Submission of

New South Wales Council for Civil Liberties

to the

Senate Legal and Constitutional Committee's

Inquiry into the Provisions of:

- **National Security Information (Criminal Proceedings) Bill 2004**
- **National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004**

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Contents

Note: throughout this submission any reference to 'criminal proceedings' should also be read to apply equally to extradition proceedings.

1. Preface: ICCPR Article 14

International Covenant on Civil and Political Rights (1966)

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing** by a competent, independent and impartial tribunal established by law. **The press and the public may be excluded from all or part of a trial for reasons of** morals, public order (*ordre public*) or **national security in a democratic society**, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, **everyone shall be entitled to the following minimum guarantees, in full equality**:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

…

NOTE: Australia acceded to the *International Covenant on Civil and Political Rights* on 13 August 1980. Australia is obliged by the treaty to 'respect and to ensure to all individuals within its territory…the rights recognised in the…Covenant': ICCPR Article 2(1).

2. Executive Summary

This submission is made on behalf of the New South Wales Council for Civil Liberties ('CCL') in respect to the two National Security Information (Criminal Proceedings) Bills currently before the Senate:

- National Security Information (Criminal Proceedings) Bill 2004; and,
- National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004.

CCL is concerned about various provisions of these Bills, but particularly the adverse affect this legislation will have on the right of every citizen to a fair trial. The right to a fair trial is recognised at common law[1] and in international law.[2] These Bills, in their present form, represent an attack on this fundamental right to a fair trial.

Without a Bill of Rights enshrining the common law right to a fair trial, or incorporating the *International Covenant on Civil and Political Rights* ('the ICCPR') into domestic law, it is important that Parliament consider these changes to criminal procedure *very* carefully. CCL recommends that the Bill be heavily modified before being passed by the Senate.

Overall, the Bills fail to recognise the serious nature of criminal proceedings. It is fundamental in our accusatorial system, where the Crown brings a person to trial by accusing them of a crime, that all the evidence against a defendant be put before that defendant. This is so that a defendant may answer the case against him or her.

CCL strongly recommends that the proposed closed hearings, to examine the Attorney-General's non-disclosure and witness exclusion certificates, be held at least four weeks before the start of a trial. Such pre-trial closed interlocutory hearings should be *mandatory*. This will allow for a defendant to know what evidence will be available at trial *before* the trial starts.

CCL is concerned that the legislation, as currently drafted, would allow a closed hearing to proceed without the defendant or any legal representative being present to advance the defendant's interests. How can a defendant defend themselves if they are not permitted to hear the evidence against them? This is a serious undermining of the adversarial system of criminal justice and the right to a fair trial.

CCL believes that the provisions that seek to interfere with judicial discretion should be removed from the Bill. It is inappropriate to seek definitive advance rulings on the admissibility of evidence. Furthermore, it violates the separation of powers to order a court to give more weight to national security than a defendant's right to a fair trial.

CCL is deeply concerned that a defendant's legal representative will not be able to access evidence in his or her trial without security clearance. Every defendant has the right to choose who will represent them. This is an element of a fair trial. Parliament should not interfere with that right by permitting the Executive to deem some lawyers 'inappropriate' or a 'national security risk'.

[1] e.g *Dietrich v The Queen* (1992) 177 CLR 292.
[2] *International Covenant on Civil and Political Rights* (1966) Article 14.

CCL notes that if Parliament passes any of the provisions that restrict the right to a fair trial, then the Australian government is *obliged* to *immediately* inform the Secretary-General of the United Nations that Australia is derogating from the right to a fair trial and the reasons for that derogation.[3]

Finally, if Parliament is nevertheless minded to restrict the right to a fair trial, then CCL strongly recommends that a three-year sunset clause be inserted into the Bill to ensure that this violation of civil liberties does not become a permanent feature of Australian criminal justice.

Friday, 1 July 2004

[3] *International Covenant on Civil and Political Rights* (1966) Article 4(3).

3. Attorney-General's Certificates

The National Security Information (Criminal Proceedings) Bill ('the NSI Bill') provides for the Attorney-General to issue two types of certificates. A non-disclosure certificate orders the non-disclosure of information that relates to or may affect national security.[4] A witness exclusion certificate orders that a witness must not be called because his or her 'mere presence' will disclose national security information.[5]

'National security' is defined very broadly as "Australia's defence, security, international relations, law enforcement interests or national interests".[6] It encompasses political, military, economic, intelligence, policing, technological and scientific interests.

3.1 certificates should have a default expiry period

The extent of the life of a certificate is not made clear in the NSI Bill. For example, what effect does a certificate continue to have if criminal proceedings are abandoned by the DPP?

The Bill should be modified to state that a certificate only survives while criminal proceedings are on foot.

Furthermore, it should be made explicit that the certificate expires once the court has made an order rejecting or adopting (in whole or in part) the conditions of the certificate.[7]

3.2 need for a time limit on AG's decision after notification

The NSI Bill creates an obligation on a prosecutor and defendant to notify, 'as soon as practicable', the Attorney-General of information or witnesses that might prejudice national security in a criminal proceeding.[8] It will be an indictable offence to disclose that information or call that witness after notification but prior to the Attorney-General's decision to issue (or not to issue) a certificate.[9]

It is important that the Attorney-General be given a time frame within which to make a decision on the issuing of a certificate. Otherwise, the Attorney-General might be able to delay issuing a certificate until *after* a trial has commenced – or even finished.

This gives the Executive an effective veto over the information or witnesses in a criminal proceeding. The information or witness might be vital to an accused's defence and its exclusion would be prejudicial to his or her case. Alternatively, the information or witness might be embarrassing to the government. Either way, this loophole is open to abuse by the government of the day.

[4] NSI Bill s 24.
[5] NSI Bill s 26.
[6] NSI Bill s 8.
[7] NSI Bill s 29.
[8] NSI Bill ss 22 & 23.
[9] NSI Bill ss 35 (disclosure: max 2 yrs) & 36 (witness exclusion: max 2 yrs). An 'indictable offence' is one attracting 12 months imprisonment or more: *Crimes Act 1914* (Cth) s 4G.

If the Attorney-General has not yet made a decision about issuing a certificate, then a court should be able to stay proceedings until a decision is made. It would be unfair to proceed with a trial while the Attorney-General withholds information or witnesses from the proceedings.

The Bill should be modified to oblige the Attorney-General to inform the parties and the court of his or her decision to issue (or not to issue) a certificate 'within a reasonable time'.

It should be a defence to these indictable offences[10] that the Attorney-General failed to make a decision 'within a reasonable time'.

Furthermore, a court should also be given the express power to stay proceedings until the Attorney-General makes a decision on the issuing of a certificate.

[10] NSI Bill ss 35 & 36.

4. Closed Hearings

4.1 need for pre-trial closed interlocutory hearings

The NSI Bill provides that a court must hold a closed hearing 'as soon as the trial begins' to determine whether an order should be made to effectively reject or adopt the certificate (in whole or in part).[11]

A court can, contrary to the Attorney-General's certificate, rule that the information be tendered or a witness called. One effect of such an overruling of the Attorney-General's certificate could be that the defence team would suddenly be served 'on-the-spot' with new evidence.

In NSW, the effect of such late service in criminal proceedings is to send the matter "back to taws".[12] Proceedings are adjourned and a new hearing date fixed.[13] This ensures that the defendant has had sufficient time to prepare his or her defence based on all the evidence in a brief. This is an essential element of a fair trial.[14]

The NSI Bill allows for an adjournment for the purposes of a party deciding whether to appeal an unfavourable interlocutory order.[15] A similar provision is required in this Bill to allow for an adjournment to give the defence sufficient time to examine the new evidence and to prepare a response.

To avoid unnecessary delay in proceedings the NSI Bill should provide for pre-trial interlocutory closed hearings to allow for the challenge of certificates issued by the Attorney-General. In a criminal proceeding, where the liberty of the accused is often at stake, it is a fundamental tenet that the Crown must inform the defence of all the evidence against the defendant *before* trial. Full pre-trial disclosure can only occur if closed hearings are available before a trial begins.

A pre-trial closed interlocutory hearing would also allow the defence the opportunity to challenge the 'conclusive evidence' nature of a certificate.[16]

The NSI Bill should be modified to expressly <u>mandate</u> pre-trial interlocutory proceedings, at least four weeks prior to the hearing date, relating to all certificates issued by the Attorney-General. A defendant in a criminal proceeding should be aware of all the evidence against him or her at trial and have time to prepare his or her case accordingly. Anything less would result in an unfair trial.

Further, the Bill should provide that if, as matter of national security, it becomes necessary to issue a certificate during the trial,[17] then the court may stay proceedings to allow the defence to examine the new evidence and prepare a response.

[11] NSI Bill ss 25(3), 25(4) & 26(4).
[12] *DPP v West* [2000] NSWCA 103, [24(o)], [29] (Mason P, Sheller & Giles JJA agreeing).
[13] *Criminal Procedure Act 1986* (NSW) s 187(4) (adjournment for late service of brief).
[14] *International Covenant on Civil and Political Rights* (1966) Article 14(3)(b.
[15] NSI Bill s 32.
[16] NSI Bill ss 25(1) & 25(2).
[17] NSI Bill s 23.

4.2 procedure for closed hearings undermines adversarial system and right to fair trial

The NSI Bill permits the court to exclude from the closed interlocutory hearing any defendant and/or legal representative whose presence 'is likely to prejudice national security'.[18]

While respecting the right of the court to decide who may be present in the courtroom, it is an essential feature of our adversarial system of criminal justice that a defendant should be present at all times.

At the very least, a defendant's legal representatives should be present in court to represent his or her interests. This is important because the court might not realise the significance for the defence case of the information or witness being examined during the closed hearing. That is why it is paramount that a defendant be represented *at all times*.

CCL is well acquainted with closed proceedings in the Security Appeals Division of the AAT,[19] wherein the entire defence team can be ejected from the tribunal room while the Crown gives secret evidence. When the Crown has completed its secret submissions, the defence is invited back to the room to answer the accusations it was not permitted to hear. This makes a mockery of justice.

While Parliament might deem such a procedure permissible when it comes to civil matters, it is entirely inappropriate for a defendant to be unrepresented at any stage of a criminal proceeding. Unlike civil proceedings, an adverse result in a criminal trial could lead to the defendant's imprisonment – the harshest punishment the state may inflict upon a citizen.

It is important to remember that it is fundamental to a fair trial that a defendant be represented at all stages in a criminal trial. It is highly likely that a court would stay proceedings if the defendant were left undefended in a serious criminal matter.[20]

Article 14 of the *International Covenant on Civil and Political Rights* provides that the 'press and public may be excluded from all or part of a [criminal] trial for reasons of…national security in a democratic society'.[21] The Covenant does not authorise the exclusion of the defendant or legal practitioners. In fact, the ICCPR states that everyone has the right to be present at their own trial and to be represented by legal representatives of his or her own choosing.[22] These rights are expressed as '*minimum* guarantees' and are to be afforded in '*full* equality'.[23]

Section 27(3) of the NSI Bill should be modified to ensure that a defendant is not left unrepresented as a result of a court's ruling to exclude a defendant and/or his or her legal representatives from any part of a closed hearing.

[18] NSI Bill s 27(3).
[19] *Administrative Appeals Tribunal 1975* (Cth) s 39A.
[20] *Dietrich v The Queen* (1992) 177 CLR 292.
[21] *International Covenant on Civil and Political Rights* (1966) Article 14(1).
[22] ICCPR, Article 14(3)(d).
[23] ICCPR, Article 14(3).

4.3 attendance at closed hearings is too restrictive

The NSI Bill lists those people who may be present during a closed hearing.[24] The list attempts to be exhaustive. Given rules of statutory interpretation, it is not a good idea to legislate such exhaustive lists when detailing court procedure. For example, there appears to be no provision for interpreters or observers representing foreign nations in the list.

Since it is not possible for Parliament to foresee all the people whose presence might be desirable in a courtroom, it is not a good idea to fetter judicial discretion with an exhaustive list.

Section 27(2) should be modified to include an indicium along the lines of "any other person specified by the court".

[24] NSI Bill s 27(2).

5. Court Orders

5.1 the Bills attempt to interfere with judicial discretion

The NSI Bill stipulates that before making an order to reject, confirm or modify a certificate, the court *must* rule on the admissibility of the information as evidence.[25] This displays a fundamental misunderstanding of the rules of evidence.

While a judicial officer might be able to make an advance ruling on the relevance or exclusionary rules of evidence, it is highly controversial whether a judge in a criminal trial may exercise his or her *discretion* under Part 3.11 of the *Evidence Act* to exclude, or limit the use of, evidence before that discretion is invoked.[26]

This is so because in our adversarial system a judge is not, at the beginning of the trial, in possession of all the facts. The facts emerge at trial from the evidence adduced by both parties. So it is plainly wrong to expect a judicial officer to make an advance ruling on the admissibility of evidence when he or she does not know, for example, whether it will be prejudicial to the defendant[27] or should be excluded because it was improperly or illegally obtained.[28] Evidence should be excluded at the appropriate point in a trial and not before.

Such a direction is arguably unconstitutional because it attempts "to direct the manner in which judicial power should be exercised…[which includes] exercising an available discretion".[29]

Section 29(6) should be removed from the NSI Bill because it interferes with the discretion of a judicial officer to exclude evidence.

5.2 the Bills seek to diminish the right to a fair trial

The NSI Bill directs that when an order is to be made, a court must take into account whether such an order would have a 'substantial adverse effect on the defendant's right to a fair hearing'.[30] CCL is concerned by the qualification that the adverse effect must be *substantial*.

A defendant's right to a fair trial should not be diminished by the requirement that any prejudice be *substantial* before it should be considered worthy of consideration.

Section 29(8)(b) should be modified to delete the word 'substantial'.

[25] NSI Bill s 29(6).
[26] see *TKWJ v The Queen* [2002] HCA 46, [40] (Gaudron J).
[27] *Evidence Act 1995* (Cth) s 137.
[28] *Evidence Act 1995* (Cth) s 138.
[29] *Nicholas v The Queen* (1998) 193 CLR 173, 188 (Brennan CJ).
[30] NSI Bill s 29(8)(b).

5.3 the Bills seek to usurp judicial power

One of the most disturbing aspects of the NSI Bill is its presumption that Parliament can insist that a court give national security a greater weight than a defendant's right to a fair trial.[31]

This is blatant legislative usurpation of judicial power and undoubtedly violates the doctrine of the separation of powers.

It is permissible for Parliament to list relevant considerations for a court to consider when making a decision. But it the exclusive role of a judge to weigh and balance those considerations on a case-by-case basis. Parliament interferes in the judicial power of the Commonwealth by ordering a Ch III court to give more weight to one consideration than another.[32]

Section 29(9) should be removed from the NSI Bill because it violates the separation of powers.

[31] NSI Bill s 29(9).

[32] e.g. *Polyukhovich v The Queen ('War Crimes Act Case')* (1991) 172 CLR 501, 607 (Deane J): 'the Parliament cannot, consistently with Ch III of the Constitution, usurp the judicial power of the Commonwealth by…[infringing] the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power...'. See also *Nicholas*, n 29.

6. Security Clearance

The NSI Bill requires that a defendant's legal representatives, and assistants of those legal representatives, should apply for and receive security clearance before accessing information that might prejudice national security.[33] The Bill further makes it an indictable offence to disclose national security information to anyone on the defence team who does not have security clearance.[34]

It is unnecessary for a lawyer to undertake a security check before viewing any evidence.

A lawyer is an officer of the court.[35] His or her highest duty is to obey the court.[36] Any lawyer, who contravenes a curial order not to disclose information relating to national security, risks proceedings for professional misconduct.[37]

Furthermore, it is sufficient that the Bill creates an offence for contravening a certificate of the Attorney-General or an order of the court.[38] Any lawyer convicted of such an offence would be subject to the discipline of the court and risks being struck off.

CCL is deeply concerned that a requirement for security clearance for a defendant's legal representatives might allow the government to manipulate who can represent a defendant and who cannot. Such a power could be used to harass or oppress individual defendants and/or lawyers. Every defendant has the right to chose who will represent them.[39] This is a *minimum* element of a fair trial. Parliament should not interfere with that right by deeming some lawyers 'inappropriate' or a 'national security risk'.

Section 34 should be removed from the NSI Bill. The appropriate authority for determining the good fame and character of every lawyer is the court that admitted them – not Parliament.

[33] NSI Bill s 34.
[34] NSI Bill s 41 (max penalty: 2 years).
[35] *Legal Profession Act 1987* (NSW) s 5.
[36] *Giannarelli v Wraith* (1988) 165 CLR 543 (Mason J): 'The duty [of counsel] to the court is paramount and must be performed, even if the client gives instructions to the contrary'.
[37] *Legal Profession Act 1987* (NSW) s 127.
[38] NSI Bill ss 38-41.
[39] ICCPR, Article 14(3)(d).