Federation of Community Legal Centres (Vic) Inc

4th April 2005

Committee Secretary
Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House
Canberra, ACT, 2600
legcon.sen@aph.gov.au

Dear Secretary

Inquiry into the provisions of the *National Security Information Legislation Amendment Bill* 2005

The Federation of Community Legal Centres has a number of significant concerns regarding the *National Security Legislation Amendment Bill* 2005. We appreciate the opportunity to provide this feedback and would welcome the opportunity to further elaborate on our submission, should the Committee decide to hold public hearings in Melbourne.

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres ('CLC's') across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLC's) assist in excess of 60,000 people throughout Victoria each year by providing provide free legal advice, information, assistance, representation, and community legal education. This submission has been prepared on behalf of the Federation by the Anti-Terrorism Laws Task Group, in consultation with various other members of the Federation.

The *National Security Information Amendment Bill* 2005 proposes to extend the provisions of the *National Security Information (Criminal Proceedings) Act* 2004 to include certain civil proceedings. It broadly adopts the same procedure that applies to federal criminal proceedings, but with some changes to allow for differences in civil proceedings. The Federation has concerns about the *National Security Information (Criminal Proceedings) Act* and does not support the wholesale adoption of these provisions to the civil jurisdiction.

It is imperative in addressing threats to national security that governments adhere to their international obligations to uphold human rights, fundamental freedoms and the rule of law. The Federation is concerned that the Bill, if passed, will allow the Attorney General to closely monitor and regulate court processes. We see this as a clear breach of the doctrine separation of powers that is a cornerstone of our legal system. We also believe that the Bill, if passed, will operate to prevent the operation of open and accountable

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administration of justice, limit fundamental rights of access to justice and limit access to civil compensation.

Breadth of the definition of 'national security'

The proposed Bill extends the provisions of the *National Security Information (Criminal Proceedings) Act* 2004 to apply to civil proceedings to "protect information that relates to, or whose disclosure may affect, national security".[1] 'National security' is defined as 'Australia's defence, security, international relations, law enforcement interests or national interests'. This definition is far broader than the existing definition of 'matters of state'[2] under the *Evidence Act 1995* (Cth), and creates a scope for application far beyond the context of 'terrorism' trials. This definition is so broad in scope that it could cover everyday civil matters dealt with by community legal centres that bear no relevance to terrorist activities. The Federation is further concerned that there are no limits on the Attorney' General's exercise of discretion in determining what constitutes 'national security'.

Restriction on participation in Civil Proceedings

The Bill gives extensive power to the government to control who can participate in legal proceedings. If passed, it will mean that only Judges and people who have passed government controlled security clearance will be permitted to participate in legal proceedings. The security clearance provisions extend to the parties as well as their legal representatives, which further restricts the right of parties to a civil proceeding to have a fair trial. As with criminal proceedings, this means that a party to a proceeding may be denied use of a lawyer of their choice, if the lawyer is not security cleared. These provisions will seriously undermine the rights of parties to participate in civil trials.

The Bill proposes to create an offence of disclosure of information to a party, a party's legal representative or an assistant who is not security cleared, except in permitted circumstances.[3] The Federation is concerned that the effect of this provision would be to limit the capacity of a lawyer to receive a comprehensive briefing from his or her client, or to discuss the subject matter of the proceedings with possible witnesses and others. It would also seem to restrict a lawyer from informing a client, who is not security cleared, about the details and even outcome of proceedings.

The Bill provides that the court must make a record of a hearing if it is closed, however, this record will only be provided to security cleared parties.[4] The Bill also allows the Attorney-General, if he or she was represented at a closed hearing, to request that the record be varied to ensure that it does not disclose information which is prejudicial to national security to security cleared parties or their representatives.[5] Effectively the Attorney–General is able to determine definitively what information parties to civil proceedings are able to obtain. The Federation sees this as a clear infringement on the doctrine of the separation of powers. We support the courts retaining unfettered discretion with respect to restrictions on the fundamental principle of open courts.

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[1] Phillip Ruddock's second reading speech.
[2] S 130(4) *Evidence Act 1995* (Cth).
[3] Clause 46G
[4] Subclause 38I(5)
[5] Subclause 38I(7)

This may have very serious ramifications where the government finds itself party to proceedings. The Bill fails to recognise that such a situation gives rise to a grave conflict of interest and does not provide any solution to this issue. The executive would be in a position to control what information is available to other parties in the proceedings, despite themselves being party to the proceedings. Further, the Attorney-General, being a government minister, is clearly in a position of conflict when it comes to determining whether parties involved in proceedings against the government should be given access to information or not. Notwithstanding this very obvious conflict of interest, the Act does not make provision for circumstances where the government is subject of proceedings.

The Act does provide that the Attorney-General must nominate another Minister where the Attorney-General's department specifically becomes involved in proceedings. Unfortunately, this attempt to remedy the conflict of interest is insufficient in that it fails to recognise the conflicted position any government minister would be in where another government department is involved in proceedings.

Amendments to the Administrative Decisions (Judicial Review) Act 1977

The Bill proposes inserting a section into the *Administrative Decisions (Judicial Review) Act* 1977 (ADJR Act) to limit the jurisdiction of the court to review a certificate decision of the Attorney-General.[6] Further, a person will not be able to request under section 13 of the ADJR Act that the Attorney General, or an appointed Minister give findings or reasons for the certificate or notice decision. By exempting the Attorney-General's decisions from judicial review, the Bill gives the government extensive powers without providing any mechanism to monitor the exercise of those powers. The Federation does not support these sections as they are clear infringements upon principles of natural justice.

The granting of security clearances is made subject to a document, the Australian Government Protective Security Manual,[7] which is a policy document issued through the Attorney General's Department. The document is not publicly available; although 'not security classified, its availability will be restricted to government departments, agencies and contractors working to government.'[8] As a policy document, it is subject to variation by the executive government at any time, free of any legislative, judicial or public oversight. It is clearly a breach of the principles of natural justice that a government decision-making process affecting individuals is not publicly available and not subject to the scrutiny usually afforded to government administrative decisions. This is compounded by the proposal to exclude judicial review of such decisions.

Extensive powers of the Attorney-General

The Bill provides that the court retains the power to stay proceedings, to exclude people from the court or to make suppression orders.[9] The Bill has, however, given extensive power to the Attorney General to influence proceedings and to determine whether a hearing should be closed, or whether a witness, information or a party should be excluded. For example, the Attorney-General may issue a certificate to prevent witnesses from disclosing information by not allowing them to answer questions[10]; to issue a

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[6] Subclause 9B

[7] Note 1 to clause 34 (2).

[8] Website of the Attorney-General's Department, http://www.ag.gov.au/www/protectivesecurityHome.nsf/HeadingPagesDisplay/Protective+Security+Manual?OpenDocument accessed 30 March 2005.

[9] Subclause 19(3) and Subclause 19(4).

[10] Clause 38E.

certificate to prevent information from being disclosed[11]; to issue a certificate to prevent a witness from being called[12]; and to close a hearing in a civil proceeding.[13] The extensive powers given to the Attorney-General to influence civil proceedings undermines the doctrine of separation of powers, and fails to adhere to principles of open justice, and open and transparent government. Furthermore, as noted above, if this Bill is enacted, these powers would not be open to judicial review.

In particular relation to the certificate to close a court, the Federation believes that the closed hearing requirements threaten to destroy the fundamental fairness and independence of judicial processes. Open court rooms are an important part of the judicial process. It is especially important to have open court rooms where the government is a party. In acting as a check on the government's exercise of power it is also essential that the court can compel the government to make disclosures about its activities as they are relevant to proceedings.

Rationale for the Legislation

In his second reading speech Phillip Ruddock MP states that

> It was recommended by the Australian Law Reform Commission that this protection should be provided in civil proceedings, and that is one of the additional reasons that we are legislating in this form.[14]

The Federation does not agree with the Attorney General's interpretation that the Australian Law Reform Commission (ALRC) Inquiry supports this Bill. The ALRC was commissioned to inquire into the protection of classified and security sensitive information by the then Attorney General of Australia. After extensive consultation, the ALRC produced a comprehensive report entitled *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004) in June 2004 which contains 80 recommendations for reform, covering a range of matters of law and practice.[15] The ALRC did not recommend that the specific protection, as set out in the *National Security Information Legislation Amendment Bill 2005,* be provided for in civil proceedings.

The ALRC recommended that power to determine how proceedings will be run should rest with the court. The Federation strongly supports this approach. The ALRC also argued for a more flexible approach to sensitive security information, arguing that closed hearings, Ministerial certificates and security clearances are not the only way method of dealing with classified and security sensitive information, and that courts should be allowed to make a broad range of orders to protect such information. The Federation also favours this approach.

In regards to obtaining information from closed hearings, the ALRC recommended that all parties should be able to obtain a transcript of proceedings to allow them to pursue any avenue of appeal open to them. We believe that this is a necessary part of a fair judicial process.

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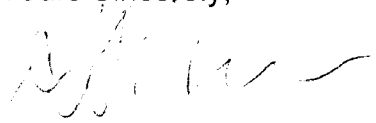
[11] Clause 38F.
[12] Clause 38H.
[13] Clause 38I.
[14] Ruddock's second reading speech 2005 for this Bill.
[15] ALRC submission to *Parliamentary Inquiry into National Security Information Bill* 2004.

If you have any questions regarding our submission, please contact Marika Dias, Convenor, Anti-Terrorism Laws Task Group on (03) 9363 1811 or via Marika_Dias@fcl.fl.asn.au or Sarah Nicholson, Policy Officer on (03) 9654 2204 or via Sarah_Nicholson@fcl.fl.asn.au.

Yours Sincerely,



Pauline Spencer
Executive Officer