

PAVING THE WAY FOR CONVICTION WITHOUT EVIDENCE – A DISTURBING TREND IN AUSTRALIA’S ‘ANTI- TERRORISM’ LAWS

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I INTRODUCTION

As has happened in many countries, the Australian government has responded to the September 11, 2001 attacks on New York and the Pentagon by enacting significant new laws. Since the original suite of ‘anti-terrorism’ bills was introduced into the House of Representatives, the introduction of further legislation, often with the effect of amending what had already been enacted, has continued at a rapid pace.¹ As other writers have noted, these laws are, on their face, quite draconian.² They have created a range of new criminal offences, in many cases with very serious penalties.³ They have

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¹ Parliament of Australia, *Terrorism Chronology* (2004) Parliamentary Library <<http://www.aph.gov.au/library/intguide/law/terrorism.htm>> at 5 February 2005.

² See, for example, M Head, “‘Counter-Terrorism’ Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights” (2002) 26 *Melbourne University Law Review* 666; J Tham, ‘Casualties of the Domestic ‘War on Terror’: A Review of Recent Counter-Terrorism Laws’ (2004) 28 *Melbourne University Law Review* 512.

³ For example, schedule 1 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) introduced Divisions 80, 101 and 102 into the *Criminal Code* (Cth) (‘*Criminal Code*’), creating 21 new criminal offences, four having a maximum penalty of life imprisonment, six having a maximum penalty of 25 years imprisonment, and eight having a maximum penalty of 15 years imprisonment. Divisions 101 and 102 were repealed, but re-enacted in identical form (with the exception of s 102.1, which underwent some clarificatory amendments) by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). As will be discussed below, item 20 of schedule 1 of the *Anti-Terrorism Act 2004* (Cth) (‘*Anti-Terrorism Act*’) has since amended one of the training offences under Division 102 of the *Criminal Code* to increase the maximum penalty from 15 to 25

also significantly increased the scope for individuals to be detained without charge by police and security agencies.⁴

This last-mentioned aspect of Australia's new 'anti-terrorism' laws – the extension of the grounds on which individuals can be detained without being charged – is an instance of a more general disturbing feature of these laws: an increase in the liability of individuals, under these laws, to be subject to detention or imprisonment without evidence of criminal guilt being led and proved against them in court.

Laws which vest the executive with the power to detain individuals on an arbitrary basis are undesirable. If they are ever necessary, they are necessary evils, of which the scope and consequences should be kept to a minimum; and the burden therefore falls on the proponents of such laws to show that the evil is indeed necessary. This paper will look at one recent piece of legislation – Item 20 of sch 1 to the *Anti-Terrorism Act 2004* (Cth) – and one bill currently before the Parliament – the National Security Information (Criminal Proceedings) Bill 2004 (Cth) – and, in relation to each, demonstrate that there has been a failure, on the part of the government sponsoring the legislation, to recognise and adequately to meet – or even to acknowledge – this justificatory burden.

A *The Right to Freedom From Arbitrary Detention*

The previous paragraph asserts the undesirability of laws which vest the executive with the power to detain individuals on an arbitrary basis. This contention in favour of liberty can draw support from a number of normative sources. One such source is international law that is binding on Australia: the right to freedom from arbitrary detention is set forth in the *International Covenant on Civil and Political Rights* ('ICCPR'),⁵ to which Australia is a party. Article 9(1) states that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The Human Rights Committee's jurisprudence makes it clear that 'non-arbitrary detention' is not synonymous simply with 'lawful detention':

years imprisonment, while item 19 of the same schedule has increased the scope of liability for the membership offence under Division 102.

Another example is provided by item 15 of schedule 1 of the *Anti-Terrorism Act*, which widens the scope for liability under s 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (the offence of engaging in hostilities in a foreign state), at the same time as item 13 increases the maximum penalty for the offence from 14 to 20 years imprisonment.

⁴ Schedule 1 of the *Anti-Terrorism Act 2004* (Cth) introduced ss 23CA, 23CB and 23DA into the *Crimes Act 1914* (Cth), increasing the permissible investigation period for an individual arrested for a terrorism offence (that is, an offence against div 72 or Part 5.3 of the *Criminal Code: Crimes Act 1914* (Cth), s 3 (1)). Item 24 of sch 1 of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) introduced a regime which permits the detention and questioning of any adult person if it is believed on reasonable grounds that this will 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'.

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS 3 (entered into force 23 March 1976) (hereafter 'ICCPR').

The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.⁶

Closely allied to the right to freedom from arbitrary detention is the right to a fair trial; for detention that results from conviction at a trial that is not fair is rather apt to be described as arbitrary. Article 14 of the *ICCPR* provides that the following are among the elements of the right to a fair trial:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...
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:
 - ...
 - (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;⁷
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing...
 - (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.

Of course, there is the threat of something like a methodological contradiction, or at least a lack of argumentative clarity, in assuming the normative force of one set of laws – the *ICCPR* – in order to criticise a different set of laws. This threat can be deflected, however, by noting that the *ICCPR* is not simply ‘another law’. It is one attempt by the international community to articulate some of the implications of:

the principles proclaimed in the Charter of the United Nations [that] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,⁸

and is said to be founded upon a:

[recognition] that these rights derive from the inherent dignity of the human person.⁹

While these features of the *ICCPR* do not give it any sort of ultimate status – for example, it is quite conceivable that its drafters, in the text of the instrument upon which they agreed, failed to give full effect to the principles cited in the preamble – they do

⁶ *Hugo van Alphen v The Netherlands*, Communication No 305/1988, [5.8], UN Doc CCPR/C/39/D/305/1988 (1990). The point was reiterated in *A v Australia*, Communication No 560/1993, [9.2], UN Doc CCPR/C/59/D/560/1993 (1997). See also the discussion in S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (Oxford University Press, 2000), 211-9.

⁷ Article 9(3) *ICCPR* also provides that anyone arrested or detained on a criminal charge must be brought promptly before a judicial officer, and is entitled to be tried within a reasonable time, or released.

⁸ Preamble of the *ICCPR*.

⁹ *Ibid.*

give it a presumptive normative status greater than that of an ordinary legislative measure.¹⁰

The right to freedom from arbitrary detention, and the associated right to a fair trial, can have a number of dimensions. For example, these rights can be understood to limit particular actions of governments, directed against particular individuals on particular occasions. However, they can also be understood to limit the regimes of law put in place by governments. Thus, for example, the Human Rights Committee has noted that art 14 applies to ‘procedures for the determination of criminal charges against individuals’ and to ‘[l]aws and practices dealing with these matters’.¹¹

In his *Second Treatise of Government* John Locke articulates a normative basis for the rights understood in this second fashion – as rights to live free of laws that permit arbitrary detention and unfair trials – which is derived not from law but from considerations of political legitimacy. First, he attacks the suggestion that absolute government could ever truly enjoy the consent of its subjects; he then goes on to articulate the limits that a demand for consent places on the scope of legitimate legislative power:

As if when Men quitting the State of Nature entered into Society, they agreed that all of them but one, should be under the restraint of Laws, but that he should still retain all the Liberty of the State of Nature, increased with Power, and made licentious by Impunity. This is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*...

Though the *Legislative* ... be the *Supream* Power in every Common-wealth; yet ... It is *not*, nor can possibly be absolutely *Arbitrary* over the Lives and Fortunes of the People. For it being but the joynt power of every Member of the Society given up to that Person, or Assembly, which is Legislator, it can be no more than those persons had in a State of Nature before they enter'd into Society, and gave up to the Community... It is a Power, that has no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects. The Obligations of the Law of Nature, cease not in Society but only in many Cases are drawn closer, and have by Humane Laws known Penalties annexed to them, to inforce their observation.¹²

It is not necessary, in reading these paragraphs, to take Locke’s references to the State of Nature and the Law of Nature literally, as references to an actual, pre-political way of human life, and to an actual, metaphysically binding, moral code.¹³ Rather, the

¹⁰ The proposition above is expressed in the context of the evaluation of legislation; a correlative proposition, this time in the context of the evaluation of the common law, was expressed by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

¹¹ Human Rights Committee, *General Comment 13, Article 14* (21st sess, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, [2], UN Doc HRI\GEN\1\Rev1 at 14 (1994).

¹² J Locke, *Two Treatises of Government* (Cambridge University Press, edition 1963), Book II, [93], [135], [371-2], [402-3]. Spelling, punctuation and italics original.

¹³ For a more complex version of social contract reasoning, which explicitly avoids such literalism, see J Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press, 1971). Note that, although Rawls identifies himself as belonging to the same tradition as Locke (11, and particularly

paragraphs can be read as a concise but persuasive argument that the right to live free from laws that permit arbitrary detention and unfair trials is a necessary incidence of liberal democratic government. Under such a government, the legislature cannot legitimately exercise power which has not been vested in it by those who elect it, and we who elect such a legislature certainly cannot be regarded as having vested in it the power to pass laws that would oppress us in such a fashion that we would be better off without them.

This paper will not attempt to demonstrate, in a categorical fashion, that the legislation to be analysed in the following sections amounts to a breach of the *ICCPR* – that would require a detailed consideration of the jurisprudence of the Human Rights Committee beyond the brief exposition provided above.¹⁴ Nor will it attempt to demonstrate beyond doubt that this legislation goes beyond the limits of Lockean legitimacy – this would require a weighing up of the threat against which the legislation is ostensibly directed, and the threat posed by the legislation, in order to form a view as to the likelihood of our consenting to otherwise undesirable laws. Rather, as was stated above, the argument will be that the government which has sponsored this legislation has failed to recognise and adequately to address the threat that each piece of legislation poses to the right to be free of the threat of arbitrary detention and an unfair trial. Furthermore, in each case this crucial issue – this justificatory burden which is borne by the government – has been avoided by the use of rhetoric that conceals the matter that is truly at stake: whether individuals should be subject to criminal conviction in circumstances where evidence of criminal guilt has not been led against them.

II THE ANTI-TERRORISM ACT 2004

On 1 July 2004 the *Anti-Terrorism Act 2004* (Cth) ('the Act') became law. Item 20 of sch 1 to the Act amends s 102.5 of the *Criminal Code* – which makes it an offence to intentionally provide training to, or receive training from, a terrorist organisation – in three ways. First, it repeals the offence of training with an organisation known to be a terrorist organisation. Second, it increases the penalty for training with an organisation while being reckless as to the status of the organisation as a terrorist organisation, from a maximum of 15 years to a maximum of 25 years imprisonment.¹⁵ Third, it introduces

n 4), his account of political legitimacy differs in significant respects from that of Locke; for a discussion of some of the differences, see A J Simmons, 'Justification and Legitimacy' in A J Simmons (ed), *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001). In relation to the freedoms in question, however, these differences are unimportant: see J Rawls, *The Law of Peoples* (Harvard University Press, 1999), 80, in which Articles 3, 9, 10 and 11 of the *Universal Declaration of Human Rights*, GA res 217A (III), UN Doc A/810 at 71 (1948) – which state the rights to freedom from arbitrary detention and to a fair trial – are said by Rawls to constitute human rights which any decent domestic political institutions must recognise and protect.

¹⁴ For a discussion of the consistency of some recent anti-terrorism legislation with the *ICCPR*, including a consideration of the exceptions to protection permitted by the *ICCPR* in the interests of public safety and national security, see S Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428.

¹⁵ In relation to these first two amendments, the Explanatory Memorandum that accompanied the Anti-Terrorism Bill 2004 is somewhat disingenuous. While it is true to say, as the Explanatory Memorandum does, that the amendment 'replaces section 102.5 of the *Criminal Code* with modified offences of providing training to or receiving training from a terrorist organisation', there is no indication anywhere in the Explanatory Memorandum that the sole modification to existing s

a new offence, of training with a proscribed terrorist organisation, which (as will be argued below) is best conceived of as a recklessness offence with a reverse onus of proof. The penalty for this new offence is also a maximum of 25 years imprisonment.

The amendments to s 102.5 brought about by the Act are summarised in the following table:

102.5(2) is to relabel it as s 102.5(1), and to increase the penalty from 15 to 25 years imprisonment: Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth), 20.

Previous section 102.5	Amended section 102.5
<p>(1) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person knows the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 25 years.</p>	<p><i>No equivalent in amended statute to previous subsection 102.5(1)</i></p>
<p>(2) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person is reckless as to whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 15 years.</p>	<p>(1) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person is reckless as to whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 25 years.</p>
<p><i>No equivalent in previous statute to amended subsection 102.5(2)</i></p>	<p>(2) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p> <p>(b) the organisation is a terrorist organisation that is covered by paragraph (b), (c), (d) or (e) of the definition of terrorist organisation in subsection 102.1(1).</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(3) Subject to subsection (4), strict liability applies to paragraph (2)(b).</p> <p>(4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).</p>

At the time the Bill was introduced into the House of Representatives, on 31 March 2004, no charges had been laid under s 102.5 of the *Criminal Code*; the first arrest of a suspect under s 102.5 took place on 15 April 2004,¹⁶ and that matter has not yet come to trial. No reason was given by the government as to why the previously existing two offences, one requiring knowledge and the other only recklessness, should be replaced by a single recklessness offence attracting the penalty that previously attached to the knowledge offence.¹⁷

¹⁶ M Forbes, M Grattan and J Koutsoukis, *Uni Student Faces Terror Charge* (2004) The Age <<http://www.theage.com.au/articles/2004/04/15/1081998300694.html>> at 31 July 2004. See also Australian Federal Police, *Man Arrested in Sydney on Terrorism Charge* (2004) <<http://www.afp.gov.au/afp/page/Media/2004/1504manarrestedterrorism.htm>> at 5 February 2005. As the organisation with which the arrested man had allegedly trained was not banned at the time of the alleged training, the charges will have to proceed according to para (a) of the definition of 'terrorist organisation'.

¹⁷ The Attorney-General's second reading speech does not refer to the amendments to the existing offences, but only to the new offence introduced by the Act: Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27657.

A *The New Offence of Training with a Proscribed Organisation*

The wording of the new offence is given in the table above. Unlike the ordinary recklessness offence, it applies only to an individual who trains with an organisation covered by para (b), (c), (d) or (e) of the definition of ‘terrorist organisation’ in s 102.1(1) of the *Criminal Code*. Section 102.1(1) defines ‘terrorist organisation’ in the following way:

terrorist organisation means:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)); or
- (c) a Hizballah organisation, if that organisation is specified by the regulations for the purposes of this paragraph (see subsections (7), (8) and (9)); or
- (d) a Hamas organisation, if that organisation is specified by the regulations for the purposes of this paragraph (see subsections (7), (8) and (10A)); or
- (e) a Lashkar-e-Tayyiba organisation, if that organisation is specified by the regulations for the purposes of this paragraph (see subsections (7), (8) and (10C)).

So the offence applies only to individuals training with banned organisations. In this respect it differs from the other terrorist organisation offences, which draw no distinction between the grounds on which an organisation constitutes a terrorist organisation.¹⁸

B *General Features of Offences Relating to Involvement with a Banned Organisation*

Before an organisation can be banned pursuant to para (b), sub-s (2) requires that

the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).

The same requirement is applied by sub-s (7) to any banning pursuant to para (c), (d) or (e).¹⁹ ‘Terrorist act’ is defined, for the purposes of s 102.1, by s 100.1 of the *Criminal Code*, to mean any action or threat of action where the following four criteria are met:

¹⁸ Prior to the passage of the Act, the offence of membership of a terrorist organisation (section 102.3 of the *Criminal Code*) applied only to members of banned organisations. However, item 19 of sch 1 of the Act has amended that section to make it apply to membership of any terrorist organisation. It is curious that the only reason offered in support of that amendment by the Attorney-General was the desirability of uniformity in the legislation (Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27660), although the very same piece of legislation has undone that uniformity in the case of the training offence.

¹⁹ It should be noted that the grounds of proscription under sub-s (2) make paras (c), (d) and (e) of the definition largely redundant (although not completely, as proscription pursuant to para (b) does enlive some additional consultative machinery: ss 102.1(2A), 102.1A). At the time those paragraphs were introduced into the *Criminal Code* (by the *Criminal Code Amendment (Hizballah) Act 2003* (Cth) and the *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* (Cth)), sub-s (2) required, in addition, that the banned organisation have been identified as a terrorist organisation by a mechanism established by the United Nations Security Council. This requirement was subsequently repealed by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

- the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
- the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
- the action does, or the threatened action would:
 - cause serious physical harm, or death, to a person; or,
 - endanger the life of a person other than the one taking the action; or,
 - create a serious risk to the health and safety of the public, or of a section of the public; or,
 - cause serious damage to property; or,
 - destroy, or seriously interfere with or disrupt, an electronic system;
- the action is, or the threatened action would be:
 - action that is not advocacy, protest, dissent or industrial action; or,
 - intended to cause either serious physical harm, or death, to a person; or,
 - intended to endanger the life of a person other than the one taking the action; or,
 - intended to create a serious risk to the health and safety of the public, or of a section of the public.

The consequence of this extremely broad definition of a terrorist act is that a very wide range of organisations are liable to proscription as terrorist organisations. For example, any organisation that offers support to political protestors who clash with police is liable to be banned, on the grounds that it is indirectly fostering politically motivated activity which is intended to intimidate a government, and which both is intended to, and does, create a serious risk to the health and safety of a section of the public (by provoking the police to attack them).

Thus, if someone is charged with an offence under Division 102 of the *Criminal Code* (that is, a terrorist organisation offence), where the organisation with which he or she has allegedly been involved is a proscribed one, then he or she is liable to be convicted without any evidence having to be led of the criminal aims or conduct of the organisation. Furthermore, it is not essential that the organisation in fact have such criminal aims, or engage in criminal conduct; and this is so for two reasons. First, proscription of an organisation depends only upon a reasonable belief on the part of the Minister; this belief does not have to be proved.²⁰ Second, as is indicated by the example above, it is possible to be an organisation ‘indirectly fostering the doing of a terrorist act’ without being an organisation engaged in any criminal activity or acting with any criminal purpose: the organisation may (for example) simply be providing support to political protestors.

²⁰ Although the Minister’s decision that an organisation is one that is ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)’ is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and also s 75(v) of the *Australian Constitution*, such review is confined to questions of legality, rather than going to the merits of the decision. Also, in an application for judicial review it is the applicant – which, in the circumstances we are considering, would be the accused – who bears the legal burden. For a fuller discussion of judicial review in the context of the proscription of terrorist organisations, see J Tham, ‘Possible Constitutional Objections to the Powers to ban ‘Terrorist’ Organisations’ (2004) 27 *University of New South Wales Law Journal* 482.

Similarly, for none of the offences under Division 102 is there any requirement that the accused person's involvement with the organisation be intended to further any terrorist aims. A possible exception is s 102.7, which creates an offence with the following principal element:

the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division.

However, even here the legislative intent is not entirely clear; in particular, the grammar of the paragraph leaves room for doubt that the requirement that the support or resources 'would help' must be within the scope of the accused person's intention. But even if this narrower reading of the offence is adopted, a further point still remains: activity described in para (a) need not be activity that is terroristic in nature or intent. It may, as the example above showed, simply be the provision of support to political protestors. To obtain a conviction under Division 102, then, there is no obligation on the prosecution to prove that the accused's involvement with the organisation displayed any intention or desire to bring about criminal consequences.

A final point to note that is common to all of the offences under Division 102 is that the offence can be committed wherever in the world the involvement with the banned organisation took place.²¹

C *The Onus of Proof Under the New Training Offence*

The previous sub-section has outlined general features of the offences relating to involvement with proscribed organisations, which relieve the prosecution of the burden of proving that a banned organisation, or an accused individual, was possessed of any criminal aims. However, in all but one of those offences, the prosecution is obliged to prove that the accused knew, or was reckless as to the possibility that, the organisation was a banned organisation.²² (As the banning power operates by way of regulation – that is, is a matter of law – the relevant awareness on the part of the accused would seem to be not of the fact of proscription, but of the identify of the organisation with which he or she has been involved.)²³ The exception is the new training offence.

Section 102.5(3) provides that, for the offence of training with a proscribed terrorist organisation, strict liability applies as to the status of the organisation. Section 102.5(4) establishes an exception to liability, namely, if the accused was not reckless as to the status of the organisation. As the statutory note to s 102.5 indicates, s 13.3(3) of the *Criminal Code* imposes an evidential burden on any defendant wishing to rely on an exception provided by the law creating an offence. Such an evidential burden is discharged by 'adducing or pointing to evidence that suggests a reasonable possibility

²¹ *Criminal Code*, ss 15.4, 102.9.

²² For all but the training offence, the knowledge and recklessness offences are distinct: *Criminal Code*, ss 102.2, 102.4, 102.6, 102.7. In the case of membership of a terrorist organisation, there is no recklessness offence, so the prosecution must prove knowledge: *Criminal Code*, s 102.3. Section 102.10 of the *Criminal Code* provides for a verdict of recklessness if knowledge has not been proved in relation to an offence that requires it.

²³ For a recent discussion by the High Court of the proposition that ignorance of the law is no excuse, even in the context of regulations, see *Ostrowski v Palmer* (2004) 206 ALR 422.

that the matter in question exists'.²⁴ For practical purposes, then, the combined effect of ss 102.5(3) and (4) is to make the offence of training with a banned organisation a reverse-onus recklessness offence, according to which the onus is on the accused to establish a reasonable possibility that they were not reckless as to the organisation being a banned organisation, before the prosecution then incurs an obligation to prove their recklessness beyond reasonable doubt. If the accused cannot discharge the evidential burden in relation to their absence of recklessness, then (as the Attorney-General's second reading speech notes)²⁵ the prosecution does not have to prove that they had, or ought to have had, any awareness that the organisation was banned.

In April 2003, the Senate Legal and Constitutional Legislation Committee held public hearings on the Anti-Terrorism Bill 2004. At those hearings, the Attorney-General's Department offered the following defence of the reverse-onus character of the offence:

[W]e are dealing with something here that is definitely quite difficult to prove. Strict liability is used where it is felt that the accused may be in a position to point to evidence more easily than the prosecution. Some have said that the person would have to produce evidence. In fact, the evidential burden talks about pointing to evidence of a reasonable possibility. So as soon as they point to a witness who can assist them in that case, in the example that was used, then it is for the prosecution to prove beyond reasonable doubt that there is no substance to that particular point. The evidential burden is quite an important aspect. Legally, it is not requiring the accused to prove anything; it is requiring them to point to evidence and the burden of proof still lies with the prosecution.²⁶

These remarks are not quite accurate. For example, to discharge an evidential burden, it is not sufficient for an accused to 'point to a witness'. The accused must be able to produce testimony from that witness, which would then raise the reasonable possibility that the *Criminal Code* requires.²⁷

The placing of an evidential burden on an accused, which requires him or her to adduce evidence of his or her absence of recklessness as to the status of an organisation, is particularly significant in the context of an offence of training with a banned organisation. To date, 17 organisations have been banned, all of them Islamic organisations, active in North Africa, or in West, Central, South or South-East Asia.²⁸ If an individual is accused of training with such an organisation, it is quite likely that any witness who can testify as to his or her state of mind will not be available – either being

²⁴ *Criminal Code*, s 13.3(6).

²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27661.

²⁶ Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 30 April 2004, 37. References to '[s]ome [who] have said' and to 'the example that was used' are to the testimony of the author at those hearings: Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 30 April 2004, 20-1 (Patrick Emerton).

²⁷ See the discussion of evidential burdens in S Bronitt and B McSherry, *Principles of Criminal Law* (LBC Information Services, 1st ed, 2001), 119-20, who refer to 'the duty to produce some evidence to support a claim' and in L Waller and C R Williams, *Criminal Law: Text and Cases* (Butterworths, 9th ed, 2001), 39, who refer to 'a duty of producing some (not very much, but some) evidence sufficient for a jury to consider on a particular issue'. As noted above, the *Criminal Code* speaks of 'adducing or pointing to' evidence. Merely to point to a witness is not to produce, adduce or point to any evidence.

²⁸ Australian National Security, *Listing of Terrorist Organisations* (2004) Australian Government <<http://www.ag.gov.au/www/nationalsecurityhome.nsf/HeadingPagesDisplay/Listing+of+Terrorist+Organisations?OpenDocument>> at 19 November 2004.

in hiding, or in the custody of a foreign government. Therefore, when the Attorney-General's Department says that 'we are dealing with something here that is definitely quite difficult to approve,' they are correct. But it is wrong to suggest that it is any easier for an accused to gain access to the relevant witnesses than the prosecution.

An issue of this sort has recently been considered by the United States Court of Appeal for the Fourth Circuit.²⁹ In *Moussaoui*, the accused sought access to witnesses, detained abroad by the United States Government, whom he believed to be able to offer exculpatory evidence; the decision of the court was to deny direct access to the witnesses, and instead to oblige the Government of the United States to co-operate with the defence, under the oversight of the trial judge, in drafting substitutions for statements which had been produced by those witnesses under military interrogation, and made available to the defendant, which substitutions would then be available for use by the defendant at trial.³⁰ Whatever the adequacy of such an arrangement – and some indirect reflections on it will be offered in the following section – it must be noted that the outcome for the accused in that case is in one fundamental respect more favourable than the prospect offered by the new training offence. Although Zacarias Moussaoui is facing difficulty in gaining access to potentially exculpatory evidence, with possible adverse implications for his right to a fair trial, it is still the case that the prosecution is obliged to produce evidence as to his commission of the conspiracy offences with which he is charged.³¹ Under the new training offence, all that the prosecution would have to prove against an accused in a position in which the exculpatory evidence was unavailable would be that the accused had in fact trained with a banned organisation.

Of course, it is open to the accused to attempt to discharge the evidential burden by testifying at his or her trial, and it may be that this is what the Attorney-General's Department is implying when it says that the accused may be in a better position to prove his or her state of mind than the prosecution. However, for the accused to testify is also for the accused to face the possibility of cross-examination; and an offence which places this sort of pressure on the accused to take the witness stand raises a further concern about its implications for the right of an accused not to testify at trial.³²

D *Justifying the Onus of Proof Under the New Training Offence*

In its original form, the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) would have established a structure similar to that discussed in the previous subsection for all the offences relating to involvement with proscribed organisations.³³ It is easy to see why Parliament refused to pass the legislation in that form. In general, it is not a criminal act to train with an organisation. Nor is it a criminal act to direct, or provide support to, or be a member of, or recruit for, an organisation. Thus, if someone has this sort of involvement with an organisation, the identity of the organisation as a

²⁹ *United States v Moussaoui* (Unreported, United States Court of Appeal for the Fourth Circuit, Wilkins, Chief Judge, and Williams and Gregory, Circuit Judges, 22 April 2004) <<http://pacer.ca4.uscourts.gov/opinion.pdf/034792.P.pdf>> at 31 July 2004 (hereafter '*Moussaoui*').

³⁰ Ibid 34-6.

³¹ Ibid 4 (charges summary).

³² Given effect to by the *Evidence Act 1995* (Cth) ss 12, 17(2).

³³ Security Legislation Amendment (Terrorism) Bill 2002 (Cth) [No 2], schedule 1, proposed section 102.4 of the *Criminal Code*.

terrorist organisation is crucial to the criminal character of that involvement. And, therefore, the person's knowledge that the organisation is a terrorist one, or at least their recklessness as to that possibility, is crucial to establishing the accused's criminal state of mind³⁴ (although, as was shown in sub-s 2.2, these offences do not require the prosecution to prove that the accused had any criminal aims in his or her involvement with the organisation).

The Attorney-General's second reading speech in support of the legislation attempts to justify the new offence in the following way:

The effect of this amendment is to place an onus on persons to ensure that they are not involved in training activities with a terrorist organisation.

This amendment will send a clear message to those who would engage in the training activities of terrorist organisations, which could result in an attack of the kind seen in New York or in Bali, that they can expect to be dealt with harshly.³⁵

The first of these quoted paragraphs is extremely misleading, exploiting as it does an ambiguity between the law's 'placing an onus' on someone not to perform a certain act, by criminalising such conduct, and the technical sense in which a criminal law may place an onus of proof on either the prosecution or the defence. Prior to the passage of the Act, the law already placed a clear onus on persons to ensure that they were not involved in training activities with terrorist organisations, by prohibiting such conduct under s 102.5. And the law already had the capacity to deal harshly with such offenders – as indicated above, the maximum penalty for knowingly training with a terrorist organisation was 25 years (the same penalty as s 268.59 of the *Criminal Code* imposes for the war crime of rape), and the maximum penalty for recklessly training with a terrorist organisation was 15 years.

The effect of the amendment has not been to change the incidence of criminal liability. Rather, it has shifted the onus of proof, in effect presuming that the accused has a criminal state of mind, and placing the onus onto him or her to go some way to establish his or her innocence in order to avoid conviction. This does not place any greater onus on anyone to avoid training with terrorist organisations. It simply increases the likelihood of miscarriages of justice, by excusing the prosecution from having to prove one of the elements of the offence in those cases where the accused cannot produce exonerating evidence. The law therefore undermines the right to a fair trial. Furthermore, by permitting conviction even though no evidence has been led that the accused had any criminal aims, no evidence has been led that the organisation with which he or she was involved had any criminal aims, and no evidence has been led that the accused knew, or was reckless as to the possibility that, involvement with the organisation was a criminal offence, the law clearly permits arbitrary imprisonment.

³⁴ We are not, here, in the domain of what Lord Devlin called the 'quasi-criminal law', offences aimed at preventing 'breaches of good order and discipline', to which questions of moral guilt are at best indirectly relevant; we are concerned with offences punishable by very serious terms of imprisonment, which are intended not to have simply regulatory purposes, but to outlaw conduct described by that most value-laden of words, 'terrorism'. See P Devlin, 'Morals and the Quasi-Criminal Law and the Law of Tort' in *The Enforcement of Morals* (Oxford University Press, 1965), especially 27-33.

³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27661.

E Conclusion in Relation to the New Training Offence

The new training offence would permit conviction of a person, for an offence punishable by up to 25 years imprisonment, in circumstances where:

- The organisation with which the person trained has no criminal aims;
- The organisation with which the person trained, if it does have criminal aims, has not been proven to have them;
- The person, in receiving or providing training, had no criminal aims;
- The person, if he or she did have criminal aims in receiving or providing training, has not been proven to have had them;
- The person has not been shown to possess any criminal state of mind (that is, an intention to train with, or at least recklessness towards the possibility of training with, a banned organisation).

It is this last feature that makes this law stand out from its already doubtful cousins in Division 102 of the *Criminal Code*. It is true that, if the accused can produce evidence raising a reasonable possibility that they lack the last-mentioned criminal state of mind, then he or she will not be convicted. But, given the likely targets of prosecution under Australia's anti-terrorism law, it is highly likely that the relevant witnesses will not be available to the accused, so that discharging the evidential burden will oblige the accused to forfeit his or her right not to testify.

The language of the second-reading speech – by being little more than a pun on the word ‘onus’ – conceals these implications of the law, and suggest that it is nothing more than an expression of the need to be tough on terrorism. But the question of how tough we should be on terrorism is at best tangential to a consideration of this law. The real point is that it empowers the government, through exercise of its discretion to ban organisations, and then prosecute those who have trained with them, to send to prison people whose conduct, and mind, are both utterly innocent of criminality. This radical undermining of the right to a fair trial, and to freedom from arbitrary detention, is not even canvassed by the official rhetoric.

III NATIONAL SECURITY INFORMATION (CRIMINAL PROCEEDINGS) BILL 2004 (Cth)

The National Security Information (Criminal Proceedings) Bill 2004 (Cth) (‘the Bill’) was introduced into the House of Representatives on 27 May, 2004. Following the dissolution of the House of Representatives on 31 October, and the subsequent re-election of the government, the Bill was re-introduced into the Senate on 17 November.³⁶ The stated object of the Bill is to ‘prevent the disclosure of information in federal criminal proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing this disclosure would seriously interfere with the administration of justice’.³⁷ This is not a full statement of the purpose of the

³⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29129; Commonwealth, *Parliamentary Debates*, Senate, 17 November 2004, 1, 8. The *National Security Information (Criminal Proceedings) Act 2004* (Cth) came into force on 11 January 2005. The few amendments made prior to enactment affect neither the operation nor the text of the Bill as described in this paper, with four exceptions which nevertheless leave the argument and conclusions of the paper intact (see below nn 91, 100, 134, 147).

³⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 3(1).

legislation. A fuller statement may be found in the Attorney-General's second reading speech in support of the Bill:

The government has an obligation to protect Australia's national security and the information that may damage that security.

At the same time, the government has an equally important obligation to enforce Australia's criminal laws, including the laws that protect our security.

We must ensure that those who break the law do not escape punishment.

A recent criminal trial demonstrated that a conflict between these obligations may arise during prosecutions in relation to Commonwealth security offences, such as terrorism and espionage.

In these cases, the Commonwealth may face the unpalatable decision of whether to risk disclosing sensitive information relating to national security or to protect this information by abandoning a prosecution, even where the alleged crimes could themselves have grave consequences for our national security...

[The Bill] will provide a court which has found that sensitive security related information should not be disclosed with an alternative to simply dismissing the charge.³⁸

The purpose of the Bill, as the statement of the Attorney-General makes clear, is to permit the prosecution and conviction of individuals on the basis of information which, for reasons of national security, is not itself tendered in evidence against them at trial.

A *The Case of R v Lappas*³⁹

The recent criminal trial to which the Attorney-General made reference is the case of *R v Lappas*.⁴⁰ In that case, Simon Lappas was charged with four offences, including, in relation to two documents originating from a foreign power and described as 'highly sensitive',⁴¹ the offence of communicating to another person documents that were intended to be directly or indirectly useful to a foreign power.⁴² To prove this charge, the prosecution was obliged to prove that the documents were communicated with the stated intention. As the accused denied having this intention,⁴³ the prosecution sought to draw relevant inferences from the content of the two documents. However, it sought to do this without actually tendering the two documents as evidence at trial.⁴⁴

³⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29129.

³⁹ [2001] ACTSC 115 (hereafter '*Lappas*').

⁴⁰ *Ibid.* The Attorney-General referred directly to *Lappas* in his second reading speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29129. A helpful summary of the prosecution of Simon Lappas is given in Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004), AustLII, Appendix 4, <www.austlii.edu.au/au/other/alrc/publications/reports/98/> at 31 July 2004.

⁴¹ See Australian Law Reform Commission, above n 40, Appendix 4, [23].

⁴² *Lappas* [2001] ACTSC 115, [1]. This was, at the time of Lappas's alleged conduct, an offence against s 78(1)(b) of the *Crimes Act 1914* (Cth). That section has since been repealed (*Criminal Code Amendment (Espionage and Related Matters) Act 2002* (Cth), schedule 1, item 1).

⁴³ *Lappas* [2001] ACTSC 115, [21].

⁴⁴ *Ibid* [8], [9].

When, in the course of cross-examination of the first prosecution witness, counsel for the accused sought to tender the two documents as evidence, the government responded with a claim of public interest immunity in relation to the documents.⁴⁵ As Gray J notes in his reasons in relation to the government's claim, one consequence of upholding this claim, and excluding the documents from evidence, would be that evidence highly relevant to the prosecution case would be unable to be adduced.⁴⁶ The prosecution sought to circumvent this difficulty by leading in evidence copies of the documents with all substantive content blacked out, accompanied by a general description of the content of the documents, and oral evidence purporting to demonstrate that a certain construction could be placed on the text which would permit the relevant inference to be drawn.⁴⁷

Gray J rejected this means of proceeding, for two reasons which, as we will see below, it is important to distinguish. First, Gray J noted that, were the claim for immunity granted, and the prosecution then permitted to lead evidence in its desired manner, there presumably could be no cross-examination on whether the interpretation offered in oral evidence accurately reflected the contents of the documents; for that would expose those contents, which on public interest grounds were not to be disclosed. Nor could a person seeking to challenge that interpretation give their own oral evidence of the contents, for that also would expose those contents. Gray J concluded that such a process would be 'redolent with unfairness',⁴⁸ and went on to say that

I do not think the accused can have a fair trial unless far more of the text of the documents is disclosed to enable the accused, if he wishes to do so, to give evidence concerning it.⁴⁹

Gray J also noted that, were the claim for public interest immunity granted, then the effect of s 134 of the *Evidence Act* would be to render evidence as to the contents of the documents inadmissible. Therefore, it would not be open to the prosecution to lead the evidence that it was seeking to lead.⁵⁰

Gray J's statement of reasons makes it clear that he indicated to the prosecution and to the government the likely consequence of the government proceeding with its claim for public interest immunity, namely, that the prosecution case would not be able to proceed. Nevertheless, the government proceeded with the claim.⁵¹ Gray J decided the claim in favour of the government. However, given the implications of the exclusion of the documents from trial for the fairness of any trial of the accused, Gray J exercised his discretion pursuant to s 130(5)(f) of the *Evidence Act*, and granted public interest immunity subject to the condition that the prosecution be stayed.⁵² Following the stay of this particular charge, Lappas was convicted on two other charges.⁵³

⁴⁵ Ibid [4]. In Commonwealth proceedings, claims of public interest immunity are made pursuant to s 130 of the *Evidence Act 1995* (Cth) (hereafter '*Evidence Act*').

⁴⁶ *Lappas* [2001] ACTSC 115, [19-20], [24-5], [30].

⁴⁷ Ibid [2], [8 -10].

⁴⁸ Ibid [14].

⁴⁹ Ibid [24].

⁵⁰ Ibid [15], [28].

⁵¹ Ibid [16].

⁵² Ibid [26-7], 30].

⁵³ As referred to in *R v Lappas* (2003) 152 ACTR 7 [2-5], which was an appeal on sentencing by the Director of Public Prosecutions.

B *Responding to Lappas*

In his second reading speech in support of the Bill, the Attorney-General made the following remarks concerning *Lappas*:

The case of *Lappas* in 2001, which involved espionage charges, highlighted the inadequacy of the present arrangements.

During that case, the presiding judge stated that certain prosecution documents should be granted protection from disclosure under public interest immunity.

Having made this ruling, His Honour had no option but to stay the charge relating to the unlawful disclosure of those documents, given that he also found that the fair trial of the accused depended on their disclosure.⁵⁴

This summary of the *Lappas* case is somewhat misleading. First, it implies that the court in *Lappas*, of its own motion, determined that the documents should be excluded, whereas in fact it was the government which sought this outcome. More significantly, it attributes the failure of the prosecution in that case to the ‘present arrangements’. While it is not entirely clear which ‘present arrangements’ are being referred to, the context of the Attorney-General’s words strongly imply that he means ‘the present arrangements relating to protection and disclosure of national security information in criminal proceedings’. Assuming that this is what is meant, such an attribution of the failure of the *Lappas* prosecution to those present arrangements disregards the fact that the failure of the prosecution in that case was not, ultimately, a consequence of those arrangements at all.

The ‘present arrangements’ in relation to criminal trials which involve information that is sensitive on national security grounds consist in the existing law of public interest immunity. Although the matter of public interest immunity in Commonwealth law is now governed by s 130 of the *Evidence Act 1995* (Cth), this legislation is largely a restatement of the existing common law.⁵⁵ In relation to criminal trials, this common law is found in the cases of *Sankey v Whitlam*⁵⁶ and *Alister v The Queen*.⁵⁷

The facts in *Sankey* were somewhat different from *Lappas*: the case concerned an application by a defendant to have documents central to the prosecution case excluded on grounds of public interest immunity.⁵⁸ In *Alister*, however, the facts were much closer to *Lappas*. *Alister* concerned a defendant’s request for discovery of documents claimed to be of exculpatory value, which the prosecution sought to exclude on grounds of public interest immunity.⁵⁹ In his judgment, Gibbs CJ observed that

in the balancing process [involved in assessing a claim for public interest immunity] the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial ... Although a

⁵⁴ Above n 38, 29129.

⁵⁵ Law Book Company, *Laws of Australia*, vol 16 Evidence, 16.7 ‘Privilege and Public Interest Immunity’, [5]; see also the discussion by von Doussa J in *Chapman v Luminis Pty Ltd* (2000) 100 FCR 229, 246.

⁵⁶ (1978) 142 CLR 1 (hereafter ‘*Sankey*’).

⁵⁷ (1984) 154 CLR 404 (hereafter ‘*Alister*’).

⁵⁸ See, for example, *Sankey* (1978) 142 CLR 1, 19, 46-7 (Gibbs CJ).

⁵⁹ See, for example, *Alister* (1984) 154 CLR 404, 414-6 (Gibbs CJ).

mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done.⁶⁰

Although Gray J did not refer to *Alister* in his reasons, it can be seen that his reasoning was consistent with Gibbs CJ's insistence on the need to avoid unfairness to, or the appearance of unfairness to, the accused. However, rather than letting the scales swing in favour of disclosure, he upheld the accused's right to a fair trial in an alternative fashion, by staying the prosecution.

However, even had Gray J not stayed the prosecution on these grounds, the decision to exclude the documents from evidence would have had the consequence that the prosecution could not make out its case: it therefore was not the present arrangements relating to public interest immunity and the right to a fair trial which undid the prosecution in *Lappas*. What ultimately undid the prosecution in *Lappas* was that it sought to convict without leading evidence of guilt.

To the extent, then, that any regime seeks to circumvent this 'difficulty', it cannot seek simply to recalibrate the scales in which a court must balance competing interests in a public interest immunity claim – of the public in seeing convictions for offences committed, and in protecting national security information, and of both the public and the accused in a trial that is fair and seen to be fair. For whatever the manner in which a court approaches such a balancing task, there will issue no change in the basic principle that no conviction can take place without evidence of guilt being produced by the prosecution. A genuine response to *Lappas*, then, must not simply recalibrate the scales in which are weighed claims to public interest immunity. It must take the far more radical step of making provision for conviction on the basis of evidence that is not tendered at trial. As this paper will argue, this is what the Bill is intended to make possible: a procedure, of the sort described by Gray J as 'redolent with unfairness', under which a prosecution could proceed to conviction upon the basis of evidence that is not disclosed in full to, and hence is unable to be properly tested by, the defence.⁶¹ The rhetoric of protecting national security information is, ultimately, just a cloak.

⁶⁰ Ibid 414-5. Brennan J made similar remarks about the significance of disclosure in the context of an accused's right to lead evidence of their innocence at 455-7. Further references relating to the law of public interest immunity are given in S McNicol, *Law of Privilege* (Law Book Co, 1992) 402, [181].

⁶¹ Two other issues were identified by the Australian Law Reform Commission as being raised by *Lappas*: the need for a regime of pre-trial disclosure by both defence and prosecution which would permit as much as possible the pre-trial resolution of issues relating to the use of national security information (Australian Law Reform Commission, above n 40, [11.55]; regret that the matter was not dealt with at the pre-trial stage was expressed by Gray J: *Lappas*, above n 40, [19-20]), and the need for a standardised procedure for the handling of sensitive documents in court (Australian Law Reform Commission, above n 40, [8.86], [11.171]), and see also Evidence to Senate, Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 3 (Professor David Weisbrot, appearing for the Australian Law Reform Commission). As will be seen, the Bill's provisions in relation to pre-trial matters do not address the issue raised by *Lappas*. However, the Bill does permit the making of regulations with respect to the storage of information

C *The Operation of the Bill*

The Bill would achieve this objective by introducing a complex regime governing the disclosure of information believed to have implications for national security ('the Regime').⁶² This Regime has four interrelated steps. At each step, it would undermine the right to a fair trial as that right is set out in the *ICCPR*, culminating in the possibility canvassed above, of conviction without the evidence of guilt actually being led.

1 *Step One*

The Regime does not apply to a criminal proceeding⁶³ unless the prosecutor elects to invoke its operation.⁶⁴ The prosecutor may invoke the Regime once a proceeding has already commenced.⁶⁵ As will be explained below, the Regime has implications for the capacity of a defendant to call and question witnesses, and to tender documents; this prosecutorial discretion is therefore apt to be used to pull the rug out from under a defendant once it becomes apparent that the defendant has committed to a certain strategy. It clearly has the potential to undermine the capacity of the defendant to effectively prepare his or her defence.

In addition, once the Regime has been invoked, it becomes an offence, punishable by up to two years imprisonment, for anyone to disclose information that is likely to prejudice national security to any legal representative of the defendant, or to any person assisting a legal representative of the defendant.⁶⁶ The offence is not committed if the disclosure has been approved by the Secretary of the Attorney-General's Department, or is in accordance with conditions that have been approved by the Secretary, or if the individual to whom disclosure has been made has been given a security clearance considered appropriate by the Secretary in relation to the information.⁶⁷

The precise aim of this offence is a little difficult to discern. It expressly excludes from the offence disclosure that occurs in the course of giving evidence.⁶⁸ Nor does it prevent

disclosed in criminal proceedings: The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 23(1), 49.

⁶² It must be noted that, on the whole, when reading the Bill it is not a simple matter to determine the precise character of the powers vested in, and obligations placed upon, the various persons and institutions to whom reference is made; indeed, in the outline of the Regime to follow, several points of doubt and ambiguity will be identified in relation to the Attorney-General's duty to provide certain material to a court. It may be that this is an inevitable feature of such legislation: the Australian Law Reform Commission has noted that the United States *Classified Information Procedures Act* has been criticised on the grounds that it is not always intuitively easy to use and could have been drafted to articulate more clearly the process to be followed. (Australian Law Reform Commission, above n 40, [11.90]).

⁶³ The Bill's application is limited to federal criminal proceedings, with 'proceeding' understood to include both pre-trial and trial stages of a matter: The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 6, 13. It also applies to any matter arising under the *Extradition Act 1988* (Cth): cl 14(b). Henceforth, all references are to the Bill, unless otherwise indicated. Although at the time of writing the Bill is not yet law, for ease of exposition this paper uses the indicative rather than the subjunctive to discuss its provisions.

⁶⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 6(1)(b).

⁶⁵ The National Security Information (Criminal Proceedings) Bill 2004 (Cth); this possibility is expressly contemplated by cl 6(2).

⁶⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 46.

⁶⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 46(c).

⁶⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 46(a).

disclosure by the prosecutor in the course of carrying out his or her duties,⁶⁹ which would include disclosure during the pre-trial stage, or in the hearing provided for by step four of the Regime (to be discussed below). The provision cannot prevent disclosure of information by the court to the defendant's lawyer, as Chapter 3 of the *Constitution* protects courts exercising Commonwealth judicial power from such parliamentary interference.

The principal effect of this provision, then, would seem to be to limit the capacity of the defendant's lawyer to receive a briefing from his or her client, or to discuss the subject-matter of the trial with possible witnesses and others. Such circumstances would not be 'permitted circumstances' of disclosure.⁷⁰ This is manifestly contrary to the right of an accused to be able to prepare an adequate defence, with the assistance of counsel of his or her choice.

The Bill does make provision for the granting of security clearances to defendants' lawyers: before or during a proceeding in which the Regime has been invoked, the Secretary of the Attorney-General's Department may give notice to any legal representative of the defendant, or to any person assisting a legal representative of the defendant, that in the course of the proceeding an issue of disclosure is likely to arise,⁷¹ and the giving of such notice entitles the person receiving it to apply to the Secretary for a security clearance.⁷² However, this is far from sufficient to overcome the objections to clause 46.

First, the right of a defence lawyer to apply for a security clearance is triggered only by the giving of notice by the Secretary of the Attorney-General's Department;⁷³ and there is no obligation that such notice be given, nor to grant the security clearance if an application is made. Nor is the issuing of such notice by the Secretary of the Attorney-General's Department a necessary condition of prosecution under clause 46; like the rest of the Bill, the application of clause 46 is triggered simply by the giving of notice by the prosecution pursuant to clause 6(1)(b).

Second, the granting of security clearances is made subject to a document, the *Australian Government Protective Security Manual*,⁷⁴ which is a policy document issued by 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'.⁷⁵ As a policy document, it is subject to variation by the executive government at any time, free of any legislative, judicial or public oversight.

Third, the possession of a security clearance is a defence to a charge under clause 46 only if the level of clearance is 'considered appropriate' by the Secretary of the

⁶⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 16, 46(a).

⁷⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 16, 46(a).

⁷¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 39(1).

⁷² The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 39(2).

⁷³ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 39(1).

⁷⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), Note 1 to cl 39(2).

⁷⁵ Attorney-General's Department, *Protective Security Manual* (PSM) (2004) Australian Government, <<http://www.ag.gov.au/www/protectivesecurityHome.nsf/HeadingPagesDisplay/Protective+Security+Manual?OpenDocument>> at 19 November 2004.

Attorney-General's Department.⁷⁶ Ignoring the inexcusable vagueness, in such a statute, of the phrase 'considered appropriate', as a defendant and his or her lawyer have no way of predicting what the Secretary of the Attorney-General's Department may or may not consider appropriate from time to time in relation to various pieces of information, this exception manifestly fails to overcome the burden the provision would place on communication between a defendant and counsel.

2 *Step Two*

Once the prosecutor has invoked the Regime, a number of obligations are placed both on the prosecutor and on the defendant.

(a) *The Notice Obligation*

Each of the prosecutor and the defendant is obliged to notify the Attorney-General if he or she believes that he or she will, during the course of the proceeding, either disclose information relating to or affecting national security, or call a witness who will disclose such information, whether by giving evidence or merely by his or her presence.⁷⁷ The notice to the Attorney-General must include a description of the information or, if the information is contained in a document, a copy of or extract from the document containing the information.⁷⁸ The notifying party must also advise the court, the other party, and the witness (if applicable) that notice has been given to the Attorney-General; this advice must include a description of the information.⁷⁹

Each is also obliged to advise the court if he or she believes that a witness, in answering a question, will disclose information relating to or affecting national security. In this case, the witness's answer to the question will have to be given in writing, and this written answer shown to the prosecutor. If the prosecutor believes that giving this answer in the proceeding will disclose information relating to or affecting national security, the prosecutor will then have to advise the court of this belief, and notify the Attorney-General.⁸⁰

To intentionally fail to give notice to the Attorney-General, or the advice to the court and other parties, which one is obliged to give, in circumstances where the disclosure of the information in question is likely to prejudice national security,⁸¹ is an offence punishable by up to two years in prison.⁸² Once advice is given to the court and notice given to the Attorney-General, the court must adjourn proceedings so that matters can proceed to the next step.⁸³

By obliging the defendant to give notice if he or she believes that information of a certain character will emerge in evidence, the Regime has the possibility of obliging the defence to disclose detailed information to the prosecution about the substance of its

⁷⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 46(c)(i).

⁷⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 24(1).

⁷⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 24(2).

⁷⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 24(3).

⁸⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 25.

⁸¹ That is, has a real and not merely remote possibility of doing so: The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 17.

⁸² The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 42.

⁸³ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 24(4), 25(7).

case, and its expectations about the likely course of argument. This potential unfairness to the accused is even greater in the circumstance where it is the defendant who gives notice that a witness's answer will disclose information of the relevant character. In such a circumstance, the Regime ensures that the prosecutor gains access to a written answer to the relevant question, although the defendant does not.⁸⁴ This is obviously inconsistent with the right of the accused to have access to witnesses against him or her, and to have access to those witnesses able to testify in his or her defence.

(b) *The Non-Disclosure Obligation*

If, subsequent to notice being given to the Attorney-General:

- the prosecutor or defendant discloses the information in question; or,
- the witness whose evidence is in question discloses the information in question; or,
- the prosecutor or defendant calls the witness whose mere presence will disclose the information in question,

and if such disclosure is likely to prejudice national security, then the discloser commits an offence punishable by up to two years imprisonment.⁸⁵ However, an exception applies to the prosecutor, who does not commit an offence if he or she discloses the information in question, provided that the disclosure takes place in the course of carrying out his or her duties.⁸⁶ An exception also applies to members of the staff of the Australian Security Intelligence Organisation ('ASIO'), the Australian Secret Intelligence Service ('ASIS') and the Defence Signals Directorate ('DSD'), all of whom may disclose the information in the course of their duties.⁸⁷

This disparity in the rights accorded to the prosecution and defence is manifestly unfair. Combined with the provision for a witness's answer being available to the prosecutor, but not the defendant, it is doubly so. When such a circumstance has arisen, the trial would have been adjourned; nevertheless, the prosecutor is permitted to disclose the information in the course of his or her duties, and thus is permitted to continue to work on the prosecution case, including preparing a response to the testimony of a witness who has not yet been heard by the defence. In the meantime, even if the defendant is able to anticipate what the information may be, they are prohibited from disclosing it, if that disclosure is likely to prejudice national security. In the case where the witness in question is a staff member of ASIO, ASIS or the DSD, the Regime creates the further possibility that, knowing what question he or she is to be asked, the witness is then able to discuss his or her answer to that question in the course of his or her duties (which may include discussion of the information with the prosecution) even though, at the same time, the defendant has not been informed of the testimony.

(c) *An Alternative Route to Step Three*

⁸⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 25(5).

⁸⁵ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 40, 41.

⁸⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 16(a) (definition of 'permitted circumstances' of disclosure) in conjunction with cl 40(1)(d), 40(2)(d).

⁸⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 16(b) together with *Intelligence Services Act 2001* (Cth) s 3 (definition of 'staff member').

There is an alternative route to the third step of the Regime. The Attorney-General may act independently of any notice received from the prosecution or defence, if her or she for any reason expects that information of the relevant sort will be disclosed, either by the prosecution, the defence or a witness, or by the mere presence of a witness.⁸⁸

(d) *The Breadth of the Definition of ‘National Security’*

The combined effect of clauses 8, 9, 10, 11 and 12 of the Bill is that ‘national security’ means:

- the defence of Australia;⁸⁹
- the protection of, and of the people of, the Commonwealth, the States and the Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system, and acts of foreign interference, whether directed from, or committed within, Australia or not, and the carrying out of Australia’s responsibilities to any foreign country in relation to such matters;⁹⁰
- political, military and economic relations between Australia, and foreign governments and international organisations;⁹¹
- economic, technological or scientific interests important to the stability and integrity of Australia;⁹²
- avoidance of disruption to national⁹³ and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;⁹⁴
- protection of the technologies and methods used to collect, analyse, secure or otherwise deal with criminal intelligence, foreign intelligence or security intelligence;⁹⁵
- protection and safety of informants and of persons associated with informants;⁹⁶
- ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation’s⁹⁷ government and government agencies.⁹⁸

⁸⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(1)(a)(ii), 28(1)(a)(ii).

⁸⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8.

⁹⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8, 9; *Australian Security Intelligence Organisation Act 1979* (Cth) s 4, definition of ‘security’.

⁹¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8, 10.

⁹² The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8, 12. Clause 12 was deleted prior to enactment. This does not affect the example given in the text.

⁹³ It is not clear whether the intention of the Bill’s drafter is that this refers only to Australian efforts, or to the efforts made by any nation.

⁹⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8, 11(a).

⁹⁵ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8, 11(b).

⁹⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8, 11(c).

⁹⁷ It is not clear whether the intention of the Bill’s drafter is that this refers only to the Australian government and its agencies, or those of any nation.

⁹⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 8, 11(d).

This is a remarkably broad definition of ‘national security’.⁹⁹ Its breadth determines the implications of a decision by the prosecutor to invoke the Regime, as well as the scope for the Attorney-General’s exercise of the power to intervene without receiving notice. While it may be natural enough to suppose that such decisions would only be made in the case of a trial for an espionage or ‘terrorism’ offence,¹⁰⁰ the Regime imposes no such limits. And the breadth of the definition of ‘national security’ shows that there is no reason to suppose such limits to be observed. Imagine, for example, the case of an individual being charged under s 70.2 of the *Criminal Code* (the offence of bribing a foreign public official) who seeks to lead evidence about the true origin, or nature, of the payments in question. It is easy to imagine that such evidence might affect or relate to economic relations between Australia and the foreign government in question and, therefore, that if the prosecutor chose to invoke the Regime, all the duties and powers described above might come into play.

3 *Step Three*

The third step is reached once the Attorney-General has been given notice of the possibility of the disclosure of information of the relevant character, or, in the absence of notice, if he or she nevertheless expects such disclosure to occur. The Attorney-General may take one of a number of actions.

The Attorney-General may decide that no further steps will be taken. In this case, he or she must inform the court of this decision. He or she must also inform the relevant party or parties of this decision:

- if it is the prosecutor who is likely to disclose the relevant information, or to call a witness whose mere presence would constitute disclosure – the prosecutor;
- if it is the defendant who is likely to disclose the relevant information, or to call a witness whose mere presence would constitute disclosure – the defendant;
- if it is a witness’s testimony which the prosecutor or defendant believes is likely to disclose the relevant information – the witness, as well as the prosecutor or defendant as appropriate;
- if it is a witness’s answer to a question which has been judged by the prosecution to constitute disclosure – the prosecution, the defence and the witness.¹⁰¹

⁹⁹ For example, it is far broader than the instances of ‘matters of state’ listed in s 130(4) of the *Evidence Act 1995* (Cth).

¹⁰⁰ For example, although the Bill itself makes no reference to the concepts of a ‘terror suspect’ or a ‘terrorist offence’, the Explanatory Memorandum, referring to the definition of ‘criminal proceeding’, states that ‘the *Extradition Act 1988* has been included to prevent information from being disclosed in extradition proceedings; for example, where the proceedings involve a terror suspect (Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth) 1).

¹⁰¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(7), 26(8), 28(10). Before enactment the Bill was amended such that, in any case except the calling of a witness whose mere presence would constitute disclosure, if the defendant is entitled to be informed then so is defence counsel (*National Security Information (Criminal Proceedings) Act 2004* (Cth), s 26(8)).

In the case of information that would be disclosed by way of a document, the Attorney-General may issue a *non-disclosure certificate*. The certificate must describe the information the disclosure of which is threatened, and must prohibit the witness, and/or the prosecution, and/or the defence, as appropriate, from disclosing that information. This certificate may be accompanied by:

- a copy of the document with the information deleted, which copy may be disclosed; or,
- a copy of the document with the information deleted, but with a summary of the deletions attached, which copy and summary both may be disclosed; or,
- a copy of the document with the information deleted, but with a statement attached of the facts that the deleted information would, or would be likely, to prove, which copy and statement both may be disclosed; or,
- nothing.¹⁰²

In the case of information that would not be disclosed by way of a document, the Attorney-General may likewise issue a *non-disclosure certificate*. The certificate must describe the information the disclosure of which is threatened, and must prohibit the witness, and/or the prosecution, and/or the defence, as appropriate, from disclosing the information. This certificate may be accompanied by:

- a written summary of the information, which summary may be disclosed; or,
- a written statement of the facts that the information would, or would be likely, to prove, which statement may be disclosed; or,
- nothing.¹⁰³

In those cases in which the information would be disclosed by a witness's answer to a question, it is not clear how the Attorney-General is to give a description of the information, given that clause 25 provides that only the prosecutor and the court are permitted to see the witness's written answer.

In the case of a witness whose mere presence would threaten disclosure, the Attorney-General may instead issue a *witness exclusion certificate*, stating that the witness must not be called.¹⁰⁴

The Attorney-General must provide to the court a copy of any certificate issued,¹⁰⁵ and of any summary or statement attached to it.¹⁰⁶ In addition, in the case of a non-disclosure certificate, if the information is contained in a document, and the Attorney-General's certificate is accompanied by a copy of the document from which the information has been deleted, then the court must also be provided with both the original document and the redacted copy.¹⁰⁷ The Regime does not explain how the Attorney-General is to provide the original document to the court if it is not in his or her possession; presumably, the Attorney-General would provide to the court the copy of or

¹⁰² The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(2), 26(8).

¹⁰³ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(3), 26(10).

¹⁰⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 28(2).

¹⁰⁵ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(4)(a), 28(3).

¹⁰⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(4)(b), 26(4)(c).

¹⁰⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(4)(b).

extract from the document that had been provided to him or her by the relevant party pursuant to clause 24(2)(c).

The National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth) is intended to amend the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to ensure that decisions by the Attorney-General to grant a certificate are not subject to review under that act upon an application by the defendant.¹⁰⁸ Furthermore, the Bill makes it is an offence, punishable by up to two years imprisonment, to disclose information or to call a witness in contravention of a non-disclosure or witness exclusion certificate.¹⁰⁹ Therefore, the power of the Attorney-General to issue a certificate is an extensive power to determine the course of a criminal proceeding, so long as the certificate stands.

4 *Step Four*

It is following the issuing of a certificate by the Attorney-General that the fourth and final step of the Regime comes into play: the determination of the effects on the proceeding of the issuing of that certificate. If a certificate is issued during pre-trial proceedings then, prior to the mater coming to trial, the court must hold a closed hearing to respond to the issuing of the certificate.¹¹⁰ If a certificate is issued during the course of a trial, then the trial must be adjourned (or, if it has already been adjourned as part of step two of the Regime, the adjournment must continue), in order that the court hold a closed hearing to respond to the issuing of the certificate.¹¹¹

(a) *Step Four: The Pre-Trial Effects of a Certificate*

Prior to the closed hearing being held, the Attorney-General's certificate stands.¹¹² Furthermore, a non-disclosure certificate is deemed by the Bill to be conclusive evidence that disclosure of the information in question is likely to prejudice national security.¹¹³ This has the potential to impede the capacity of an accused to defend him or herself during committal proceedings, and to prepare his or her defence in anticipation of trial. As there is nothing in the Regime that prevents pre-trial proceedings from continuing once a certificate has been issued, but prior to the holding of the closed hearing, the Attorney-General has the power, by issuing certificates, to prevent the

¹⁰⁸ National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth) sch 1, item 1. The Attorney-General, in his second reading speech in support of the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth), does not canvass this consequence of amending the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to include a certificate decisions within the definition of 'related criminal justice process decision' (Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29130); the Explanatory Memorandum describes it simply as a 'limitation' on jurisdiction (Explanatory Memorandum, National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth) 2). The *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* (Cth) came into force on 11 January 2005.

¹⁰⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 43, 44.

¹¹⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 27(3)(a), 28(5)(a), 31.

¹¹¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 27(3)(b), 27(3)(c), 28(5)(b), 31.

¹¹² The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(5), 28(4).

¹¹³ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 27(1).

defence from gaining access to documents, or from calling witnesses at a committal or bail hearing.

In hearings before the Senate Legal and Constitutional Committee, the Attorney-General's Department said that:

Those pre-trial proceedings being administrative, we have made the Attorney's certificate conclusive for those proceedings.¹¹⁴

Although it is true that some pre-trial matters, such as committal, are administrative and not adjudicative matters,¹¹⁵ not all are – for example, requirements relating to discovery and disclosure of evidence are essential incidents of the exercise of judicial power. But it would be misleading to say, even of those pre-trial matters which are administrative matters, that they are merely administrative. A committal hearing gives the accused an opportunity to hear, and in a preliminary way to test, the evidence against him or her.¹¹⁶ Likewise, processes of discovery and disclosure enable the accused to build up a picture of the prosecution case, to which he or she is then able to prepare a defence.

If the Bill were to be passed, it would be possible for a committal or bail hearing to reach its decision:

- on the basis of a summary of a document prepared by the Attorney-General, the un-edited text of which the accused has not been permitted to see;¹¹⁷ or
- on the basis of a statement of the facts that a document would prove, or be likely to prove, prepared by the Attorney-General, in circumstances where the un-edited text of the document has not been made available to the accused;¹¹⁸ or
- on the basis of a summary of a witness's answer to a question, prepared by the Attorney-General, in circumstances where the accused has not been permitted to hear the full answer;¹¹⁹ or
- on the basis of a statement of the facts that a witness's answer to a question would prove, or be likely to prove, prepared by the Attorney-General, in circumstances where the accused has not been permitted to hear the full answer;¹²⁰ or
- in circumstances where the accused has been precluded by the Attorney-General from calling as a witness someone he or she believes has evidence relevant to the hearing.¹²¹

¹¹⁴ Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 25 (Maggie Jackson).

¹¹⁵ R Fox, *Victorian Criminal Procedure* (Monash University Law Book Co-Operative, 11th ed, 2002) 185.

¹¹⁶ The High Court has held that, in ordinary circumstances, a committal hearing is an essential component of a fair criminal trial: *Barton v The Queen* (1980) 147 CLR 75, 99-101 (Gibbs CJ and Mason J), 109 (Aickin J). Stephen J took the view that the absence of committal proceedings would put the court upon inquiry as to the fairness of a criminal trial: at 105-6.

¹¹⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(2)(a)(ii), together with cl 27(1).

¹¹⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(2)(a)(iii), together with cl 27(1).

¹¹⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(3)(a)(i), together with cl 27(1).

¹²⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 26(3)(a)(ii), together with cl 27(1).

¹²¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 28(2).

To permit the political arm of government to intervene in such hearings, and in other pre-trial matters, in the manner provided for by the Bill, is entirely contrary to the right of an accused to a fair trial.

(b) Step Four: The Effects of a Certificate on Extradition Proceedings

In the case of extradition proceedings, a non-disclosure certificate is also conclusive evidence that disclosure of the information in question is likely to prejudice national security.¹²² However, the Bill makes no provision for the holding of a closed hearing in the context of an extradition proceeding, suggesting that the certificate stands throughout such proceedings.¹²³ The second reading speech supporting the Bill upon its re-introduction into the Senate offers the following justification:

[E]xtradition proceedings are not a trial of the person for an offence, but merely determine whether an individual should be surrendered to another country to face trial in that country.¹²⁴

Again, for the Attorney-General, by issuing certificates which are unable to be contested, to be able to exercise a significant influence on the course of proceedings which may bring it about that an accused is to face trial in another country, is quite inconsistent with the accused's right to a fair trial.

(c) Step Four: The Closed Hearing

As was stated above, the court must hold a closed hearing to determine how to respond to the issuing of an Attorney-General's certificate. The Attorney-General has a right of intervention in such a hearing.¹²⁵ During this hearing the court may order that defendant, and/or defence counsel, be excluded from any part of the hearing in which the prosecutor, the Attorney-General or counsel for the Attorney-General gives details of the information concerned, or argues as to why it should not be disclosed, or why a witness should not be called, if the court considers that the presence of the defendant and/or defence counsel would mean that the information would be disclosed to them, and this disclosure would be likely to prejudice national security; although the defendant, and/or his or her counsel, must be given the opportunity to make submissions concerning such argument even if they are excluded.¹²⁶

Defence counsel may be excluded by the court only if they have not been given security clearances at a level considered appropriate by the Secretary of the Attorney-General's Department, in relation to the information concerned.¹²⁷ However, this provision offers little protection to the accused's right to a fair trial. First, there is no obligation on the part of the Secretary of the Attorney-General's Department to grant a security clearance at the appropriate level. Second, the defendant's rights turn entirely upon the executive's conception of an 'appropriate level' of security clearance. As was noted

¹²² The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 27(2).

¹²³ The version of the Bill introduced in May differed from the present version, in that there was provision for the holding of a closed hearing in relation to a non-disclosure certificate (though not a witness exclusion certificate) issued in the context of an extradition proceeding.

¹²⁴ Commonwealth, *Parliamentary Debates*, Senate, 17 November 2004, 9.

¹²⁵ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 30.

¹²⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 29(3), 29(4).

¹²⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 29(3)(b).

above, this is quite inadequate to protect the defendant's right to choose his or her counsel, and to be properly represented by them at trial.

The Regime gives the court a number of options as to the outcome of this hearing. In the case of a witness excluded by a certificate of the Attorney-General, the court may permit, or may prohibit, the calling of the witness.¹²⁸ In the case of information subject to a non-disclosure certificate, the court may permit disclosure of the information, or prohibit it.¹²⁹ In the case of a document, the court may permit disclosure of:

- a copy of the document with the information deleted; or,
- a copy of the document with the information deleted, but with a summary of the deletions attached; or,
- a copy of the document with the information deleted, but with a statement attached of the facts that the deleted information would, or would be likely, to prove.¹³⁰

If such an order is made, evidence of the contents of the document may be adduced by tendering the copy, or the copy and summary, or the copy and statement.¹³¹ It should be noted that, in a case where the Attorney-General's non-disclosure certificate was not accompanied by a redacted version of the document, the Attorney-General has no obligation to provide the court with a copy of the document in question; the Regime does not make it clear, in such a case, how the court is to make its determination on the treatment of the document in question.¹³²

Once a court has given an order in relation to a certificate issued by the Attorney-General, it is an offence, punishable by up to two years imprisonment, to contravene that order.¹³³ The Bill grants a right of appeal from a decision arrived at in the closed hearing to both the prosecutor and the defendant (and to the Attorney-General, if he or she intervened in the hearing).¹³⁴ In practice, it is likely to be difficult for a defendant to make out a case on appeal if he or she and his or her legal representative were excluded from the original hearing, and so do not know what arguments were advanced at that hearing. This difficulty for a defendant is compounded by provisions of the Bill that preclude a court from releasing a copy of the record of a closed hearing to anyone but the appellate court,¹³⁵ and that give the prosecutor (and the Attorney-General, if he or she intervened) the right to see the court's proposed statement of reasons prior to its release to the defendant, and the right to seek to have that statement varied if he or she

¹²⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(6).

¹²⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(2), 31(4), 31(5).

¹³⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(2).

¹³¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(3).

¹³² The Explanatory Memorandum is no help here, simply stating that '[t]he court considers the original information': Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth) 2.

¹³³ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 45.

¹³⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 36(2), 37.

¹³⁵ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 29(5)(b). Clause 29 was amended prior to enactment. Section 29 of the *National Security Information (Criminal Proceedings) Act 2004* (Cth) permits defence counsel access to the record, but also permits the prosecution, and the Attorney-General if he or she intervened, to apply to the court to have the record varied on the grounds that access to it by the defence would disclose information likely to prejudice national security.

considers that the proposed statement would disclose information which would be likely to prejudice national security.¹³⁶

In reaching its decision at the closed hearing, the court is not bound by the Attorney-General's certificate.¹³⁷ However, the court must consider whether, having regard to the Attorney-General's certificate, permitting the disclosure of the information, or the calling of the witness, would risk prejudice to national security.¹³⁸ The court must also have regard to the object of the regime set out in clause 3 (and quoted above),¹³⁹ must consider whether its order would have a substantial adverse effect on the defendant's right to receive a fair hearing (and in particular on the conduct of his or her defence), and must consider any other matter it considers relevant.¹⁴⁰ However, it is the first of these considerations to which the court must give the greatest weight;¹⁴¹ that is, the questions of a *substantial adverse effect* on the defendant's right to a fair trial, and of *serious interference with the administration of justice*, are to be secondary considerations. This is obviously a significant departure from the existing test in relation to public interest immunity stated by Gibbs CJ in *Alister*, and quoted above.¹⁴²

(d) *Step Four in Relation to Trial: Implications for the Right to a Fair Trial*

The first thing to note is that the closed hearing procedure gives the Attorney-General yet further power to determine the course of proceedings. Not only is the court, in considering its response to the issuing of a certificate, obliged to give the greatest weight to the certificate itself; the Attorney-General is allowed to intervene as of right. Given that the hearing will be deciding matters potentially crucial to the course of a criminal trial, and quite possibly determinative of its outcome, this is, in effect, a right for the political arm of government to intervene fundamentally in the process of a criminal trial. On the other hand, the accused has no right to call the Attorney-General to cross-examine him or her on the matters stated in the certificate.

Second, as was noted above, the Regime permits the exclusion of the defendant, and/or the defendant's lawyer, from crucial elements of the hearing at which the court reaches a decision in relation to a certificate issued by the Attorney-General. It is impossible for the defendant, or his or her lawyer, to make an effective case for disclosure of information, or for the calling of a witness, if they are prevented from hearing the details of the information concerned, or from hearing the prosecution arguments to the contrary.

The third implication of the Regime's fourth step, in relation to the right of an accused to a fair trial, is the manner in which it permits circumvention of the *Lappas* outcome. The Regime seeks to do this by permitting the court to allow the tendering in evidence, in lieu of a document, a copy from which the sensitive information has been deleted,

¹³⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 32.

¹³⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), clause 31(2) states this explicitly in relation to non-disclosure certificates. Clause 29(6) makes this clear by implication with respect to witness-exclusion certificates.

¹³⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(8)(a).

¹³⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 3(2), and the text, above n 37.

¹⁴⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(7)(b), 31(7)(c).

¹⁴¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(8).

¹⁴² *Alister* (1984) 154 CLR 404, 414-5 (Brennan J); Gibbs CJ, above n 60.

with the copy accompanied perhaps by a summary of the deleted information, or a statement of the facts that the deleted information would prove, or would be likely to prove. But is the Regime effective?

The Attorney-General's Department has suggested that it is not: in hearings before the Senate Legal and Constitutional Legislation Committee, responding to a suggestion that the criteria laid down in clause 31(7) would govern any decision by the court as to whether or not to stay a proceeding on the grounds of unfairness to an accused, the Department stated that:

Having decided that a particular document can be admitted with certain amendments, in making those amendments the right of the accused to a fair trial is not as significant as protecting the security of the information if it is extremely sensitive. But, having made that decision, there is subsequently when the trial resumes a question of whether the trial proceeds. That is not subject to 29(8) [as clause 31(7) was in the original version of the Bill].¹⁴³

As the Bill was originally drafted, it was not clear whether the Attorney-General's Department was correct on this point. There were certainly at least one reason to think that they were correct: given the protection of Commonwealth judicial power from legislative and executive interference provided by Chapter 3 of the *Constitution*, it is ultimately impossible for the Parliament to pass a law *compelling* the judiciary to take a different approach in circumstances such as *Lappas*. Under this interpretation, the Regime invites the judiciary to do so, but does not and cannot mandate that result; although, in the process of issuing the invitation, the Regime does undermine in fundamental ways the right of the accused to a fair trial, in the many ways discussed above.

On the other hand, there was some reason to think that the Attorney-General's Department was not correct. While the Bill itself provided little guidance in relation to this question, it did state that:

The power of a court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.¹⁴⁴

What relevant implications might the Bill contain? In his evidence given to the Senate Legal and Constitutional Committee on behalf of the Law Council of Australia, Mr Bret Walker, SC raised concerns about the effect the Bill might have upon the existing discretionary powers of the court.¹⁴⁵ He drew attention to cl 18 of the original version of

¹⁴³ Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 29 (Maggie Jackson). Similar remarks also appear at 26-7, 28. Much the same view was put forward at the hearings by Australian Lawyers for Human Rights: Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 21 (Simeon Beckett), 22, 23 (Simon Rice, OAM).

¹⁴⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 19(1), which was cl 18 in the original version of the Bill. The power of a court to stay proceedings in order to prevent an abuse of process, or a trial which is unfair to the accused, is discussed by the High Court in *Barton v The Queen* (1980) 147 CLR 75; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292.

¹⁴⁵ Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 9 (Bret Walker, SC).

the Bill (cl 19(1) of the present version), and also to the original Explanatory Memorandum, which read:

Before a trial commences, any certificates that have been issued must be considered at a closed hearing of the trial court. The Attorney-General may intervene in the proceeding. The court rules on the admissibility of the original information and considers the certificate. The court may:

1. agree with the Attorney-General, that the information not be disclosed or disclosed other than in a particular form, in which case the trial continues or the defendant appeals; or
2. disagree with the Attorney-General and order disclosure of the information in which case the trial continues or the prosecution appeals.¹⁴⁶

This suggested that the Bill may intend an implicit reduction in the power of the court, namely, a removal of the power to stay a prosecution on the grounds that to continue with the trial would be unfair to the accused.

However, this matter has been resolved in the present version of the Bill, re-introduced into the Senate on 17 November. Clause 19(2) reads:

To avoid doubt, the fact that the court considers a matter in making an order under section 31 does not prevent the court from later ordering that the federal criminal proceeding be stayed on a ground involving the same matter.¹⁴⁷

Given this provision, one must ask: What is the point of the Bill at all? If the principal function of the Bill is simply to alter the balance of reasons in relation to decisions to exclude information on grounds of public interest immunity, this could be achieved by amending the relevant provisions of the *Evidence Act 1995* (Cth).¹⁴⁸ There would then be no need for the rest of the Bill, the provisions of which would so severely undermine the right of an accused to a fair trial. Once the decision to exclude had been made in the closed hearing – at which the court must give the questions of a *substantial adverse effect* on the defendant's right to a fair hearing,¹⁴⁹ and of *serious interference with the administration of justice*,¹⁵⁰ less weight than the risk of prejudice to national security, which must be decided having regard to the Attorney-General's certificate¹⁵¹ – the question of a stay on the grounds of unfairness to the accused, which arose in *Lappas*, could be addressed by the court in accordance with the existing law. Indeed, to the extent that the weight of reasons to be applied in the closed hearings means that the exclusion of information becomes more likely, the likelihood of such a stay on the grounds of unfairness might also seem to increase.

¹⁴⁶ Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth) (version of May 27, 2004) 2.

¹⁴⁷ Following amendment prior to enactment, s 19(2) of the *National Security Information (Criminal Proceedings) Act 2004* (Cth) reads: 'An order under section 31 does not prevent the court from later ordering that the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under section 31 would have a substantial adverse effect on a defendant's right to receive a fair hearing.'

¹⁴⁸ In particular, s 130(5).

¹⁴⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(7)(b).

¹⁵⁰ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 3.

¹⁵¹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(7)(a), 31(8).

However, despite clause 19(2), the Bill does do more than simply alter the test to be applied in deciding whether or not information should be excluded on public interest grounds. For this would not circumvent the outcome in *Lappas*. For in that case, it was not simply that the excluded information had exculpatory value for the defendant. It was also crucial to the prosecution case. If, as a result of the Regime, the court excludes a witness from being called, or a witness from answering a question, then the information that otherwise would have come into evidence will not be available to the prosecution any more than the defendant, and thus the *Lappas* ‘problem’ will remain. However, as was noted above, where the court determines that a document shall be excluded, it may permit a copy of the document to be admitted into evidence with the sensitive information deleted. Where the court determines that no summary of the information, or statement of the facts the information might prove, is to be attached, then once again *Lappas* will not be circumvented. But if such a summary or statement is attached, then the prosecution will be able to proceed, although the relevant evidence has not been tendered. When one considers this possibility, there is no getting around the observation made by Gray J in *Lappas*: such a procedure is ‘redolent with unfairness’.¹⁵² It removes from the accused the right to fully test the evidence against him or her, and opens the door to the possibility of conviction on the basis of evidence that has not been led and not been tested at trial.

In testimony to the Committee, the Attorney-General’s Department denied that the Bill would create the possibility of a ‘secret trial’.¹⁵³ However, as the above discussion has shown, the Regime does provide for the conviction of an accused:

- on the basis of a summary of a document, the un-edited text of which the accused has not been permitted to test as evidence, or perhaps even to see;¹⁵⁴ or
- on the basis of a statement of the facts that a document would prove, or be likely to prove, in circumstances where the un-edited text of the document is not permitted to be tested by the defendant, and perhaps has not even been made available to him or her.¹⁵⁵

It does not seem unreasonable to describe these possibilities as the possibility of conviction on the basis of secret evidence.

The Regime would also permit the conviction of an accused:

- in circumstances where the accused has been precluded from calling as a witness someone he or she believes has evidence relevant to the trial;¹⁵⁶ or
- in circumstances where a witness’s answer to a question, which is relevant to the trial, has been excluded from evidence, having been disclosed to the prosecution but not the defendant;¹⁵⁷ or

¹⁵² *Lappas* [2001] ACTSC 115, [14].

¹⁵³ Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 24, 25, 28 (Maggie Jackson).

¹⁵⁴ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(2)(e), together with cl 31(3), and cl 29(3) permitting the exclusion of the defendant from the closed hearing.

¹⁵⁵ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(2)(f), together with cl 31(3) and 29(3).

¹⁵⁶ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(6).

- in circumstances where a document, which is relevant to the trial, has been excluded from evidence, and perhaps has not even been made available to the accused.¹⁵⁸

Given that the decision as to whether to permit these items of evidence to be admitted, or to exclude such witnesses, would be made in a closed court from which the accused and his or her counsel may be excluded, it is not ridiculous to speak of a ‘secret trial’. For it is only during the course of that closed hearing that the defendant would have the opportunity to make a case as to why, given the contents of the document or the identity of the witness in question, it would be unfair to him or her for the trial to proceed without the full document, or the witness, being produced.

D *Undermining The Integrity of Public Offices and Processes*

In *Sankey*, the High Court made it clear that, under the traditional doctrine of public interest immunity, it is ultimately the court’s responsibility to determine what information is excluded, on public interest grounds, from a criminal trial. Section 130 of the *Evidence Act 1995* (Cth) preserves this principle:

- (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
- (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).

The Regime, however, does not. In a number of ways, it undermines the independence and impartiality of the application of national security considerations at trial, and in doing so risks undermining the integrity of both the prosecutorial office, and the judiciary.

1 *Politicisation of Criminal Trials*

Once notice has been given by the prosecution or defence under step two of the Regime, the proceeding must be adjourned until the Attorney-General takes some action.¹⁵⁹ The Regime does not impose any limit on the time the Attorney-General may take to consider a matter. On its own, this creates scope for unfairness to an accused, increasing the time during which his or her future is uncertain, and (if he or she is innocent) the time for which her liberty is restricted. In addition to these general concerns, however, the Attorney-General’s capacity to delay proceedings by delaying his or her decision-making process is open to abuse.

Likewise, there is an obvious threat to the right to a fair trial posed by empowering the executive government, acting through the Attorney-General, to exercise a significant degree of interference in the conduct of a criminal trial, by issuing non-disclosure and

¹⁵⁷ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(4), together with cl 25(5) and 29(3).

¹⁵⁸ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 31(2)(d) and 31(4), together with cl 29(3).

¹⁵⁹ The National Security Information (Criminal Proceedings) Bill 2004 (Cth), cl 24(4), 25(7).

witness exclusion certificates. Again, this general concern is amplified by consideration of the possibilities for abuse.

What sorts of abuses are possible? As was noted above, during the adjournment following the giving of notice, it is not an offence for the prosecution to disclose any information in question in the course of his or her duties. This creates the possibility of deliberate delay on the part of the Attorney-General, in order to give the prosecution the time to develop its case in response to information it believes is going to be disclosed, or in response to the written answer of a witness to which the prosecutor, but not the defence, has been given access. It also opens the possibility of delaying a prosecution for purely political reasons (perhaps because an acquittal is expected, and would be politically embarrassing). It is similarly possible to envisage abuse in relation to the issuing of certificates. For example, one can imagine the Attorney-General intervening of his own accord, and issuing certificates in cases in which, although there is no genuine threat to national security, such intervention would advance the cause of the prosecution.¹⁶⁰

It is equally apparent that the Security Clearance Regime, vesting as it does in the Secretary of the Attorney-General's Department virtually unfettered discretion to determine the legality of disclosing national security information to the defence counsel, as well as the power (but no obligation) to grant security clearances pursuant to guidelines stated in an executive policy document that is not publicly available, is also wide open to politicisation and abuse.

Ultimately, it does not matter whether or not such abuses actually occur. The Attorney-General is a politician, and a senior member of the Cabinet, and even if he or she acts at all times with complete propriety, the mere fact that the Regime gives rise to the possibility of political interference in the criminal process, in turn gives rise to the possibility of a perception of unfairness to the defendant. And, as Gibbs CJ noted in the passage from *Alister* quoted above,¹⁶¹ the defendant is entitled not simply to the fact of, but also to the unequivocal appearance of, justice having been done.

2 *Undermining the Integrity of the Prosecutor's Office*

Under the Regime, it is the prosecutor who has the power, at the first step, to invoke the Regime. This creates a temptation to do so not in the interests of justice, nor in the interests of national security, but in the interests of securing a conviction. The Regime also exposes the prosecutor to political pressure from the Attorney-General, who may wish the regime to be invoked, so as to be able to exercise his or her power to issue certificates.

Indeed, in places the drafting of the Bill displays an underlying presumption that the Regime is simply another weapon in the prosecutor's arsenal. Thus, clause 29(3), in stating the conditions for a closed hearing at the fourth step, reads:

¹⁶⁰ Concerns about the threat of politicisation and abuse, by the Attorney-General, of the system of certificates that the Bill would create, have also been expressed by the Australian Press Council: Evidence to Senate, Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 6-7 (Inez Ryan).

¹⁶¹ *Alister* (1984) 154 CLR 404, 414-5 (Brennan J); Gibbs CJ, above n 60.

If the court considers that the information concerned would be disclosed to:

- (a) the defendant;
- (b) any legal representative of the defendant who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned;
- (c) any court official who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned;

and that the disclosure would be likely to prejudice national security, the court may order that the defendant, the legal representative, or the court official is not entitled to be present during any part of the hearing in which the prosecutor or any person mentioned in paragraph (2)(f) [that is, the Attorney-General or counsel to the Attorney-General]:

- (d) gives details of the information concerned; or
- (e) gives information in arguing why the information should not be disclosed, or why the witness should not be called to give evidence, in the proceeding.

This seems to presume that it will always be the prosecutor who is in possession of the information. The possibility that it may be the defendant who is seeking to tender a document as evidence, and who therefore may be the only person in a position to give details of the information concerned, does not seem to be contemplated.

A similar presumption, that the Regime is a tool solely for the prosecutor, is displayed in that part of cl 26 identified above, which obliges the Attorney-General to provide to the court a document respecting which he or she has issued a non-disclosure certificate. The drafter appears to have neglected the possibility that the document in question may be in the sole possession of the defendant.

An even more disturbing presumption is displayed by that part of cl 26 identified above, which obliges the Attorney-General to attach to a non-disclosure certificate a description of information contained in a witness's answer to a question. The Regime seems to making one of two assumptions: either that all such witnesses will be agents of the government, whose testimony is already known to the Attorney General; or alternatively, that the prosecutor is simply free to inform the Attorney-General, a senior member of the political arm of government, of the contents of a witness's testimony in an ongoing criminal proceeding, which testimony has not yet been disclosed to the defendant. Either assumption is quite obviously a very disturbing one for the Bill's drafters to have made.

It is a major achievement of contemporary Australia to have de-politicised the practice of criminal prosecution. In all the ways described above, the Bill would threaten to undo that achievement, and in the process fundamentally undermine the integrity of the prosecutor's office.

3 *Undermining the Independence and Impartiality of the Judiciary*

As was discussed above, the Regime permits the court to order that, in place of a sensitive document, there shall be admitted as evidence a summary of information deleted from the document, or a statement of the facts that such deleted information would, or would be likely to, prove. By inviting the court to summarise the information deleted from a document, or to issue a statement of the facts that the deleted information would prove, or would be likely to prove, the Regime invites the court to become a

participant in the proceedings before it, and to substitute its own judgement on matters of fact for the judgement of the jury. This aspect of the Regime in fact raises the possibility of unconstitutionality under s 80 of the *Constitution*, which provides that trial on indictable offences shall be by jury. But even if this worry is put to one side, it would seem to be difficult for the defendant – or, for that matter, the prosecutor – to have confidence in the court’s direction to the jury on the consideration of evidence, some of which has itself been formulated and presented by the court.

IV SOME CONCLUDING REFLECTIONS

The foregoing analysis of the new training offence created by the *Anti-Terrorism Act 2004* (Cth), and of the Regime that would be established by the National Security Information (Criminal Proceedings) Bill 2004 (Cth), shows that, in this time of the ‘global war on terror’, the Australian government is prepared to make radical changes to the traditional processes of criminal prosecution. And, indeed, there was some suggestion, during the hearings of the Senate Legal and Constitutional Legislation Committee in relation to the National Security Information (Criminal Proceedings) Bill (Cth), that the Regime provided for by the Bill might be more palatable if limited to certain classes of proceeding, such as prosecution for ‘terrorism’ offences.¹⁶²

It is important to remember when considering such a suggestion that, in Australian law, the various terrorism offences created under Part 5.3 of the *Criminal Code Act 1995* (Cth) cover a wide range of conduct, extending far beyond paradigmatically terrorist acts such as bombing and hijacking. For example, it may be an offence under s 102.6 of the *Criminal Code* to give a small donation to a charity that is known to give occasional succour to revolutionaries or militants; for an organisation, by providing such succour, may well be indirectly fostering the doing of terrorist acts. This does not seem a particularly grave or heinous crime.

But even in those cases where the conduct allegedly undertaken by an individual accused of a terrorism offence is grave or heinous, this is no grounds for refusing to accord them the right to a fair trial. The right to a fair trial exists to ensure that the innocent are not wrongfully convicted. It is also a crucial expression of the ideals of liberal democracy, according to which the state is an expression of the will and values of the citizenry, not a tyrant empowered to rule over its subjects with contempt and disdain. The continuing abuse of human rights in the United States holding facility at Guantanamo Bay shows the consequences of an excessive readiness to sacrifice justice to expediency in the pursuit of terrorism suspects. Guantanamo Bay has been described by former High Court Justice Mary Gaudron as ‘a serious assault on the rule of law’ and ‘a serious breach of their [ie the detainees’] human rights’,¹⁶³ and by Lord Steyn of the House of Lords as a ‘legal black hole’ and ‘a monstrous failure of justice.’¹⁶⁴

¹⁶² For example, Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, 4 (Professor David Weisbrot).

¹⁶³ Mary Gaudron, Dame Roma Mitchell Commemorative Human Rights Lecture, (speech delivered Melbourne, 4 March 2004) (copy on file with author). The speech is reported in I Munro, ‘Asylum Law is a Fiction: Ex-Judge’ *The Age* (Melbourne), 5 March 2004 <<http://www.theage.com.au/articles/2004/03/04/1078378908116.html>> at 10 March 2005.

¹⁶⁴ Lord Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’, Twenty-Seventh F A Mann Lecture, delivered 25 November 2003.

Both the pieces of legislation analysed in this paper, by providing for the possibility of criminal conviction in the absence of crucial evidence of criminal guilt being led, undercut the right to a fair trial, and therefore open the door to the possibility of arbitrary imprisonment. In neither case has the rhetoric of those officials promoting the legislation openly acknowledged and responded to this fact. Rather, it has sought to cloak and obscure the legislation's true purpose and effects. It would be an exaggeration to say that these laws create the possibility of conviction by executive fiat – but not an outrageous exaggeration. In the absence of better justifications, they are bad law.