

# **Inquiry into the National Security Information Legislation Amendment Bill 2005**

## **OVERVIEW**

The National Security Information Legislation Amendment Bill (the Bill) seeks to extend the operation of the *National Security Information (Criminal Proceedings) Act 2004* to include certain civil proceedings.

According to the Explanatory Memorandum the Bill broadly adopts the process for federal criminal proceedings under the Act, with some departures to account for the nature of civil proceedings. Key differences in the civil regime include the following –

- The Attorney General or an appointed Minister gives written notice to the parties and court, rather than the prosecutor, that the Act applies to a civil proceeding. This is not necessary in federal criminal proceedings which invariably involve the Director of Public Prosecutions.
- The Attorney-General (or appointed Minister) must be given notice of a prehearing conference and may attend the conference, given that the Attorney-General may not necessarily be a party to the proceeding and may not otherwise be aware of it.
- At any time during a civil proceeding, the Attorney-General (or appointed Minister) may agree with the parties to the proceeding to an arrangement about any disclosure and the court can give effect to such an order.
- The security clearance provisions extend to the parties as well as their legal representatives and the assistants of the legal representatives.
- Where a witness may disclose security sensitive information in giving evidence, the court must order a witness to provide a written answer to the question. Upon receiving the answer, the court must adjourn the proceeding. The adjournment is not necessary where the information in the written answer discloses information that is the subject of a certificate under proposed clause 38F which is still in effect or the answer discloses information that is the subject of an order by the court under clause 38B or 38L. This departure from the procedure for criminal proceedings will seek to reduce delays and adjournments during the civil proceedings.

- The Bill applies to civil proceedings in any Australian court. A civil proceeding means all stages of the civil process, including discovery and interlocutory proceedings.

The court retains the power to determine that the proceedings should be stayed in the event that a party would not be guaranteed a fair hearing, even after the court makes an order after the closed hearing.

The Bill requires parties to relevant proceedings to be security cleared. Upon receiving written notice from the Secretary of the Attorney General's Department a party or the party's legal representative may apply to the Secretary of the Department for a security clearance at the level the Secretary considers appropriate.

Failure to apply for a security clearance within the relevant period allows the court, inter alia, to recommend that the party seek a security clearance or engage a legal representative who has been given or is prepared to seek a security clearance.

The Bill creates a number of offences to prevent disclosure of national security in civil proceedings.

## **LAW COUNCIL POSITION**

### **Stay of Proceedings**

The Law Council strongly supported amendment of the *National Security Information (Criminal Proceedings) Bill 2004* and the *National Security Information (Criminal Proceedings)(Consequential Amendments) Bill 2004* (the National Security Bills) so that a criminal court might be given the right to stay criminal proceedings in circumstances where a fair trial could not in the court's opinion be guaranteed.

Amendments to this effect were subsequently made in the course of Parliamentary debate.

In civil proceedings to which the Attorney General or some other representative of the Federal Government is a defendant it seems the framework provided by this Bill may be perceived as enabling the Federal Government to evade civil liability for a wrong inflicted on the other party if a court should decide to stay proceedings because a fair hearing cannot be guaranteed. Notwithstanding the use of another Minister to make decisions about the use of security sensitive information in litigation involving the Attorney General, the perception could well be that the Bill provides the Federal Government with a means to evade civil liability in particular circumstances.

Of course the Federal Government may, as a plaintiff in a civil proceeding, be equally frustrated in attempts to pursue civil remedies.

It could not unreasonably be suggested that, in a dispute between the Federal Government and, say, a contractor for the supply of military hardware, in which considerable damages might be sought by one or each party against the other and security sensitive information might well be germane to resolution of the litigation, that the use of Ministerial certificates might frustrate the proceedings or be perceived as providing an unfair advantage to one of the parties, most probably the Federal Government.

The Senate Legal and Constitutional Committee has already recommended that for certain purposes the clauses in the National Security Bills requiring a court to give greatest weight to national security rather than an accused person's right to a fair hearing be removed. That was not done and again in this Bill the court must give greatest weight to the national security considerations. The Senate Committee might wish to reconsider its approach to this matter in relation to civil proceedings.

The courts in Australia have a long and credible history of being able to manage sensitive evidence in all kinds of situations and there is no reason to believe that security sensitive information would not be able to be managed successfully by them so as to maximise the prospects that civil litigation could be successfully and fairly concluded.

### **Security clearances for Lawyers**

The Law Council has previously expressed its opposition to the application of the security clearance system to lawyers representing clients charged with criminal offences. These comments were directed at the National Security Bills referred to above.

At the heart of the Law Council's arguments were the following:

- (a) A concern that the security clearance proposal would unfairly restrict an accused person in the selection of their lawyer. In the Law Council's submission, the security clearance system proposed involved a very direct and serious prejudice to lawyers and clients.
- (b) If a security clearance system must operate, the Law Council believed the courts should retain discretion over the process, rather than the Secretary of the Attorney General's Department.

The Law Council proposed certain amendments about the means by which legal representatives would receive security clearances. The Law Council recommended that the *National Security Information (Criminal Proceedings) Bill 2004* should be amended in the following ways:

- (a) That, prior to the Secretary of the Attorney General's Department issuing a notice requiring a lawyer to undergo a security clearance, the Secretary must first seek the consent of the affected lawyer to the security clearance process;
- (b) If, on any grounds, the lawyer refuses to submit to the security clearance process, clause 39 should then set out a process where the Secretary of the Attorney General's Department makes application to a competent court for an order for a notice to be given to the applicable lawyer;
- (c) Under this proposed process, the affected lawyer would be permitted to make submissions during the application;
- (d) Given the application would not be directly relevant to the substantive proceeding itself, it could be heard in a different court – such as the Federal Court or a State Supreme Court;
- (e) Relevant prescribed factors to be considered by the Court during such an application should include:
  - (i) The lawyer's period in active practice without either previous criminal convictions or adverse findings in disciplinary matters sufficient to demonstrate both proven good character and reliability;
  - (ii) The lawyer's previous experience in handling such information;
  - (iii) The effectiveness of the implied undertaking to only use such information for the purposes of defending an accused in the relevant court proceedings;
- (f) The onus would rest with the Secretary of the Attorney General's Department to demonstrate the factual basis of his/her objection to the lawyer receiving any such information.

These proposed amendments were not accepted by the Government.

Fundamentally the Law Council believes that a court, and not the Secretary of the Attorney General's Department, should determine whether a legal representative and, in the case of this Bill, the parties and the assistants of a legal representative, require a security clearance. Failing this, the process undertaken by the Secretary of the Attorney General's Department should be as fair and as transparent as possible. This remains the Law Council's position in relation to this Bill.

## **Resourcing**

The provisions of the Bill could require a very large number of security clearances be provided for the members of the Legal Professions, as well as the production of numerous certificates in relation to information or witness exclusion certificates.

A Court must stay proceedings until such time as these certificates are provided (subsection 38D(5)). The practical effect of this provision is that Court hearings will be delayed, possibly for a substantial period of time, until the certificates are provided from the Attorney General.

The Law Council strongly suggests that the Attorney General's Department and other relevant agencies are properly resourced so that this process does not lead to increased Court hearing times and lengthy delays in the judicial system.

## **Offences**

A number of the offences are predicated upon the disclosure of information that is likely to prejudice national security.

Presumably in any prosecution for such an offence evidence would need to be adduced to establish the likely prejudice. Such evidence would need to be persuasive and compelling but statements by expert witnesses to that effect would be very difficult for an accused person to rebut.

The element of the offence represented, for example, by paragraph 38D(1)(b), which is an element of the offence in section 46C, requires that a person must give the Attorney General notice in writing if they know or believe that he or she will disclose information in the proceedings and that disclosure *may affect* national security. This is of concern because of the difficulty with identifying information that is security sensitive information and the lack of clarity in this threshold

The Committee is urged to investigate the interplay of this threshold with the use of 'likely to prejudice national security' in paragraph 46C(b), and the definition of national security itself.

Such ill-defined concepts do not make good law and can potentially be abused. The Law Council recommends that the Committee investigate the insertion of terms such as 'may *materially* affect national security' or 'is reasonably likely to prejudice national security' or another formulation more able to be interpreted by the Courts and people who are required to make a judgment about their evidence under provisions such as section 38D.

In addition, the offence in Clause 46G appears to be absolute in its application. If information disclosed "is likely to prejudice national security" and is not otherwise excepted, the state of knowledge about the information on the part of a person unaware of its security sensitive nature appears to be immaterial.

Legislation which facilitates the inadvertent commission of an offence carrying a penalty of imprisonment for 2 years by innocent disclosure is inappropriate. A defence or exception for this offence should include allowance for unwitting and reasonable behaviour on the part of the person disclosing the information.