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# Counter Terrorism and Access to Justice: Public Policy Divided?

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# Counter Terrorism and Access to Justice: Public Policy Divided?

## **Abstract**

This paper will consider the manner in which Australia's counter-terrorism strategy has been operationalised, highlighting the implications of its strategy for access to justice. Access to justice, encompassing the ability of individuals, including persons suspected of terrorism offences and non-suspects, effectively to exercise their human and legal rights, can be an important curb on state power. But, in another equally important sense, providing individuals with access to justice also protects national security by helping to ensure that the law enforcement and security agencies focus their efforts on genuine terror suspects rather than wasting their resources on investigating and prosecuting genuine non-suspects. Accordingly, access to justice in the context of counter-terrorism, and more broadly, involves such things as suspects' (and, non-suspects') enforceable rights: to be represented by competent, independent and affordable legal counsel (thus including the availability of adequate legal aid); to the presumption of innocence; to a fair trial; not to be convicted of a terrorism offence through the use by police, intelligence and prosecuting authorities of evidence that would be inadmissible in 'normal' criminal proceedings; not to be subject to indefinite detention particularly so-called pre-charge detention; and, so on. The paper will assess the performance over the course of the war on terror of the Australian Government using the access to justice benchmark. It will examine how public policy in the area of counter-terrorism, particularly as it affects a legally-aided person's choice of legal representative, has been shaped by such influences as the counter-terrorism models and precedents provided by 'leading' Western states like the United States and Great Britain and how these 'extraneous' factors have interacted with 'indigenous' political, social and security pressures to shape Australia's counter-terrorism strategy especially as it has affected access to justice.

## **Keywords**

era2015, counter terrorism, access to justice, legal aid, NSI Act, rule of law, human rights, fair trial, national security

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## COUNTER TERRORISM AND ACCESS TO JUSTICE: PUBLIC POLICY DIVIDED?

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This paper will consider the manner in which Australia's counter-terrorism strategy has been operationalised, highlighting the implications of its strategy for access to justice. Access to justice, encompassing the ability of individuals, including persons suspected of terrorism offences *and* non-suspects, effectively to exercise their human and legal rights, can be an important curb on state power. But, in another equally important sense, providing individuals with access to justice also protects national security by helping to ensure that the law enforcement and security agencies focus their efforts on genuine terror suspects rather than wasting their resources on investigating and prosecuting genuine non-suspects. Accordingly, access to justice in the context of counter-terrorism, and more broadly, involves such things as suspects' (and, non-suspects') *enforceable* rights: to be represented by competent, independent and affordable legal counsel (thus including the availability of adequate legal aid); to the presumption of innocence; to a fair trial; not to be convicted of a terrorism offence through the use by police, intelligence and prosecuting authorities of evidence that would be inadmissible in 'normal' criminal proceedings; not to be subject to indefinite detention particularly so-called pre-charge detention; and, so on. The paper will assess the performance over the course of the war on terror of the Australian Government using the access to justice benchmark. It will examine how public policy in the area of counter-terrorism, particularly as it affects a legally-aided person's choice of legal representative, has been shaped by such influences as the counter-terrorism models and precedents provided by 'leading' Western states like the United States and Great Britain and how these 'extraneous' factors have interacted with 'indigenous' political, social and security pressures to shape Australia's counter-terrorism strategy especially as it has affected access to justice.

### Introduction

Legal aid is an important mechanism for ensuring that individuals who cannot afford to engage a private legal practitioner to represent them are put on a roughly equal footing to those who are able to afford private legal representation and therefore to obtain an equivalent measure of access to justice (see Rix 2008a for an analysis of the Australian legal aid system, and the associated community legal sector). By providing poor, disadvantaged and excluded Australians with the opportunity to pursue just outcomes of the civil, administrative, family and criminal law matters they seek to have resolved, legal aid (and the community legal sector with which it is closely associated) makes a significant contribution to enhancing the cohesiveness and inclusiveness of Australian society. This is a fundamentally important role for, after all, access to justice and equality before the law underpin the legitimacy of the legal system and the willingness of individuals to accept and comply with the law. In this way, legal aid helps to uphold the rule of law and prevent the social discord and fragmentation that would result from disaffected individuals and groups choosing for lack of available alternatives to take the law into their own hands.

This paper is especially concerned with the role of legal aid in providing access to justice to individuals involved in criminal law matters, in particular, terrorism cases. Since the advent of the ‘war on terror’ in 2001, this has become a difficult and complex area of the administration of justice for liberal democracies such as Australia. The state, through the elected government, has a duty to respect and protect human rights and uphold the rule of law. But it also has an equally weighty duty to protect and safeguard the country’s national security from such threats as terrorist violence and attacks. The legitimacy of the state, and government, in liberal democracies is largely derived from its ability at once to protect the human rights of its citizens and uphold the rule of law and to safeguard the nation’s security as the basic precondition of the social, economic and political life of the country being able to continue with minimal disruption. Genuine threats to national security such as those mounted by determined terrorist groups and individuals can equally be threats to the rule of law and to human rights. But the government’s efforts to safeguard the country’s national security, and by extension (if not open acknowledgement) the rule of law and human rights, can paradoxically just as equally threaten the rule of law and the human rights of its citizens. The paradox is explored in this paper through an investigation of the conditions imposed on legally-aided clients in terrorism cases when selecting their legal representatives and the implications of imposing these conditions on the one hand for the rule of law and human rights and on the other for Australia’s national security. Some tentative suggestions as to how the paradox could be resolved are also offered beginning with a repudiation of the false zero sum ‘equation’ widely thought to represent or simulate the relationship between national security and the rule of law and human rights (that is, more of one necessarily means less of the others and vice versa).

### **Counter-terrorism and fair trial requirements**

Writing in *The Sydney Morning Herald* on February 24 this year, George Williams who is the Anthony Mason Professor of Law at the University of New South Wales pointed out that ‘From September 11 [2001] to the end of the Howard Government, Parliament passed 44 anti-terrorism laws, an average of one every seven weeks’ which is an unenviable legislative record with ‘no parallel in any other democratic nation (Williams 2009).’ These many laws include provisions allowing for the detention in secret of non-suspects merely for intelligence-gathering purposes, reversal of the onus of proof (cancelling the presumption of innocence), removal of the right to silence and limitations on access to legal representation (see Rix 2006 and Rix 2008). It is the restriction on a legally-aided client’s right to be represented by a lawyer of their own choosing contained in the National Security Information (Criminal and Civil Proceedings) Act 2004 (hereafter referred to as the NSI Act) which is the focus of this paper. The inclusion of this apparently minor and inconsequential provision in the NSI Act has serious implications for national security and for human rights and the rule of law. Before examining in greater depth the provision and its implications, however, the paper first considers how imposing conditions on a person’s ability to choose their own legal counsel affects their right to receive a fair trial.

George Williams’ piece in *The Sydney Morning Herald* appeared just after the release of the International Commission of Jurists’ (ICJ) report dealing with terrorism, counter-terrorism and human rights. The release of this report is significant because, as Williams observes, the ICJ is ‘[o]ne of the world’s most respected legal bodies’

(Williams 2009), is a non-governmental organisation which steadfastly adopts a non-partisan approach in all of its work and which focuses on upholding international law and the rule of law in order to advance human rights throughout the world. Titled *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, the report provides a comprehensive international survey of the effect which the counter-terrorism measures adopted by more than 40 national governments since 2001 has had on human rights and the rule of law in their countries. It should be noted here that the Eminent Jurists Panel comprises ‘eight distinguished jurists from all regions of the world, is an independent body, [and is] supported by ICJ Secretariat staff (ICJ 2009: v).’

Restricting access to legal representation in criminal proceedings has the potential to undermine one of the cornerstones of the criminal justice system that has come to characterise liberal democratic states. This is the right to a fair trial ‘before an independent and impartial judiciary’, a principle regarded as being so fundamental to international human rights law (see, for example, Article 14 of the International Covenant on Civil and Political Rights (ICCPR)) that the UN Human Rights Committee has stated that it ‘cannot be departed from, even at a time of emergency (ICJ 2009: 143).’<sup>1</sup> Similarly for international humanitarian law, fair trial requirements even during armed conflicts are ‘enshrined in Common Article 3 of the *Geneva Conventions*, and in the relevant provisions of the *Geneva Conventions* (ICJ 2009: 143).’<sup>2</sup> Having prompt access to legal counsel of an individual’s own choice is just one of the requirements of a fair trial and complements the other requirements that are stipulated in international humanitarian law and international human rights instruments like the ICCPR. The other requirements, more correctly ‘minimum guarantees’, contained in the ICCPR (Article 14) include that a person be informed promptly and in full of the charge against her/him, that a person facing a criminal charge be presumed innocent until found guilty according to law (beyond reasonable doubt), that the person be given adequate time and resources to prepare her/his defence including having access to legal counsel of her/his own choosing and that the person be present at their trial and be able to defend her/himself in person or with the assistance of legal counsel of her/his own choosing (cited in ICJ 2009: 143). The right to a fair trial is fundamental to international human rights law and international humanitarian law and this right encompasses the minimum guarantee that a person is able to be represented by legal counsel that she/he freely chooses. Thus, any restraint or limitation on the ability of a person to choose their own legal counsel in criminal proceedings imposes an unwarranted condition on their right to a fair trial, a right that is so fundamental that it cannot be departed from even in situations of armed conflict. The so-called ‘war on terror’ is not an armed conflict as such and imposing conditions on a person’s right to choose counsel in terrorism cases, therefore is a serious infringement on their right to a fair trial which is not even able to fall back on the

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<sup>1</sup> It is incongruous, then, that as the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Martin Scheinin) blandly notes in his August 2008 Report to the UN General Assembly ‘In situations where counsel is assigned under legal aid, however, the Human Rights Committee has accepted that limitations may be imposed on the right to choice of counsel (UN 2008: 19).’ The Special Rapporteur cites in a footnote (n. 91) *Teesdale v. Trinidad and Tobago*, Human Rights Committee Communication No. 677/1996, CCPR/C/74/D/677/1996 2002), para. 9.6.

<sup>2</sup> The Additional Protocols I and II to the Geneva Convention dealing with the protection of civilians during respectively international and non-international armed conflicts both affirm fair trial requirements.

pseudo-justification that it is an exceptional measure required to deal with exceptional circumstances.<sup>3</sup>

The following section begins with a brief history and overview of the NSI Act. It then investigates the provisions contained in the Act which limit the information (that is, information that is regarded as having relevance to national security as broadly defined) that can be withheld from the defendant and/or their legal representative. This is followed by an examination of the restriction the NSI Act imposes on a legally-aided client in a terrorism case to have access to legal counsel of their own choosing.

### **The NSI Act**

The National Security Information (Criminal Proceedings) Act 2004 passed into law on 8 December 2004, with its key provisions commencing on 11 January the following year. The latter was the date on which the National Security Information (Criminal and Civil Proceedings) Regulations (the NSI Regulations) also commenced. The NSI Regulations, which incorporate the Requirements for the Protection of National Security Information in Criminal Proceedings and Civil Proceedings (the NSI Requirements) prescribe how national security information should be stored, handled and destroyed. The NSI Requirements include more detailed requirements for how national security information should be accessed, stored and handled and also deal with a number of relevant physical security considerations. The NSI Act 2004, which dealt only with criminal proceedings, was amended by the National Security Information Legislation Amendment Act 2005 to extend the protection from disclosure of “security sensitive information” by including “certain civil court proceedings” (Australian Laws to Combat Terrorism’ n.d.). The National Security Information (Criminal and Civil Proceedings) Act 2004 is the result.

According to the Federal Attorney-General’s Department, the NSI Act, NSI Regulations and NSI Requirements provide

a comprehensive regulatory framework for the disclosure, storage and handling of all NSI involved in federal criminal proceedings or civil proceedings, whether in documentary or oral form. The NSI Act applies from the pre-hearing stages through to completion of appellate proceedings, thereby enabling the parties to identify and bring forward any NSI issues as early as practicable (AGD 2008: 6).

The object of the Act, as should already be apparent, is to prevent the disclosure of information in federal criminal proceedings or civil proceedings that could prejudice national security unless non-disclosure would severely impede the administration of justice. The NSI Act, Regulations and Requirements are all based on a broad view of what ‘national security’ means. In the Act (Section 8), ‘national security’ is defined to encompass “‘Australia’s defence, security, international relations or law enforcement interests’” the latter included ‘to ensure that law enforcement information which is connected to national security, including intelligence collection methods and technologies, is not excluded from protection’ under the Act (AGD 2008: 10).<sup>4</sup> While

<sup>3</sup> The inappropriateness of the phrase ‘war on terror’ and associated ‘war paradigm’ is dealt with at length in *Assessing Damage, Urging Action*, Chapter Three: The legality and consequences of a ‘war on terror’ (ICJ 2009: 49-66).

<sup>4</sup> It is noted in *Assessing Damage, Urging Action* that ‘[t]hese provisions [had been] criticised on the grounds that the scope of information that could be withheld was excessively broad (ICJ 2009: n. 428,

the NSI Act does not contain a single definition of ‘national security information’ it does classify information into two different categories: 1. information simply relating to national security and which itself, or its disclosure, could *affect* national security. 2. Information which could *prejudice* national security if disclosed. Section 24 of the NSI Act requires the Attorney-General to be notified if the information or its disclosure would affect national security. Where the Attorney-General comes to the view that disclosure of the information would prejudice national security, he or she may issue a certificate which limits disclosure (section 26). But what is ‘information’? As far as the Act is concerned (section 7) “‘information” means information of any kind, whether true or false, whether in material form or not and whether it is in the public domain or not’ including ‘an opinion or a report of a conversation (AGD 2008: 11).’ Thus, as far as the NSI Act is concerned ‘information’ can mean almost anything and is therefore a nearly meaningless term. Nevertheless, attaching such a broad and all-encompassing meaning to ‘information’ coupled with the inclusion of ‘law enforcement interests’ in the definition of national security gives the Executive enormous scope for unwarranted interference in the administration of justice. This is a matter which is taken up in the final section of the paper.

The Attorney-General can issue several types of certificates in situations where she/he considers either that information will be disclosed that is likely to prejudice national security or that a witness will disclose information that is likely to prejudice national security. A criminal non-disclosure certificate can be issued when the Attorney-General has been informed under section 24 or subsection 25(6) that a disclosure of information is expected or that information will be disclosed by a party to the proceeding or a witness and she/he believes that the information to be disclosed is likely to be prejudicial to national security. The Attorney-General can issue a criminal witness exclusion certificate when she/he has been notified under section 24, or expects for any reason ‘that a person whom the prosecutor or defendant intends to call as a witness may disclose information by his or her mere presence’ and believes that the disclosed information is likely to be prejudicial to national security (AGD 2008: 17 and 18). The NSI act also enables the Attorney-General to issue civil non-disclosure (subsection 38F(2)) or civil witness exclusion (section 38H) certificates under arrangements that are ‘substantially similar’ to those in criminal proceedings. A notable exception is where the Attorney-General is a party to the civil proceeding in which case ‘any references to the Attorney-General means the alternative Minister appointed to perform functions under the NSI Act (AGD 2008: 31).’

When a criminal non-disclosure or witness exclusion certificate is provided to the court it must hold a closed hearing in order to make a determination on whether to make an order under section 31 regarding ‘whether it will maintain, modify or remove the restriction on the disclosure of information or the calling of witnesses (AGD 2008: 19).’ A closed hearing precedes the substantive hearing if a certificate is received before the substantive proceeding begins and is held on adjournment of the substantive proceeding when it is received after the proceeding has begun. A closed hearing (section 29) deals strictly with the two matters of whether to allow a witness

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p. 152). Similar concerns, regarding both the scope of ‘information’ and the broad definition of ‘national security’, were also expressed in many submissions to the Senate Legal and Constitutional Legislation Committee’s (SLCLC) inquiry in the provisions of the National Security Legislation Amendment Bill 2005. See SLCLC (2005) Provisions of the National Security Information Legislation Amendment Bill 2005, especially pp. 33-36

to be called and whether to allow disclosure of information that is likely to prejudice national security and, if so, what form it should take. In sum, '[t]he closed hearing is solely concerned with contested issues of disclosure preliminary to, but outside of, matters to be adjudicated (including the relevance and admissibility of NSI) in the substantive hearing (AGD 2008: 20).' Defence counsel and court staff who do not have security clearances can be excluded from a closed hearing when disclosing information to them is believed to have the potential to prejudice national security. The persons who can be present at a closed hearing are the magistrate, judge or judges hearing the case, the prosecutor, and the Attorney-General or her/his legal representative if she/he exercises her/his right to intervene (section 30). Court officials, the defendant, the defendant's legal representative and witnesses can only be present subject to the court's discretion.

In *Assessing Damage, Urging Action*, the Eminent Jurists Panel noted that in Australia, as in Canada, a defendant may appeal against the issuing of a criminal non-disclosure or witness exclusion certificate. However, the Panel was concerned that, in Australia, 'the court is required to give greatest weight to the question of "the risk of prejudice to national security" rather than to the needs of the accused (ICJ 2009: 153).' Requiring courts to make 'national security' a higher priority than the needs and rights of the accused is consistent with other aspects of the NSI Act, and of Australia's counter-terrorism legislation more generally (see, for example, Rix 2008).

#### **Legal counsel of one's own choosing?**

The Commonwealth Legal Aid Application Guideline 7 deals with 'National security matters—requirement for security clearance'. Guideline 7 commenced operation on 4 July 2006 and replaced the former Criminal law Guideline 9 'National Security matters'. The exceptions in the discarded Guideline 9, which under certain circumstances enabled assistance to be provided even when a legal aid client's legal representative did not hold a security clearance, were omitted from Guideline 7. Guideline 7 was introduced to ensure compliance with the NSI Act particularly as it relates to disclosure of NSI in Commonwealth criminal and civil (including family) matters. According to the Attorney-General Department's Practitioners' Guide to the NSI Act, '[t]he Commonwealth Legal Aid Amendment Guidelines do not restrict a legally-assisted client's ability to *nominate* a preferred legal practitioner (AGD 2008: 28; emphasis added).' Nominating a preferred legal practitioner is one thing, actually being able to choose a legal practitioner is quite another. Before or during a federal criminal proceeding, the Secretary of the Attorney-General's Department may provide written notice to the defendant's legal representative or associate assisting the representative to the effect that information may be disclosed in the proceeding which has the potential to prejudice national security (section 39). In such cases, the defendant's legal representative and her/his assistants can apply to the Attorney-General's Department for a security clearance, a process which 'is conducted at arm's length from the agencies involved in prosecutions (AGD 2008: 29).' After a section 39 notice has been issued, the legal representative of a legally-aided client will only receive further payments under the legal aid scheme subject to being issued with a security clearance or having applied for a security clearance (payments under a grant of legal aid may be made for work completed before the section 39 notice was issued). A legal representative is required to apply for a security clearance within 14 days of receiving a section 39 notice. This is precisely where the freedom to nominate a preferred legal practitioner becomes a highly conditional choice of legal



representative. When the legal representative fails to apply for a security clearance, '[t]he court may then advise the defendant of the consequences of being represented by an uncleared legal representative [that is, the possibility that the legal representative will not have access to NSI which is relevant to the proceedings] and may recommend that the defendant engage a legal representative who has been given, or is prepared to seek, a security clearance (AGD: 2008 30).' The level of security clearance required by legal representatives, court personnel, and so on is calibrated to the highest level of NSI classification involved in a case so that, for example, should 'Secret' be the highest level of NSI classification a 'Secret' level security clearance is required.

The NSI provisions pertaining to civil cases 'mirror' those applying in criminal cases. However, there is an important, extra provision:

In recognition of the additional financial burden involved in engaging a security-cleared legal representative to attend a closed hearing, a self-represented litigant involved in a civil matter who is refused a security clearance at the appropriate level would be eligible to apply for financial assistance under the Special Circumstances Scheme. If approved, this would provide financial assistance for the legal costs associated with engaging a security-cleared legal representative to attend the closed hearing and any related appeal. The opportunity for such unrepresented parties to access financial assistance in order to retain a security-cleared lawyer is an important component of the scheme (AGD 2008: 42); subsection 39A(6) of the NSI Act.

This extra provision is an acknowledgement of the additional financial burden to a self-represented litigant in a civil proceeding should they wish to have a legal representative attend a closed hearing. However, consistent with the provisions relating to criminal proceedings, the choice of legal representative is constrained by the need for the representative to have a security clearance at the appropriate level.

### **Models and precedents**

According to the Practitioners' Guide, the provisions for closed hearings contained in the NSI Act are not as broad 'in ambit' as the statutory procedures for protecting NSI in court proceedings that operate in the UK, Canada and the US. In these other jurisdictions, prescriptions for the closure of proceedings cover the substantive hearing as well as the 'more confined "voir dire" segment' of a trial. However, the Guide also points out that 'In developing its [Australia's] legislative regime for the protection of NSI in court proceedings, careful consideration was given to the statutory approaches taken in the United States, Canada and the United Kingdom (AGD 2008: 7).' In the United States, as with Canada, statutory NSI protection procedures have been in operation for more than 20 years. The relevant acts are the US Classified Information Procedures Act 1980 (the US CIPA) and the Canada Evidence Act 1985. Both of these Acts place an obligation on a criminal defendant who expects to call NSI as evidence to notify the Government of this eventuality and 'also require that the nature and admissibility of such evidence be determined in closed hearings (AGD 2008: 7).' In the USA, in the event that a court determines the admissibility of NSI the US Government can seek orders under the CIPA enabling a redacted version, a summary of the relevant facts or 'an admission of relevant facts' to be substituted for the original information and called as evidence. As for Canada, the Attorney-General first decides whether the NSI can be disclosed, a decision which can be challenged before a court. If it is determined by the court that the NSI is admissible

it can then authorise a summary or a ‘written admission of facts’ to be substituted for the NSI. However, where a court does not permit a summary or admission of relevant facts to replace the NSI ‘the Attorney-General may issue a certificate prohibiting disclosure of the information (AGD 2008: 8).’

In the UK, there is no single equivalent of the US CIPA or Canada Evidence Act. Instead, two acts deal with how NSI should be used in criminal proceedings: the Criminal Procedures and Investigation Act 1996 codifies the public interest immunity principle and the Official Secrets Act 1920 sets out other procedures for protecting NSI. The restrictions on court reporting contained in the Criminal Procedures and Investigation Act section 37 have been incorporated into subsections 29(5) (criminal proceedings) and 38I(5) (civil proceedings) of the NSI Act (AGD 2008: 8).

According to the Practitioners’ Guide, and without citing any substantiating evidence, the security clearance procedure under the US CIPA ‘...has been accepted by the US legal profession as being part of its obligations to properly represent clients (AGD 2008: 27).’ The Guide also asserts that undertaking security clearances of legal representatives has been validated by ‘recent US case law’ as the ‘best mechanism to prevent unauthorised disclosure of classified information in the custody of the court (AGD 2008: 27).’<sup>5</sup> As for Canada, ‘security cleared counsel appear before hearings conducted by the Security Intelligence Review Committee and are appointed from a panel of security cleared lawyers (AGD 2008: 27-28).’ The UK Juries Act authorises ‘limited’ security assessments of potential jurors conducted consistent with guidelines issued by the Attorney-General.

**The zero sum equation: does weakening the rule of law and lessening human rights protections in fact increase national security?**

The requirement that legal counsel representing a legally-aided client in a terrorism case obtain a security clearance makes the administration of justice unwieldy and inefficient and leaves it highly susceptible to unwarranted executive interference. It holds legally aided people hostage to the discretion of the Secretary of the Attorney-Generals’ Department regarding the issuing of national security notifications and to the Department for determination of the appropriate level of clearance required by a legal representative. The process of issuing a national security notification and determining whether a security clearance is required and, if so, at what level, appears to be a completely arbitrary one, lacks transparency and is not open to public scrutiny.<sup>6</sup> Thus legal practitioners and civil society organisations which seek to hold executive government and its agencies accountable and answerable for their actions have no effective means of keeping this process under scrutiny and review. Just as importantly, this requirement provides the executive arm of Government with wide access to information about individual lawyers and therefore opens up the possibility of misuse and abuse of the information, and the access to it, by the executive and the national security authorities which act on the executive’s authority.

In imposing restrictions on the ability of a legally-aided person to choose their own counsel, the NSI Act ‘detracts significantly from the guarantee in article 14(3) of the

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<sup>5</sup> The Guide cites *US v Usama Bin Laden* 58F Supp 2d 113 (S D N Y 1999) as a case in point (n. 78, p. 27).

<sup>6</sup> Similar concerns were raised in a number of submissions to the SLCLC’s inquiry into the NSI Amendment Bill (see SLCLC 2005, especially pp. 26-27).

ICCPR that all persons have access to a legal representative of their own choosing, and that such representation be provided by the State in cases where the person does not have sufficient means to pay for it' themselves (Law Council of Australia 2008: 81). This is a serious threat to the right to a fair trial.

In the view of the Law Council [of Australia], the security clearance system for the legal profession under the Act threatens the right to a fair trial in two ways. First, it restricts a person's right to a legal representative of his or her choosing by limiting the pool of lawyers who are permitted act in cases involving classified or security sensitive information. Secondly, it threatens the independence of the legal profession by allowing the executive arm of government to effectively "vet" and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information. By undermining the independence of the legal profession in this way, the right to an impartial and independent trial with legal representation of one's own choosing is similarly undermined (Law Council of Australia 2008: 80).

By providing the executive arm of Government with greater powers at the expense both of the human rights of individuals involved in terrorism cases and of the independence of the legal profession, the NSI Act opens the door to the arbitrary exercise or abuse of state power. It also dangerously weakens rather than enhances Australia's national security.

In the Additional Comments and Points of Dissent attached to the SLCLC Report on the NSI Amendment Act, Senator Brian Greig of the now Federally-defunct Australian Democrats made a number of important points. The Democrats were concerned that the Act would undermine Australia's national security, rather than enhance it. '[I]n the minds of many Australians', the Democrats suggested, 'national security means the protection of the physical safety *and* fundamental rights of all Australians (SLCLC 2005: 50; emphasis added).' In putting forward this suggestion, the Democrats in a subtle way advanced a notion of national security that includes both physical safety and fundamental rights and which is therefore at variance with the conventional view. According to the conventional view, there are circumstances in which safeguarding national security requires the protection of human rights and the rule of law to be a secondary consideration for the Government. Those who hold to the conventional view regard the 'war on terror' as just such a circumstance requiring the Government to adopt exceptional measures to deal effectively with the exceptional threat to physical safety and fundamental rights that is believed to be presented by groups and individuals who are intent on perpetrating terrorist violence. The conventional view is underpinned by the zero sum equation which implicitly (and, sometimes even explicitly) equates, on the one hand, the protection of human rights and the rule of law with reduced national security and, on the other, increased national security with fewer and weaker human rights protections and a weakening of the rule of law.<sup>7</sup> The new notion advanced by the Australian Democrats escapes the zero sum equation by rejecting the presumption that human rights (and the rule of law) and national security are necessarily in opposition to or inconsistent with each other. Instead, the protection of human rights and the rule of law is regarded as being

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<sup>7</sup> Dangerous thinking of this sort is evident in the Attorney-General Robert McClelland's recent praise of Singapore's approach to national security and counter-terrorism (see Dorling 2009). See also Mr McClelland's recent address to the 7<sup>th</sup> Annual National Security Australia Conference (McClelland 2009).

a fundamental aspect of national security and *its* protection. Such a notion of national security escapes the flaw in the conventional view, namely, the privileging of state security over the security and liberty of the person and its inherent risk of state power being misused or abused.

### **Conclusion**

The NSI Act imposes serious restrictions on the ability of a legally-aided individual in terrorism cases to be represented by a legal practitioner of their own choosing, threatening the right of such an individual to a fair trial. The right to legal counsel of one's choice is one of the fair trial requirements, or minimum guarantees, recognised in both international human rights law and international humanitarian law. The zero sum equation that underpins the conventional view of national security is based on the two-part assumption that enhancing national security reduces human rights protections and weakens the rule of law and that strengthening human rights and the rule of law weakens national security. On this flawed logic, then, even though the NSI Act threatens the right to a fair trial it nevertheless enhances Australia's national security. However, the NSI Act is a dangerous piece of legislation that, far from enhancing national security, seriously erodes it. A new conception of national security is urgently required which regards protecting human rights and upholding the rule of law as being fundamental to the safeguarding of Australia's national security. With this conception of national security, the NSI Act and much of the other legislation included in Australia's counter-terrorism regime could be discarded (and, hopefully forgotten altogether).

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