AMCRAN

Australian Muslim Civil Rights Advocacy Network

Submission to the

Senate Legal and Constitutional Committee

Inquiry into

National Security Information Legislation Amendment Bill 2005

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About AMCRAN

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is dedicated to preventing the erosion of the civil rights of all Australians, and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education, and communication with and through the media. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals.

Introduction

We thank the Committee for its invitation to make a submission in respect of the *National Security Information Legislation Amendment Bill* 2005 ('the Bill'), noting, however, the short time frame for submissions to be made. This submission, therefore, only addresses our main concerns with the Bill, but we are prepared to appear before the Committee to elaborate further if it would assist the Committee.

The Bill as it stands would have a detrimental impact on the civil rights of all Australians as it seeks to extend the national security information provisions that have recently been introduced for criminal proceedings. AMCRAN made written submissions to the Senate Committee Inquiry conducted into the *National Security Information (Criminal Proceedings) Bill* 2004, and parts of this submission reiterate those concerns in the context of the new bill. However, there are some further concerns that arise specifically in relation to civil proceedings.

In his second reading speech, the Attorney-General referred to a report of the Australian Law Reform Commission upon which the legislation is based[1]. In the report, the Commission recognised that its challenge was to "develop mechanisms capable of reconciling, so far as possible, the tension between disclosure in the interests of fair and effective legal proceedings, and non-disclosure in the interests of national security". It considered that it would be an "oversimplification" to characterise such a task as striking a balance between the right of an *individual* to a fair and open trial with the need of the *Government* to maintain official secrets and that consideration also must be given to the broader and compelling *public* of both 'open justice' and open and accountable government.

AMCRAN appreciates the need to protect information that may seriously prejudice national security, and would not *per se* object to provisions limiting the use of such evidence. We are, however, concerned that the Bill provides insufficient safeguards to ensure the independence of the court, and to protect the legitimate interests of litigants. Further, it deprives the public of both open justice and open and accountable government.

In each section, we make recommendations as to how the problems may be corrected. As mentioned above, we have a fundamental disagreement with the current implementation of the legislation, however we understand that the Committee may not be in a position to recommend reworking the legislation altogether.

Definition of "national security"

In deciding whether or not to issue non-disclosure and witness-exclusion certificates in either criminal or civil proceedings, the Attorney-General must consider whether

[1] Australian Law Reform Commission report 98, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, referred to by The Hon Philip Ruddock, MP, Second Reading Speech, Hansard, 10 March 2005.

the information is 'likely to prejudice national security'[2]. 'Likely to prejudice national security' is defined as 'a real, and not merely a remote, possibility that the disclosure will prejudice national security'[3].

The term 'national security' is broadly defined in the *National Security Information (Criminal Proceedings) Act* 2004 ('the Act') as 'Australia's defence, security, international relations, law enforcement interests or national interests'.[4] These elements, in turn, have also been widely defined. For example, 'international relations' in the Act means 'political, military and economic relations with foreign governments and international organisations' [5]. It is not inconceivable that according to this definition, almost any matter involving a non-Australian citizen or naturalised Australian citizen could be a matter relevant to 'national security'. Of particular concern is the issue of "political relations", as this could very well include cases involving political activity (for example, advocating freedom for the Acehnese in the current context, or previously supporting the African National Congress).

We note that in the previous Senate Committee Inquiry into the *National Security Information (Criminal Proceedings) Bill* 2004, similar objections to the breadth of the definitions were raised by a number of submitters, including the Law Institute Victoria, Amnesty International, the Australian Press Council, Mr Joo Cheong Tham, Mr Patrick Emerton, and indeed, the Committee itself:

> **"The Bill does not specify or even indicate what would be prejudicial to national security—this is a matter for the Attorney-General to decide. The Committee accepts that the term 'prejudice national security' is inherently difficult to define and interpret, relying on a highly subjective assessment. Further, any interpretation of the term assumes significance in light of the political and security environment which changes over time depending on perceived threats and developments in international relations.**
>
> **Even so, the Committee believes that the definition contained in the Bill is broad in the extreme, especially considering it is being used as the basis for the nondisclosure of information in criminal proceedings. The defendant is required to notify the Attorney-General and the court if he or she knows or believes that information to be presented during the proceedings relates to, or if disclosed is likely to affect, national security. The Committee notes that the definition of national security incorporates such broad areas of national activities which in effect may make the definition unhelpful or unworkable for the defendant.**
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> **The Committee considers that in light of the broad and vague definition of national security, the Bill may place a heavy and unfair burden on the defendant to comply with its requirements."[6]**

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[2] *National Security Information (Criminal Proceedings) Act* 2004 (Cth) clause 26(1)(c), and the corresponding proposed clause 38F(1)(c) of the *National Security Information Legislation Amendment Bill* 2005 ('the Bill').

[3] *National Security Information (Criminal Proceedings) Act* 2004 (Cth) s 17.

[4] *National Security Information (Criminal Proceedings) Act* 2004 (Cth) s 8.

[5] *National Security Information (Criminal Proceedings) Act* 2004 (Cth) s 10.

[6] Report of the Senate Legal and Constitutional Committee Inquiry into Provisions of the *National Security Information (Criminal Proceedings) Bill* 2004 and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Bill* 2004, August 2004, paragraphs 3.19 – 3.21.

It is relevant to consider then, that, as pursuant to the Act, the amending Bill grants the Attorney-General very broad discretionary powers.

The Attorney-General is permitted to issue a non-disclosure or witness-exclusion certificate if he, 'for any reason',[7] expects that there will be disclosure of the relevant information. Not only is this a very broad power, it also does not require the Attorney-General to provide any reason (which could be challenged by the other party in the closed certificates hearing) for his expectation. In its report, the ALRC recommended that ministerial certificates "should be expansive as circumstances permit" and accompanied by statements or affidavits "where appropriate". It is submitted that the ALRC did not go far enough in recommending that the provision of reasons should be mandatory.

It is submitted that referring the decision with respect to the disclosure and admission of sensitive information to the government effectively permits unfettered executive interference with the judiciary. In practice, discretionary powers have been shown to be problematic when the powers are placed in the hands of the purely executive arms of government. For example, in the context of the NSW consorting laws, the police and the prosecution were granted broad discretion whether or not to prosecute.[8] Commentators were of the view that 'the degree of discretion granted to police and the extremely wide net cast by this offence create an extremely fertile ground in which corrupt conduct and practices can flourish.'[9] Consequently, the NSW government has largely replaced consorting laws with non-association laws that are much less open to discretion. If this is the case for powers given to the executive arm of government, what then of the powers granted to someone in the representative arm of government and who may be more often than not subject to the ebb and flow of public opinion?

As the Attorney-General has extensive exclusionary powers over parties' evidence, the proper administration of justice requires a closer, more precise definition of what information cannot be disclosed during legal proceedings. Furthermore, the Attorney-General is not obligated under the current legislation to give any reasons for why a particular issue has national security concerns, he need only give a summary of the evidence itself.

Recommendation 1: That the current Bill should not pass unless 'national security' is defined more carefully in the Act so as not to be (a) as subjective as they currently are or (b) as broad as they currently are. The comprehensive definition of law enforcement issues[10] in the Act could be a model for such a definition.

Recommendation 2: That the Attorney-General, as part of a certificate, outline the national security implications of disclosure of the information in the certificate and

[7] Clauses 38F(1)(a)(ii), 38H(1)(a)(ii) of the Bill.
[8] See generally Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?' (2003) 26(3) *University of New South Wales Law Journal* 567.
[9] Steel at pp 598 - 599.
[10] The Act, s 11.

that these implications be subject to judicial scrutiny and consideration in the judge's ruling on the certificate.

Offence under clause 46C: Notification of Attorney-General

AMCRAN is concerned about the operation of clause 46C, which makes it an offence to contravene subclauses 38D(1), (3) or (4), or subclause 38E(2) of the Bill. These subclauses provide that a party to proceedings must notify the Attorney-General and other relevant parties if they know or believe they will disclose information prejudicial to national security during the course of proceedings – or will call a witness who may make such disclosures (either by their mere presence or through the evidence they give).

In effect, these subclauses impose a positive obligation on a party who 'knows or believes' that information prejudicial to national security will be disclosed to give a notice to the Attorney-General. AMCRAN submits that, given the breadth of the definition of "national security" and all of its inherent vagueness and biases as discussed above, that it would be almost impossible for a person, especially one who is unrepresented, to form an opinion as to whether or not the information is likely to prejudice national security. To further impose a two-year prison sentence under these circumstances is entirely unjust.

Recommendation 3: That the clause 46C offence for contravening provisions requiring a party to notify the Attorney General and other parties by removed.

Separation of the executive and jurisprudential arms of government

Consistent with our previous submissions, the Act and the Bill also raise issues in respect of the separation of powers as entrenched in the Constitution, since the Attorney-General's power to intervene during closed court hearings permits executive interference with the judiciary.

The separation of the powers of the government[11], is one of the foundations of democracy. However, under the regime proposed by the Bills, it is the Attorney-General, part of the representative and executive arms of government, who issues a certificate, the issuing of which is conclusive evidence that the information relates to 'national security'. There is a conflict of interest between the political issues involved in being an Attorney-General, and involvement in particular cases at law. There is already evidence from the parliamentary library showing, for example, that the issue

[11] *L'Esprit de Lois,* Montesquieu, 1748.

of which terrorist organisations are proscribed by the Attorney-General has, as a consequence of political motivations, become subjective and arbitrary[12]. Such an effect would likely also be seen in the application of the provisions of this legislation.

Under the Bill, the Attorney-General may determine whether or not disclosure of certain information during legal proceedings would prejudice national security. While this determination is subject to judicial review (through the power of the court to conduct a separate hearing on the matter), the Attorney-General is nonetheless permitted to intervene in the certificate review process[13] (even though he may not be a party to the substantive proceedings) as well as to appeal the court's decision[14].

Furthermore, while the Attorney-General may be present (indeed, he becomes a party) during the review process, other parties to the civil proceedings may be excluded due to the closed hearing requirements set out in the Bill. This creates an imbalance in how parties may present their cases. In addition, parties and/or their legal representatives cannot attend closed hearings unless they are given a Government-administered security clearance. This further unduly extends executive control over the judicial process.

Recommendation 4: Because of the concerns in relation to the separation of powers, it is not appropriate that the Attorney-General decides whether an issue is a matter of 'national security'. For this reason, an independent third party should make such decisions. One suggestion would be to expand the role of the Inspector-General of Information and Security (IGIS) to cover this role. This would still allow for the protection of sensitive information, but not violate the separation of powers principle. The Attorney-General, for example, could apply to the IGIS for such a certificate, rather than he himself being the source. The IGIS already has some powers to investigate national security issues.

Procedural fairness as priority and stay of proceedings

Where the Attorney-General issues a non-disclosure certificate under cl 38F of the Bill, the court must adjourn proceedings and conduct a separate, closed hearing to decide whether to make a court order under cl 38L[15]. In making this decision, the Court must take into account whether or not there would be a risk of prejudice to national security if the information was disclosed or if the witness was called; whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding; or any other matter the court considers relevant[16]. However, in making its decision, cl 38L(8) of the Bill requires the court to give the greatest weight to the risk of prejudice to national security.

[12] *The Politics of Proscription*, Research Note No. 63, 21 June 2004, Parliamentary Library.
[13] The Bill, cl 38K.
[14] The Bill, clauses 38Q, 38R, 38S.
[15] Clause 38G.
[16] Clause 38L(7)(a), (b) and (c).

Whilst the proposed amendments to s 19 of the Act preserve the power of the court to control the conduct of proceedings and to order the stay of proceedings after a cl 38L order, AMCRAN submits it is insufficient to ensure that the rights of litigants are preserved when the court is required to give the greatest weight to the risk of prejudice to national security.

We also submit that it is further counter-balanced by the watered-down effect of the second factor to be taken into account, i.e., whether the disclosure would have a "*substantial* adverse effect on the substantive hearing in the proceeding". The Act also defines "substantial adverse effect" as an effect that "is not adverse and not insubstantial, insignificant or trivial".[17] AMCRAN is of the opinion that *any* adverse effect is sufficient to undermine the interests of justice, and must be taken into account by the court in making a decision under cl 38L.

We further note that the NSW Council for Civil Liberties in its submission to the Senate Committee Inquiry into the provisions of the *National Security Information (Criminal Proceedings) Bill 2004* recommended that the word "substantial" be removed. The Senate Committee in its report endorsed these views and recommended the deletion of the word "substantial" as well as the clause requiring the court to give the greatest weight to the risk of prejudice to national security. However, these were retained in the final *National Security Information (Criminal Proceedings) Bill* that was passed by Parliament.

Recommendation 5: That the word "substantial" be removed from paragraph 38L(7)(b).

Recommendation 6: That subclause 38L(8) be removed.

Conflict of interest concerning the Attorney-General and Executive Government

Unlike criminal proceedings, there is the distinct possibility that the Attorney-General or other member of the elected government could be subject to civil proceedings against him or her. The Bill provides for this case[18] by allowing another Minister of the Government to act in the place of the Attorney-General for the purpose of proceedings under the Bill.

As pointed out in Recommendation 4, our preference would be that it not be the Attorney-General who may intervene in proceedings in matters concerning national security information. If Recommendation 3 above were accepted, this section would not apply.

[17] The Act, s 7.
[18] Clauses 6(2), 6(3) and 6(4).

However, as it stands, in AMCRAN's view, the Bill shows an incredible level of partiality to the elected government of the day. It makes little difference whether the Attorney-General or another Minister hold the reigns; in either case decisions having a major impact on the admissibility of evidence in a civil case are made by the person. It is obviously partial that this the same person probably belongs to the same political party or coalition as the Attorney-General.

The independence of the judicial system is one of the bastions of democracy. Indeed, the appearance of impartiality must also be preserved as *"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*[19]

In this case, it is important that the perception be that before the eyes of the law, the government is on an equal footing with the other party. However, if the government (a) has complete access to the evidence while the other party does not have access to it; and (b) has the power to prevent the disclosure of information that may be detrimental to its own case or helpful to the case of the other party on the basis of a broadly defined discretionary and largely opaque notion such as 'national security', then *prima facie*, this appears unjust.

AMCRAN is concerned that the Bill would operate to adversely affect the prospects of success of certain proceedings, namely, any person seeking a remedy in relation to the issue of a warrant under the *Australian Security Intelligence Organisation Act* 1979 or any civil action which may be launched against the Government.

An example of a real scenario where this may be an issue is the case of the Australian citizens detained in Guantanamo Bay, and particularly the case of Mamdouh Habib, who has already commenced proceedings in the Administrative Appeals Tribunal for the return of his passport. His lawyer has also publicly indicated that he intends to pursue civil action against the government[20]. One issue that may be examined before a court is whether the Australian government had knowledge that Habib was being rendered by the US government from Pakistan, where he was first detained, to Egypt. Egypt has a reputation for torture[21]. If the government did allow Mr Habib to be rendered, whether the government violated international treaties in doing so may be a major issue.

Mr Philip Ruddock, the Attorney-General, has already publicly stated that the government did not know of the rendition. Hypothetically, however, if there were evidence Mr Habib could present or witnesses that he could call to prove or indicate that the Australian government did, in fact, know of his rendition, then the Attorney-General, or any member of his party, would have an obvious conflict of interest between his responsibilities as the guardian of Australia's national security and his own political future. Were it to be revealed that he had misdirected the public and that his government were involved or somehow implicated in the torture of one of its citizens, this may have an impact on the party's public standing.

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[19] *R v Sussex Justices; Ex parte McCarthy* (1924) 1 KB 256, per Lord Hewett.

[20] Australian Broadcasting Corporation, *The World Today*, 14 February 2005. Transcript available online: http://www.abc.net.au/worldtoday/content/2005/s1302163.htm

[21] Conclusions and recommendations of the UN Committee against Torture: Egypt. 23/12/2002. CAT/C/CR/29/4D (5.b,c)

Recommendation 7 (not necessary if Recommendation 4 is accepted): That in civil cases where the government is a party, the Attorney-General should not be able to appoint a Minister for the purposes under the Bill. Rather, it is important that the Government should step aside and allow an independent third party to determine national security information issues.

Security clearance

It will be necessary for either a party or the party's lawyer or both to obtain security clearances in order to have access to the security information that may have a direct impact on their case. While it is semantically correct that lawyers who act in civil cases do not need to obtain security clearance, as pointed out by the Opposition[22], this is little more than semantics. In practice, in order to effectively represent a client, or for the party to effectively represent themselves, they need unfettered access to all the evidence and/or witnesses. Any obstacle to this access would limit the ability of the lawyer or the party to proceed.

In this vein, we reiterate our concerns as submitted previously in relation to the security clearance requirements under the Act and as proposed by the Bill. In both cases, there is no clear indication of what standards or factors are to be taken into account, excepting a reference to the Australian Government Protection Security Manual ('PSM'). As submitted previously, AMCRAN objects to the reliance on the PSM which is only available to government departments, agencies and contractors working for the government on three grounds. The first is the unavailability of the document to the general public. Secondly, there is evidence to suggest that the PSM is constantly being reviewed and changed. Thirdly, as the PSM itself acknowledges, the clearance process is discriminatory and intrusive[23], and unabashedly requires an examination of the person's personal characteristics of reliability and trustworthiness as well as personal history to ascertain whether or not they are a security risk. The descriptions used in the PSM also seem to be vague and subjective, such as maturity, responsibility, tolerance, honesty and loyalty.[24]

These objections are even more relevant in the present Bill in that a self-represented party to proceedings may seek security-clearance in order to access the material in question. For some, going to court is already a harrowing experience, especially those who have no choice by to be self-represented because of a social- or economical disadvantage. To further subject them to personality analysis that brings into question

[22] "[A lawyer with security clearance] has a right to be present during all stages of even the closed hearing and to have access to the security cleared material. Contrary to what has been expressed by some organisations, the bill does not make it mandatory for a lawyer to be security cleared." Robert McClelland, MP, Shadow Minister for Homeland Security, Second Reading speech, 15 March 2005.

[23] Attorney-General's Department, *Commonwealth Protective Security Manual* (2000) D 8 quoted in Australian Law Reform Commission report 98, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Part 6.2.

[24] Attorney-General's Department, *Commonwealth Protective Security Manual* (2000) D 30-33 quoted in Australian Law Reform Commission report 98, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Part 6.7.

their maturity, honesty and loyalty would no doubt have the additional effects of intimidation and demoralisation.

Parties *must* be given the opportunity to make submissions

Clause 38I(3) of the Bill gives the court the power to exclude parties and their legal representatives from closed hearings in situations where they do not have security clearance to the appropriate level. Immediately following this, cl 38I(4) goes on to state that where other parties to the proceedings must be given the opportunity to make submissions to the court regarding the disclosure or otherwise of the information. Apart from the fact that the clause seems to be very poorly drafted, cl 38I(4) is entirely futile in giving effect to the principles of natural justice if a party and/or their legal representative is not given security clearance.

If the party *must* be given the opportunity, then there *must* also be some effective mechanism in place for them or the lawyer of their choice to have access to the information.

Recommendation 8: That the requirements of a security clearance be defined in the legislation, and not on the basis of PSM, given that it is not a public document, is frequently amended, and is not subject to judicial investigation.