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## Counter-Terrorism and Information: The NSI Act, fair trials and open, accountable government

Mark Rix  
*University of Wollongong, [mrix@uow.edu.au](mailto:mrix@uow.edu.au)*

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## Abstract

This paper investigates Australia's National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (hereafter, the NSI Act) focusing on its provisions for protecting national security information. The investigation highlights the broad and encompassing definitions of 'national security' and 'information' used in the Act and considers the measures it prescribes for the protection of so-called 'security sensitive' information in Federal civil and criminal proceedings. The paper then examines the implications of the definitions and measures for a suspect's prospects of receiving a fair trial in terrorism cases. Here, the paper highlights the serious restrictions the Act places on a legally-aided person's right to engage a legal representative of their own choosing. These restrictions are then compared with those obtaining in some comparable jurisdictions. As important as the NSI Act's definitions and measures are for the way in which they limit a terrorism suspect's chances of a fair trial, their significance extends well beyond this very serious issue to even deeper concerns. These relate to the secrecy and lack of transparency surrounding the conduct of terrorism cases, the opaqueness of the processes for classifying and protecting information, and the potential for tendentious or improper use of information by the political executive and national security agencies enabled by the dearth of avenues for external, independent scrutiny. At the core of these concerns, then, are issues of the accountability and integrity of the government and of the agencies under its direction. Using the experience of Mohamed Haneef as a case study, the final section of the paper investigates the important role that defence counsel, the media and other independent parties can play to facilitate public scrutiny of the conduct of terrorism investigations and trials and in exposing the improper use sometimes made of protected information by the political executive in attempting to influence the conduct of these cases.

## Keywords

NSI Act, counter-terrorism, fair trials, classified information, national security

## Disciplines

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## **Counter-Terrorism and Information: The NSI Act, fair trials and open, accountable government**

Dr Mark Rix

*Senior Lecturer, Sydney Business School, University of Wollongong*

### **Abstract**

This paper investigates Australia's *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (hereafter, the NSI Act) focusing on its provisions for protecting national security information. The investigation highlights the broad and encompassing definitions of 'national security' and 'information' used in the Act and considers the measures it prescribes for the protection of so-called 'security sensitive' information in Federal civil and criminal proceedings. The paper then examines the implications of the definitions and measures for a suspect's prospects of receiving a fair trial in terrorism cases. Here, the paper highlights the serious restrictions the Act places on a legally-aided person's right to engage a legal representative of their own choosing. These restrictions are then compared with those obtaining in some comparable jurisdictions. As important as the NSI Act's definitions and measures are for the way in which they limit a terrorism suspect's chances of a fair trial, their significance extends well beyond this very serious issue to even deeper concerns. These relate to the secrecy and lack of transparency surrounding the conduct of terrorism cases, the opaqueness of the processes for classifying and protecting information, and the potential for tendentious or improper use of information by the political executive and national security agencies enabled by the dearth of avenues for external, independent scrutiny. At the core of these concerns, then, are issues of the accountability and integrity of the government and of the agencies under its direction. Using the experience of Mohamed Haneef as a case study, the final section of the paper investigates the important role that defence counsel, the media and other independent parties can play to facilitate public scrutiny of the conduct of terrorism investigations and trials and in exposing the improper use sometimes made of protected information by the political executive in attempting to influence the conduct of these cases.

**Keywords** NSI Act, counter-terrorism, fair trials, classified information, national security

### **Introduction**

Writing in *The Sydney Morning Herald* on February 24 2009, George Williams pointed out that '[f]rom September 11 [2001] to the end of the Howard Government, Parliament passed 44 anti-terrorism laws, an average of one every seven weeks' an unenviable legislative record with 'no parallel in any other democratic nation (Williams 2009).'<sup>1</sup> 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 (that is, overturning 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 NSI Act's provisions for protecting national security information, and the closely related restriction on a legally-aided client's right to be represented by a lawyer of their own choosing, which are the focus of this paper.

The aim of the NSI Act is to prevent disclosure of information in federal criminal and civil proceedings which is believed to have the potential to prejudice national security. Not only does the Act contain a sweeping definition of 'national security' which includes Australia's defence, security, international relations and law enforcement interests, it so broadly defines 'information' that almost anything can fall within its compass. Thus for the Act, 'information' means information of any kind including material, whether or not it is true or false, and opinions and even reports of

a conversation. The paper examines the implications of the scope which this gives to the law enforcement and security agencies to classify almost any information as 'protected' and 'sensitive' and thus to withhold it from terrorism suspects and their legal counsel even if it is vital to the case and their defence. The paper also investigates how the classification of information as either protected or sensitive can seriously constrain the ability of a legally-aided client in a terrorism case to engage a legal representative of their own choosing. It examines the very real potential this has for prejudicing a legally-aided person's prospects of receiving a fair trial, comparing the NSI provisions with those contained in similar legislation in some comparable jurisdictions. No less important than damaging the chances of a fair trial, and as also investigated by the paper, classifying information in this way can be a means of preventing disclosure of errors and misrepresentations of information made by these agencies in their conduct of a case. It also gives the political executive enormous scope to misuse or misrepresent the classified information in the media and public debate to suit its own political or electoral purposes and to the detriment of the interests of persons investigated or detained in terrorism cases. The paper uses the case of Mohamed Haneef to highlight the important role which a terrorism suspect's defence counsel, the media and other external parties can play in exposing the inappropriate use of classified information and in ensuring the proper conduct of terrorism cases by the government and national security authorities.

### **The NSI Act**

The *National Security Information (Criminal Proceedings) Act 2004 (Cth)* 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 2005* (the NSI Regulations) also commenced. The NSI Regulations prescribe how national security information should be stored, handled and destroyed. The Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings (the NSI Requirements), which are incorporated in the Regulations, include more detailed specifications 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 (Cth)* 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 (Cth)*, commencing 3 August 2005, is the result. Thus, through amendment, the NSI Act was brought into line with the Regulations (and, Requirements) which it is supposed to underpin.

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 'seriously' impede the administration of justice (it is not at all clear what force the qualifier 'seriously' has). 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>2</sup> While 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, including misinformation and non-information, 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 more fully in the final section of the paper.

The importance of the NSI Act is, then, that it broadly sets the terms and conditions for the use and disclosure of information in terrorism investigations and trials. As seen above, the Act leans very much towards non-disclosure of information and, in defining information so broadly that almost anything falls within the definition, it provides the government and national security agencies with a legislative basis for not releasing information and for threatening or punishing defence counsel and others who do so, even if this is done, for example, in order to give their client a better prospect of receiving a fair trial. As Lawrence McNamara, who interviewed several journalists and media and criminal lawyers with experience of terrorism trials and investigations, points out, ‘Even where experiences [of these lawyers and reporters] were not directly attributable to the existence or application of counter-terrorism legislation [such as the NSI Act], the laws were still seen as an indicator of the state’s willingness to restrict the flow of information (McNamara 2009, 109<sup>3</sup>).’ Thus, the NSI Act, and other important pieces of counter-terrorism legislation such as the *Australian Security Intelligence Organisation Act 1979 (Cth)*, and the *ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)* and the *ASIO Legislation Amendment (Terrorism) Act 2006 (Cth)* (both of which gave ASIO enhanced powers), frame the context within which information in counter-terrorism cases can be accessed and used by lawyers, journalists and other independent parties.

### ***Non-disclosure certificates***

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. An 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 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 of the ICJ 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 (and, even *non*-suspects) is consistent with other aspects of the NSI Act, and of Australia’s counter-terrorism legislation more generally (see, for example, Rix 2008).

#### ***National Security Information and access to legal counsel***

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 (subsection 39A(6) of the NSI Act) which provides for unrepresented parties to have access to financial assistance, through the Special Circumstances Scheme, in order to enable them to retain a security-cleared lawyer. It is an acknowledgement of the 'additional financial burden' associated with engaging a security-cleared lawyer to attend a closed hearing and any subsequent appeal (AGD 2008, 42). However, consistent with the provisions relating to criminal proceedings, the choice of legal representative is constrained by the need for the nominated representative to have a security clearance at the appropriate level.

#### ***International 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 ‘[i]n 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 to be 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).’<sup>4</sup>

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.<sup>5</sup> 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).’<sup>6</sup> 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>7</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, 27-8).’ The UK Juries Act authorises ‘limited’ security assessments of potential jurors conducted consistent with guidelines issued by the Attorney-General.

### **Information, fair trials and national security: what is the connection?**

The NSI Act’s requirement for legal counsel representing a legally-aided client in a terrorism case to 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 litigants hostage to the discretion of the Secretary of the Attorney-General’s Department (who acts on the authority of the Attorney-General) regarding the issuing of national security notifications and to the Department for determination of the appropriate level of clearance required by a legal

representative. As the Law Council of Australia points out, this ‘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 (Law Council of Australia 2008, 80).’ Moreover, 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>8</sup> Thus legal practitioners, the media and other 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 independent scrutiny and review. Just as importantly, the requirement for a security clearance provides the executive arm of Government with unrestricted access to information about individual lawyers and therefore opens up the possibility of misuse and abuse of the information by the executive and the national security agencies, such as the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO), which act on the executive’s authority.

In addition to these serious concerns with the NSI Act itself, there are also important issues surrounding the classification of information as ‘protected’, ‘sensitive’ or ‘classified’ and the uses to which this information can be put by the police and intelligence agencies or the Government. The classification of ‘information’ into any of these categories is done ostensibly for the protection of national security which, in itself, is a worthy objective. If the protection of national security requires blocking disclosure of information by classifying it in these ways, then that would seem at first blush to be a small price to pay for a greater good. However, the process of classifying information is just as arbitrary, lacking in transparency and closed to public scrutiny as the procedure for issuing a security clearance for a legal representative. And, for just these reasons, it is susceptible to the same tendentious and improper uses by the Government and its agencies. These issues are examined in the following section which investigates the case of Mohamed Haneef to highlight the important role which defence counsel, the media and other independent parties can play in exposing the inappropriate use of classified information and in ensuring the proper conduct of terrorism cases by the national security authorities. Also investigated is the enormous scope given to the political executive to use or misuse the classified information in the media and public debate to suit its own political or electoral purposes and to the detriment of the interests of persons investigated or detained in terrorism cases.

### *The Haneef Case*

Dr Mohamed Haneef, an Indian doctor then working at the Gold Coast hospital in Queensland, was arrested on 2 July 2007 at Brisbane International Airport as he was about to board a flight to Bangalore, India and held without charge for 12 days under provisions of the Crimes Act (for a thorough investigation of the case, see Rix 2010). He was charged on 14 July with the offence of recklessly providing support to a terrorist organisation, contravening the Commonwealth Criminal Code, on the grounds that his soon-to-expire SIM card was connected to failed terrorist attacks in Britain (in which a second cousin was involved).<sup>9</sup> Even though Dr Haneef was granted bail by a Brisbane magistrate two days after being charged, within hours of the bail decision the then Immigration Minister Kevin Andrews cancelled Haneef’s work visa on the grounds that he failed the character test of the *Migration Act 1958*

(*Cth*). This prevented his release from custody. The following day Attorney-General Philip Ruddock issued a Criminal Justice Stay Certificate under s. 147 of the Migration Act. This stopped Haneef from being deported and required him to remain in detention while the criminal proceedings continued. Dr Haneef was held in immigration detention and home detention for a total of nearly two weeks, and then allowed to return voluntarily to India on 28 July despite his visa remaining cancelled. However, the day before, on 27 July, the Commonwealth Director of Public Prosecutions (CDPP) had withdrawn the charge against Dr Haneef on the basis that there was insufficient evidence to support a conviction. The Attorney-General accordingly cancelled the Criminal Justice Stay Certificate. Justice Spender of the Federal Court set aside the visa cancellation decision on 21 August 2007, a decision upheld by the Full Bench of the Federal Court in December 2007 dismissing an appeal by Andrews.<sup>10</sup> The case became the subject of a Judicial Inquiry set up by the Rudd Government in March 2008, honouring an election promise made during the 2007 campaign. The inquiry was conducted by former NSW Supreme Court Justice the Honourable John Clarke. The Clarke Inquiry Report was tabled in Federal Parliament in December 2008 (Clarke 2008).

In July 2008, in one of four statements he released during the inquiry, Justice Clarke addressed some of the issues he had confronted relating to the appropriate handling of information carrying a security classification (Clarke 2008a). In particular, he was concerned to explain why it would not be possible to make public as much of the information provided to the inquiry as he had initially proposed to post on the inquiry website or publish in his report to be released at its conclusion. In the statement, Clarke points out that much of the material provided by Commonwealth and State departments and agencies had a security classification, severely limiting the extent to which it could be shown to other people or disclosed generally.<sup>11</sup> And, only the originating agency had the discretion to declassify the material. In the case of the AFP (Clarke does not specifically refer to any other Australian agency), it was unable to declassify or allow the inquiry to publish information ‘containing United Kingdom sourced and derived material’ because of the serious objections raised by the Metropolitan Police and the Crown Prosecution Service. These objections related to their wish not to compromise the integrity of criminal trials which were about to begin in the UK. And, states Clarke, ‘[h]aving regard to the fact that the maintenance of such relations [between the AFP and the Metropolitan Police and the two countries more generally] is an important element of national security the prospect of securing approval to disclose the content or publish the documents appears remote (Clarke 2008a).’

Unfortunately, Justice Clarke did not discuss in the statement why agencies other than the AFP did not declassify the material provided to the inquiry in order to allow it to disclose or publish the information. Presumably not all of the information provided to the inquiry, including that supplied by the AFP, was connected or relevant to the UK trials. And, in any event, one important side effect of classifying information as ‘sensitive’ or ‘protected’ is to prevent scrutiny of whether the relevant material is in fact sensitive or protected. In other words, such a classification is self-fulfilling and prevents any sensible, informed public debate about either the nature of the material in question or the classification process. Were, for example, the serious objections of the Metropolitan Police and the CPS justified and, even if they were, should they have been allowed to stand in the way of full public disclosure about the

conduct of the case by the AFP and the CDPP? Fortunately, the use of the media by Haneef's legal counsel ensured that the Australian public had greater access to information about the way in which the case was conducted than may otherwise have been the case. Ultimately, it also led to the establishment of the Clarke Inquiry.

In the early stages of the case, as the Australian Press Council's review of the press media's coverage of Haneef highlights, the media was primarily concerned with the narrow criminal and law and order dimensions of the case (Australian Press Council 2008; see also Ewart n.d, Dreher 2007, Debowski 2009). It was also concerned of course with 'hying up' the lurid terrorist aspects, in particular, the alleged connections with the failed attacks in Britain and the role of the famous (or, infamous) SIM card. The important justice and human rights dimensions raised by the case were at this stage largely overlooked. It was only as the case proceeded and gathered momentum with the release to the media by Haneef's legal counsel of the transcripts of the AFP's two interviews with the doctor that these justice and human rights dimensions began to gain more prominence in the media coverage.<sup>12</sup> And, as the media began to focus on these dimensions, so did media freedom itself become a major issue, in particular, media and public access to classified and 'security sensitive' information and the uses to which this information was put by the opposing sides in the case. In this context, the release of the records of interview to the media was a deliberate and completely justified tactic employed by Haneef's counsel to counter negative and misleading portrayals of their client and to correct misinformation and distortions of the truth by the AFP and senior ministers in the Government (ABC 2007a; see also Keim 2007). And, after all, the release of the records of interview enabled the media to play the significant role that it did in the case. For, had there been no releases, the claimed need to protect so-called security sensitive information (not all of which was connected to the UK trials) would have meant that the Australian public would probably have remained none the wiser about the AFP's mishandling of the case, the less than adequate performance of the Commonwealth Director of Public Prosecutions<sup>13</sup>, or of the Howard Government's conniving<sup>14</sup>. With regard to the latter, Immigration Minister Andrews' involvement in the case is at once instructive and troubling.

As noted above, Andrews invoked the character test of the Migration Act in order to cancel Haneef's work visa and keep in him in detention even though he had been granted bail. Andrews claimed that his decision was based on secret evidence made available to him by the AFP even though, at the time of the opening of the Clarke Inquiry into the case, Andrews claimed the AFP had withheld important information from him (McKenna 2008). The fact that Andrews did not use the much broader reasons available under the Migration Act of 'national security' or 'national interest' to justify his cancellation of the doctor's visa remains one of the oddities of the case (Rix 2010, 209). His failure to use these broader reasons was the main reason that the visa cancellation was overturned (an examination of the nature, availability and validity of these broader reasons is beyond the scope of this paper). In any event, in overturning the visa cancellation, Justice Spender of the Federal Court was highly critical of Andrews for releasing to the media certain 'protected information' under the Migration Act which he refused to disclose to the court or to Dr Haneef and his legal representatives. This according to Justice Spender prevented Haneef from mounting an effective challenge to the information by cross-examination (see Rix 2010, 201). The case, in particular the use of the Migration Act by Andrews, also

demonstrates how tendentious and calculatedly opaque the decision to classify information as ‘sensitive’, ‘protected’ or ‘classified’ can be. As seen above, the Full Bench of the Federal Court later upheld Justice Spender’s decision dismissing an appeal from Andrews.

## **Conclusion**

The NSI Act is an important piece of legislation that so broadly defines ‘national security’ and ‘information’ that almost anything conceivable is brought within its remit. The definitions enable the police and security agencies to withhold information from suspects or defendants in terrorism cases, even if it is vital to the case and to their defence. They can also seriously constrain the ability of a legally-aided client to engage a legal representative of their own choosing, potentially reducing their prospects for receiving a fair trial. As the Haneef case demonstrates, classifying information as sensitive or protected can also prevent disclosure of errors of fact and false or misleading information used in the conduct of cases by the law enforcement and security agencies including their attempts to manipulate media coverage. The political executive is also given broad scope to use or misuse the classified information in the media and public debate to further its own political or electoral agenda. Finally, the Haneef case demonstrates the crucial role defence counsel and the media can sometimes play in opening to public scrutiny and wider political debate the way in which terrorism cases are conducted by these agencies and influenced by the Government and its ministers to suit their own purposes even if they are contrary to the interests of justice and human rights.

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## **Notes**

<sup>1</sup> George Williams is the Anthony Mason Professor of Law and Foundation Director of the Gilbert + Tobin Centre of Public Law at the University of New South Wales.

<sup>2</sup> It is noted in the ICJ’s *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, 152n428).’ 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 into the provisions of the National Security Legislation Amendment Bill 2005. See SLCLC (2005) Provisions of the National Security Information Legislation Amendment Bill 2005 (especially 33-6).

<sup>3</sup> For more on the effect of the NSI Act and other counter-terrorism acts on journalists’ and lawyers’ access to and use of information in counter-terrorism cases, see McNamara 2009a and 2009b. McNamara conducted many of the interviews used in these articles during the Haneef case when it was attracting significant media attention. See also McNamara 2010.

<sup>4</sup> For the difficulties encountered in ‘balancing’ the protection of national security and the safeguarding of human rights in the Canadian context see, for example, Adelman 2006 and Theroux and Karpinski 2008. Both these papers discuss the provisions of the Canada Evidence Act with regard to the nature and admissibility of NSI as evidence and the security clearance process for legal counsel in terrorism cases (amongst others).

<sup>5</sup> Duncan Campbell, in a 2008 piece in *The Guardian*, points out that ‘[t]he [UK] government’s use of the Official Secrets Act to prevent issues of public interest being published is also [along with libel

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laws and other controls introduced in recent counter-terrorism legislation] condemned in an intervention from the UN [committee on human rights] which warns that public servants are being gagged even where national security is not at risk (Campbell 2008).’ See also Cram (2009) who examines freedom of expression in the context of national security and counter terrorism in the UK, particularly the provisions and use of the Official Secrets Act to prevent disclosure of sensitive information.

<sup>6</sup> But on this point see the 2008 article in the *Harvard Law Review* on withholding classified information to protect sensitive information in criminal proceedings (cited here as Harvard Law Review 2008). This article was written in response to the decision of the Second Circuit court to affirm a decision of the District Court for the Northern District of New York to withhold certain ‘classified information that might otherwise have been discoverable’, under the provisions of the CIPA Act. The article notes that the court cited a ‘highly controversial’ privilege in civil litigation that ‘demands great deference to the executive branch’s desire to protect sensitive information (819).’ The case involved the arrest and charging with numerous offences of Yassin Aref and Mohammed Hossain in connection with a police operation centring on the sale of a surface-to-air missile. In writing for the ‘unanimous panel’, Judge McLaughlin of the Second Circuit began by noting that “although CIPA does not itself create a privilege”, it “presupposes a government privilege against disclosing classified information” (820). As the *Harvard Law Review* article points out in relation to this privilege, ‘[t]he political controversy and precedential implications that the state secrets doctrine has developed in civil litigation could undermine the legitimacy of prosecutions involving classified information, while spreading the privilege’s use to criminal law may weaken the political checks necessary to restrain its use in civil litigation (819).’

<sup>7</sup> The Guide cites *US v Usama Bin Laden* 58F Supp 2d 113 (S D N Y 1999) as a case in point (27n78).

<sup>8</sup> Similar concerns were raised in a number of submissions to the SLCLC’s inquiry into the NSI Amendment Bill (see SLCLC 2005, especially 26-7). See also comments made by then Chief Justice of the Supreme Court of Tasmania Peter Underwood and former Chair of the Criminal Bar Association of Victoria Lex Lasry (Underwood 2006 and Lasry 2004).

<sup>9</sup> The allegation that the SIM card which Dr Haneef had given to Sabeel Ahmed, his second cousin, in July 2006 was connected with the failed terrorist attack on Glasgow Airport by Sabeel’s brother Kafeel on 30 June 2007 was shown to be incorrect in a breaking story by the Australian Broadcasting Corporation’s Rafael Epstein on 20 July 2007. His report revealed that the UK police had found the SIM card when they raided Sabeel’s house in Liverpool UK on 30 June, the day of the Glasgow attack (ABC 2007). Later, the Report of the Clarke Inquiry demonstrated that the AFP knew that Sabeel, not Kafeel, had the SIM card at the time of the Glasgow attack but had not made this information public or brought it to the attention of the CDPP until 20 or 21 July 2007 (Clarke 2008, 135, 146).

<sup>10</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273; *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203.

<sup>11</sup> A 2009 Discussion Paper on Proposed Amendments to National Security Legislation observes that Commonwealth inquiries like the Clarke Inquiry ‘have developed ad hoc procedures to deal with issues concerning the protection of classified and security sensitive material. (Australian Government 2009, 323).’ The NSI Act sets the parameters within which the AFP and other agencies assess and classify information according to its security sensitivity.

<sup>12</sup> Hedley Thomas’ article in the first edition of *The Australian* on 18 July 2007 provided valuable insights into the contents of the first record of interview of Haneef conducted by Federal Agent Neil Thompson of the AFP and Detective Sergeant Adam Simms of the Queensland Police Service, 3 July 2007. The interview revealed the way in which the AFP’s had mishandled the case. Later that day, Stephen Keim SC, Haneef’s senior legal counsel, disclosed that he had released the first record of interview to the media. Thomas’ article demonstrated, for example, that in the AFP interview Haneef had admitted he had lived in Liverpool, UK with two other doctors but, contrary to the information contained in the AFP’s court affidavit to extend the period it held Haneef in detention for investigation, not with Sabeel or Kafeel Ahmed. The record of interview also showed that Haneef had a perfectly good explanation for his travel plans to Bangalore, also contrary to the AFP’s court affidavit that he had no explanation (Thomas 2007). The second record of interview with Haneef was released by Haneef’s legal representatives on 22 August 2007 (almost a month after the charge was withdrawn). It showed that there were more inconsistencies between the information contained in the records of interview and the information provided by the AFP to the court and the media (Thomas 2007a).

<sup>13</sup> Damian Bugg QC, then Commonwealth Director of Public Prosecutions, admitted that the CDPP was responsible for putting before the court at Haneef’s bail hearing the error of fact that the SIM card

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had been found at the scene of Kafeel Ahmed's attack on Glasgow Airport, but blamed the AFP for the second error of fact that Haneef had lived in Liverpool with Sabeel and Kafeel (*The Age* 2007).

<sup>14</sup> For example, a series of emails between AFP officers and staff in Immigration Minister Kevin Andrews' office, published in *The Australian*, suggested the existence of a 'secret plan' to ensure that Haneef would remain in custody even if he had been released on bail (Thomas 2007b). See also Schwarten 2008.

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