not be fair. In view of what the Bill allows the Attorney-General to do such as: power to exclude a witness from being called to give evidence in a civil proceeding; force a closed hearing on the chance of disclosure of information likely, in his opinion, to breach national security; exclude people without an appropriate security clearance from a closed hearing; to be able to have the record of a closed hearing varied so that even a security-cleared legal representative could be denied access; and to appeal the court's decision not to vary the record for him; we believe that the court actually does lose control of the civil proceeding despite what the Bill says. To fall back on the stay or standard law position, which is that the accused person is free and regarded as innocent by the law, makes little sense. If someone is being held by ASIO or the Federal Police and wants to seek a Federal Court review, arguing that the warrant was issued unlawfully, there is a likely problem. Suppose the Attorney-General for the executive government argues that relevant information can't be produced because it would breach national security. Due to lack of evidence which would let it make a fair decision, the court stays the matter, how does that help? It simply gives the victory to ASIO and the federal police, and leaves the poor litigant in unlawful detention.

In conclusion, we consider that this Bill to amend the name of the 2004 Act, and which is to apply to all civil proceedings, meaning all stages of the civil process, in any Australian Court, opens the door to abuses of power and, of even greater concern, the concealment of these abuses. The secrecy provisions contained in this Bill are unreasonable in an open, democratic society and should be removed because they have the potential to undermine the right of the parties to the proceedings to receive a fair hearing. There can be no safeguards written into a Bill that permits secret evidence in civil proceedings to be a deciding factor in litigation. This Bill reminds us of how the law was misused during the Apartheid period in South Africa.

Signed: Kendall Lovett and Mannie De Saxe