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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

April 14 2005

Dear Secretary

Supplementary submission to inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005

I am writing in relation to the Committee's current inquiry into the National Security Information Legislation Amendment Bill 2005 (Cth). Please find attached a brief supplementary submission, elaborating on some of the issues raised in yesterday's hearings, which I hope the Committee will accept.

Yours faithfully

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SUPPLEMENTARY SUBMISSION TO INQUIRY INTO THE PROVISIONS OF THE NATIONAL SECURITY INFORMATION LEGISLATION AMENDMENT BILL 2005

The purpose of this supplementary submission is to elaborate on some of the issues raised in yesterday's hearings.

1. The Bill compared to the existing law of public interest immunity

In its testimony, the Attorney-General's Department suggested that the National Security Information Legislation Bill 2005 (Cth) ('the Bill') simply formalises a procedure around the existing law of public interest immunity based on national security grounds.[1] I do not agree with this statement.

First, the definition of 'national security' under the *National Security Information (Criminal Proceedings) Act 2004* (Cth) ('the Act') is considerably broader than the definition of 'matters of state' under the *Evidence Act 1995* (Cth) ('*Evidence Act'*).[2]

Second, the fact that it is the Attorney-General who determines whether the Bill will apply to any given matter,[3] coupled with the regime of Attorney-General's certificates that the Bill would establish,[4] would give the Commonwealth Executive a power to interfere with a civil proceeding, including introducing delays by way of statutorily mandated adjournments[5] and dictating (in the time between the receipt of notice by the Attorney-General and the issuing of a certificate, and then so long as a certificate remained in force) that certain evidence may not be led or certain witnesses may not be called.[6] This is quite different from the existing principles, which require the

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[1] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 13 April 2005, p 32 (Ms Maggie Jackson).

[2] Compare section 19 of the Act with section 130(4) of the *Evidence Act*.

[3] Clause 6A.

[4] Clauses 38F, 38H.

[5] Clauses 38D(5), 38E(4), 38E(5), 38E(6), 38G, 38H(6).

[6] Clauses 46A, 46B, 45D, 46E.

Commonwealth to make an application to the court for a declaration that certain information be excluded on public interest immunity grounds.[7]

Third, the Bill would impose a statutory weighting of reasons, favouring the prevention of a *risk of prejudice to national security*[8] over a *substantial adverse effect on the substantive hearing in the proceeding*, and over any *serious interference with the administration of justice*.[9] This is quite different from the court's power to take into account any relevant consideration, giving it the weight it thinks appropriate, under the existing law.[10]

These aspects of the Bill go well beyond a mere 'formalised procedure for claims of public interest immunity on national security grounds.'[11]

2. Possible alternative mechanisms to a stay

I apologise for being less than clear in my remarks on alternatives to the stay as a procedure for ensuring fairness in the event that national security information might be involved. The Human Rights and Equal Opportunity Commission interpreted my remarks as suggesting that, in exceptional circumstances, secret evidence might be considered by the court.[12]

2.1 Secret evidence

If 'secret evidence' means evidence that is used by the court in reaching its decision, although one of the parties has not had the opportunity to see and make submission in relation to that evidence, then in general I would not support the use of secret evidence.

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7 Section 130(2) of the *Evidence Act* provides that 'The court may give such a direction [ie for the exclusion of certain information on public interest grounds] either on its own initiative or on the application of any person (whether or not the person is a party).'

8 Clauses 38L(7)(a) and 38L(8) of the Bill.

9 Section 3 of the Act.

10 Section 130(5)of the *Evidence Act*.

11 As described by the Attorney-General's Department: Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 13 April 2005, p 32 (Ms Maggie Jackson).

12 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 13 April 2005, pp 22, 23 (Mr Craig Lenehan).

For example, in conventional civil litigation between two equal parties (eg a contractual dispute) it would normally be wrong for the court to rely on secret evidence to favour one party over another, without hearing submissions from both parties.

However, I think there could be exceptions to this principle in certain cases, particularly when the matter is a suit for the declaration of unlawfulness of Commonwealth action. For example, it may be that the evidence has been brought to the court's attention because a plaintiff in a suit for habeas corpus has sought to gain access to it. If the court then considered that information in the context of an application for its exclusion by the Commonwealth on national security grounds, and in the process of doing so noted that it did demonstrate the unlawfulness of the plaintiff's detention, then it would seem better that the court act on that information and declare the plaintiff's detention unlawful, then uphold the principle against secret evidence, and therefore leave the plaintiff in unlawful detention.

To generalise from this example: secret evidence in this sort of suit would be objectionable when it is adverse to a party's case, and they are not permitted to test it. When it supports their case, then it would seem to be better that the court rely upon it to give them a win, then disregard it and leave a plaintiff who ought to have won with no remedy. It is not as if this is prejudicial to the Commonwealth, which has already had the opportunity to consider the evidence and debate it in the course of an application for its exclusion, and may be able to make further submissions in relation to it without compromising national security.

2.2 Secret trials

An alternative to secret evidence is closing some or all of the argument at trial to the public, and keeping some or all of the court records and reasons for judgement secret. The Bill expressly contemplates that a party to litigation, and/or their legal team, may be present in a closed hearing, and therefore receive at least some access to the information in question.[13] In those circumstances, as I have said in my submission and my testimony, it seems silly to allow the information to be debated behind closed doors,

only to reconvene in public and have the information excluded, even if it is essential to a just resolution of the matter.

In my view, in those circumstances it would be better to allow the trial to proceed in secret, if this is the only way for justice to be done, then to leave a person in unlawful detention because crucial evidence cannot be led in public. In some civil proceedings this will not be possible, as their will be a jury involved. But in the majority of civil proceedings, and certainly in those suits against the Commonwealth that I am particularly concerned with, that will not be the case.

3. Conclusion

A number of witnesses referred to the desirability of a court-centred and court-driven approach to the protection of national security information, rather than an Executive-driven approach. I also think that this is the general thrust of the ALRC Report. And given my comments in section 1 above, I certainly think it would be desirable to amend the legislation in this direction. In light of my remarks in section 2, part of what this would involve would be to give the court a range of options and powers in handling information, in responding to the issues raised by national security information, in deciding how such information might be handled, whether or not to close certain proceedings to the public, and so on. There should not be a statutory determination that forces the court down one particular path in all circumstances.

One way to look at the issues is in terms of potentially conflicting goals, of holding the Commonwealth to account for the legality of its actions, and of ensuring the publicity of the judicial process. To some extent, we must choose between trusting the Executive to obey the law, even if it is not subject to scrutiny because of national security concerns, or alternatively trusting the judiciary to apply the law in a fair and just manner, even if some of this happens behind closed doors. If this is the trade off that has to be made, then I think it is the judiciary that should be given the benefit of any doubt.

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[13] I say this because clause 38I(3) makes exclusion of parties from the closed hearing the exception, not the norm.