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A POISONED APPLE? THE USE OF SECRET EVIDENCE AND SECRET HEARINGS TO COMBAT TERRORISM IN AUSTRALIA

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Abstract

The use of secrecy in the form of secret evidence and secret hearings had a limited role in modern democracies where the focus is on open justice. This changed after the events of 11 September 2001. Secrecy may be a necessary adjunct to maintaining military options, for combating organised crime and countering terrorism but like a double-edged sword it can also cut into the fabric of the democratic state via abuses of power, and the maintenance and expansion of organisations beyond their usefulness. This paper considers the use of secrecy in Australia with particular reference to its impact on the administration of justice in terrorism matters. It reveals an increased use of secret evidence covered by new legislation that directly impacts on the trial process. It raises issues of fairness to accused persons and others who may be required to obtain security clearances to do their job. For the present, the system seems to work fairly, if only because of the skill, ability and commitment to fair justice of parties who work in the criminal justice system; but, there is a clear potential for abuse by those who say they require secrecy to protect Australians from terrorists.

Keywords

Evidence, necessity, secrets, secrecy, secret hearings, terrorism, ASIO, administration of justice, national security.

INTRODUCTION

Secrecy is a mainstay of intelligence and increasingly of government activities. Secrecy is the planned restriction of access to information and knowledge. Though it has a role in modern democracies, it can be a double-edged sword in that the use of secrecy can advance the interests of a state; but, its use can also damage state institutions with its potential to eventually threaten the democracy itself. For example, secrecy is a reasonable and necessary tool of trade for police, security and military forces. But these same entities can also use secrecy to advance their own interests at the expense of citizens and traditional rights and freedoms. The use of secrecy also conflicts with traditional principles of open justice. Generally citizens pay little attention to the issue of secrecy largely because they are either not aware of it or assume everything is all right if it does not directly impact on their lives. In Australia secrecy is more noticeable because of its overt association with Australia's response to terrorism in response to the events of 11 September 2001. Justice Whealy noted that for persons accused of terrorism offences, "prejudice, delay and secrecy are the principal problems confronting a trial judge in these matters" (Whealy, 2007, p. 757). This paper looks at Australia's use of secrecy in terrorism matters and its adverse impact upon the administration of justice and ultimately upon democracy. Secrecy is also increasingly evident in other government business, especially government contacts with private entities wherein commercial in confidence clauses prevent disclosure of contractual details to the public.[i]

Responses to the use of secrecy by governments vary. On one side, are intellectuals like Norm Chomsky who noted in regard to the United States of America that "government secrecy is not for security reasons, overwhelmingly – it's just to prevent the population here from knowing what's going on" (Mitchell & Schoeffel, 2002, p. 10). On the other side, are the proponents of secrecy who argue that the release of certain information to the public would adversely impact upon national security. Whereas Chomsky was probably correct for governments in general (Mitchell & Schoeffel, 2002, p.10 – 12), in matters of terrorism the reality lies between the two viewpoints. Australians, however, should be very careful about too readily accepting this increased resort to secrecy by government authorities. Jenny Hocking recounts in detail the use of secrecy and

resultant abuse of power by intelligence officers and special branch police up to the early 1970s, in breach of the law, the rights of an elected government and the trust of the Australian people (Hocking, 2004).

The secrecy Hocking referred to fell into three areas. The first involved the establishment of intelligence agencies (Hocking, 2004, p.181-192) without parliamentary or legislative oversight (Hocking, 2004 at 181-192). Second, is what would be considered traditional intelligence/police secrecy wherein files were compiled on anybody of interest to the respective agencies, including labor party politicians (Hocking, 2004, p. 16 & 59). However, Hocking noted that most of this data was political in nature (Hocking, 2004, p.39-69). The third and most damning was the political allegiance of agencies favouring liberal/national parties with the receipt of information and the exclusion of the labor party. Hocking noted that the Director of Military Intelligence, Spry in 1947 wanted a senior public servant to swear an oath not to convey information to his Labor Minister and Prime Minister Menzies was prepared to not follow custom with the result that important intelligence matters were not passed onto the Labor Opposition Leader (Hocking, 2004, p.21 & 30).

The use of secrecy in Australia's response to threats of terrorism is aided by the maintenance of a heightened level of fear[ii] of a potential, but unspecified, act of terror in the community. What is clear since the events of 11 September 2001 is that though a terrorist attack from outside Australia against Australia is possible, it cannot be ruled out that the greatest threat lies in home-grown terrorism[iii] and surprisingly the impact of terrorism legislation on democratic principles. This latter impact is made worse by the increased use of secrecy as a tool to combat terrorism. This flows through to court proceedings against accused terrorists, open justice and a right to a fair trial.

Australia's terrorism legislation is significant in its extent and impact on traditional democratic principles and open justice because it gives significant powers to government authorities to investigate, question, conduct surveillance, detain; while imposing a cloak of secrecy over their activities. Much has been written about these issues especially the adverse impact on traditional rights and freedoms.[iv] Golder and Williams, for example; have expressed concern about the curtailing of human rights in a purported protection of the rights and security of citizens demonstrated in governments seeking extended time for questioning of suspected terrorists without free independent legal representation when a traditional fixed time frame with legal advice would enhance the reliability of any evidence obtained (Golder & Williams, 2006, p.52). They highlight the "rationale" of former Australian Attorney-General Philip Ruddock who argues reducing human rights improves human security with a resultant masking of what is actually taking place in lieu of openly engaging in a policy debate on the need to balance competing human rights and national security interests (Golder & Williams, 2006, p.52). Sometimes the populace gets a glimpse of political and legislative inspired misuse of power as with the Dr Haneef and Ul-Harque cases;[v] but, of more concern is the potential long-term impact of these issues on the foundations of Australian democracy. This impact is increased by the expanded use of secrecy that plays out in terrorism trials.

A BRIEF HISTORY OF SECRECY

Secrecy became part of the Australian Diaspora in 1907 with the establishment of the Australian Intelligence Corps that focused on matters military. Hocking notes that the first referendum on conscription during the First World War provided the means by which Military Intelligence engaged in political surveillance that "expanded its activities to collecting information on anti-war and Anti-conscription political groups and individuals" (Hocking, 2004, p. 15-6). Targeted individuals included Queensland Labor premier, T J Ryan (Hocking, 2004 , p. 16), Not long after the First World War had commenced the first Australian civil security intelligence organisation, the Counter-Espionage Bureau was established. Hocking notes that the state police forces also became adept at political surveillance following their enforcement of the *War Precautions Act* 1914-18 (Cth). This legislation was subsequently repealed by the *War Precautions Act Repeal Act* 1920 (Cth). After the First World War various intelligence organisations were rolled into one national body, the Intelligence Branch. Between the two World Wars it focused its activities on communists, largely ignoring right-wing radical groups that were developing in Australia (Hocking, 2004, p. 19).

During the Second World War a new security service was created. This organisation was placed under the control of the Attorney General's Department. The then Attorney General H V Evatt expressed the view that:

> It is important to impress the civil rather than the military stamp upon the proposed organisation, owing to the necessity for public confidence in the reasonable protection of civil rights and liberty (Hocking, 2004, p.20).

Such noble goals were largely ignored when the Labor party lost government after the Second World War and the Australian Security Intelligence Organisation (ASIO) was created in 1949. Hocking records that Labor politicians were not only subject to political surveillance by ASIO but also deprived of bipartisan access to intelligence (Hocking, 2004, p. 30, 32, 37 & 38). In the 1960s and 1970s ASIO repeated the mistakes of between war intelligence organisations by failing to respond to Croatian extremism in Australia and leading to a raid on ASIO headquarters by the Attorney General Lionel Murphy resulting in the Hope Royal Commission. In the meantime many Australians, including senior Labor politician s, including Ministers, were found to have been the subject of political surveillance (Hocking, 2004, p43, 46 & 47). An inquiry into the security records of the South Australian Special Branch also revealed an emphasis on political surveillance (Hocking, 2004, p. 54-61). It is a reasonable inference that other state special branches also engaged in political surveillance. Of equal concern was the revelation that security agents were leaking selective information to journalists (Hocking, 2004, p. 61-67). It seems Australia's security agencies have a good record of secretly collecting information but up to recent times an historically poor record of collecting intelligence in the 'national' interest. Furthermore, as demonstrated in the Ul-Haque matter their collection techniques can also be unlawful with agents denying a suspect their legal rights resulting in Adams J ruling alleged admissions inadmissible while keeping secret the names of ASIO officers (*R v Ul-Haque* [2007]) a secrecy denied police officers held to have acted illegally.

THE LAW OF SECRECY IN AUSTRALIA

The principle of open justice is fundamental to maintaining justice in Australia. It runs hand-in-hand with the right of an accused to a fair trial.[vi] Fairness is a principle not a right as set out in legislation. Australia does not have a Commonwealth Human Rights Act[vii] or protections like those available in the United Kingdom, Canada and the United States of America. Furthermore, there is no inherent power of courts to exclude the public (*John Fairfax Publications Pty Ltd v District Court of NSW* (2004) per Spigelman CJ at [18]). Courts should hold public hearings except where 'the nature of the circumstances of the particular proceedings are such that a public hearing would frustrate or render impracticable the administration of justice' (*John Fairfax Publications Pty Ltd v District Court of NSW* (2004); *Mirror Newspapers Ltd v Waller* (1985) at 13). The test is one of necessity, deciding whether it is "really necessary to secure the proper administration of justice' (*John Fairfax Publications Pty Ltd v District Court of NSW* (2004)).

Spigelman CJ in *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) [35-7] explained this test of necessity as:

> the test of necessity adumbrated by Lord Morris of Borth-y-gest in *Connelly v Director of Public Prosecutions* at 1301: "[t]here can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction"…
>
> Viscount Haldane LC confirmed the strictness of the test in a relevantly analogous context in *Scott v Scott* [1913 AC 417 at 438:
>
> "But unless it be strictly necessary for the attainment of justice there can be no power in the court to hear in camera ... He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. ... [H]e must satisfy the Court that by nothing short of the exclusion of the public can justice be done."

There are statutory exceptions to this principle. They include the power to make a suppression or non-publication order, orders for non-publication of information and closing of the court. Justice Adams closed the court in hearing the arguments concerning the admissibility of Ul-Haques admissions because of the sensitive nature of some of the evidence (*R v Ul-Haque* [2007]).

Privacy issues[viii] also play a role requiring judicial and court staff to take account of the risks in publishing personal or private information in court judgements. Courts generally have powers to suppress information or order non-publication when the court thinks this is necessary to prevent prejudice to, amongst other things,

national or international security and to protect the safety of persons. These orders are challengeable. Courts also have the power to prohibit the publication of certain information. In the Ul-Haque matter Justice Adams released his judgement but ordered the names of ASIO agents including those who had acted illegally, be suppressed ((*R v Ul-Haque* [2007]). Police officers in similar situations do not have the luxury of remaining anonymous. Commonwealth legislation also empowers Courts to prohibit publication of evidence relating to certain functions of the Director of Public Prosecutions usually civil functions and proceedings under the *Proceeds of Crime Act* 2002 (Cth) (s.16A *Director of Public Prosecutions Act* 1983 (Cth). There are also powers to restrict publication in matters involving persons apprehended under warrant (s.96 *Service and Execution of Process Act* 1992 (Cth)).

Commonwealth legislation also contains provisions enabling courts to exclude the public and make orders concerning non-publication of evidence (s.85B *Crimes Act* 1914 (Cth)) to protect disclosure of official secrets so long as it is in the interest of defence of the Commonwealth (Part VII *Crimes Act* 1914 (Cth)) and likewise in regard to matters concerned with espionage and similar activities where the test is concerned with the security or defence of the Commonwealth (Part 5.2 *Crimes Act* 1914 (Cth)). Non-publication or suppression orders can also be made to protect the identity of agents, (s.15MK(1) *Crimes Act* 1914 (Cth)) children (s.15YR(1) *Crimes Act* 1914 (Cth)) and witnesses (*Witness Protection Act* 1994 (Cth)). Contravening such orders is an offence, including anything said when such orders are made(s.15MK(4) *Crimes Act* 1914 (Cth)). Issues related to access to evidence could lead to stay applications grounded on the principle of an accused is not able to have a fair trial. For example, in *R v Harkim* (1989) a permanent stay was granted on health grounds and in *Jago v The District Court of New South Wales and Ors* (1989) Deane J at [60] listed length of delay, reasons given by prosecutor for delay, accused responsibility for any delay, prejudice to accused and the public interest in the resolution of serious criminal matters as the five key points for such applications.

Prior to 11 September 2001 secrecy played a role in Australia controlled largely by common law and legislation. The overarching principle was open justice and most Australians' knowledge and exposure to secrecy came in, or as a result of, court proceedings. However, experience has demonstrated why some secrecy is necessary in the criminal justice system. For example, the events surrounding the murder of Carl Williams in protective custody in a Victorian prison demonstrates one aspect of why secrecy has a role.[ix] Williams was killed because of what he knew and might tell police or because he was offering to give evidence against a former Victorian Detective, Paul Dale.[x] The release of information that a prisoner is giving adverse information about associates to the authorities places that prisoner's life in danger.[xi] The administration of justice requires some secrecy, but it has limits, notwithstanding acknowledged risks. Or to put it another way, there needs to be a continual balancing of the need for open justice against a justifiable need in certain circumstances for secrecy. This was demonstrated some years ago when an application to close the Supreme Court of New South Wales during sentence proceedings was made because evidence of assistance in a forthcoming murder trial placed both the prisoner being sentenced and close family at risk. The application was rejected on public policy grounds, even though the prisoner was the sole source of incriminating evidence in an hereto unsolved murder. [xii] This principle of open justice in Australia means the public usually have access to information revealed in court proceedings leading to actual knowledge of the key facts and issues. The collective impact is maintenance of confidence in the criminal justice system.

SECRECY AFTER 11 SEPTEMBER 2001

Following the events of 11 September 2001 the use of secrecy in investigations and courts was significantly expanded in Australia. This expansion took place in the absence of any Human Rights instrument, the existence of which would have influenced drafting and consideration of the bills in parliament. Parliament has before it the *Human Rights (Parliamentary Scrutiny) Bill* 2010. It is reasonable to assume that this Bill, if enacted; will have the unintended consequence of negating the need for Commonwealth human rights legislation. Notwithstanding the lack of a human rights instrument Australian courts look to maintain traditional common law principles of fairness and the right to a fair trial. For example; prejudice to the accused has included general issues linked to religion (Whealy, 2007, p.748), harsh custody impacting upon ability to give instructions and to concentrate during trial (*R v. Benbrika [No.12]* (2007)), overt courtroom security requiring a Perspex screen to be removed to avoid an inference of dangerousness (*R v. Benbrika [No. 12]* (2007)) and publicity associated with terrorism trials locally (*R v. Benbrika [No. 19]* (2008)) and internationally (*R v. Elomar [No. 27]* (2009)).

In 2004 the Australian Government enacted the *National Security Information (Criminal and Civil) Proceedings Act* 2004. The object of this legislation is to prevent disclosure of information in proceedings "where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice" (s. 3 *National Security Information (Criminal and Civil) Proceeding Act* (2004) (Cth)). This replaces public interest immunity claims.[xiii] The new legislation establishes a framework for dealing with information that has national security implications. The steps to be followed can be summarised as:

- Either the prosecutor of defendant must notify the Federal Attorney General (ss. 24-5 *National Security Information (Criminal and Civil) Proceeding Act* (2004) (Cth)).
- The Attorney General can then issue a certificate that of itself is conclusive evidence that any disclosure of the identified information is likely to prejudice national security (ss. 26-8 *National Security Information (Criminal and Civil) Proceeding Act* (2004) (Cth)), and;
- The judge then closes the court for a hearing of the evidence. The Attorney General can require the accused and/or the lawyers for the accused to be ordered to vacate the court unless the lawyer has an appropriate security clearance (ss. 29 *National Security Information (Criminal and Civil) Proceeding Act* (2004) (Cth)).
- In the closed hearing the judge will consider the competing interests of national security versus impact on the defendant's right to a fair trial. In this assessment the judge must give more weight to national security (ss. 31 *National Security Information (Criminal and Civil) Proceeding Act* (2004) (Cth)).
- The judge can allow or not allow use of the information or permit modified disclosure in a form suggested by the Attorney General or as ordered by the court (ss. 24-5 *National Security Information (Criminal and Civil) Proceeding Act* (2004) (Cth)).

The new procedures have been criticised. In *R. v Lodhi*, Justice Whealy took the view that the Attorney General's certificate was not conclusive on the risk to national security (*R v. Lodhi*, (2006) (Whealy, J)). The case against Lodhi centred on his collection of two maps of the Australian electricity system, sourcing information on explosives, assembling aerial photographs of Australian defence establishments and having a document about how to make explosives. His Honour has subsequently written critically about the new regime and its implications for the conduct of criminal trials, including the impacts on lawyers and court staff who may have to obtain security clearances and the potential for lawyers to be imprisoned for failing to notify the Attorney General of any information that may affect national security (Whealy, 2007, p. 748).

The other important and far-reaching use of secret evidence lies in the ability of the government to use control orders (Division 104 *Criminal Code Act*, 1995 (Cth)) and preventative detention orders against persons of interest. The first use of control orders were against Joseph Thomas and David Hicks, but these have now expired. A control order can be sought if the government believes the making of a control order would substantially assist in preventing a terrorist act and related activities. The test for the court is on the balance of probabilities, can be made ex parte and supported by evidence that can remain secret. Whereas control orders are judicial, preventative detention orders are administrative and can initially be made for 14 days (Division 105 *Criminal Code Act*, 1995 (Cth)). The object of preventative detention orders is to prevent an imminent terrorist event or to preserve evidence of terrorist activity. Again, there are non-disclosure provisions allowing secret, un-tested information to be used by the authorities against suspected persons.

Even the States in Australia have enacted legislation with secrecy provisions. For example, in Western Australia there is the *Terrorism (Extraordinary Powers) Act* 2005 (WA), a statute giving the police commissioner extraordinary powers to, amongst other things, issue covert search warrants in regard to terrorism matters. The issue of such warrants has limited safeguards that start with the involvement of a Supreme Court judge and after that an annual report to the Minister. The warrant cannot be challenged while in operation and it also allows other offences to be picked up while acting on the warrant (s. 27 (7)(e) *Terrorism (Extraordinary Powers) Act* 2005 (WA)). Western Australia also has its own preventative detention regime (*Terrorism (Preventative Detention) Act 2006* (WA)). Section 46 of this act imposes secrecy provisions in the form of non-disclosure requirements on targeted persons, a breach of which carries a prison sentient of up to 5 years. A lack of privileged contact (between a suspect and lawyer) is another feature of this legislation. Unless the police officer nominated for the purposes of the preventative detention approves privileged contact between suspect and lawyer it cannot take place (s.44(2) *Terrorism (Preventative Detention) Act* 2006 (WA)). If the lawyer has a

current security clearance to "Secret" given by the Attorney General's Department of the Commonwealth the lawyer may be allowed unmonitored access (s.44(7) *Terrorism (Preventative Detention) Act 2006* (WA)). Finally, the legislation places restrictions on the publication of Supreme Court proceedings conducted in regard to the act (s.53 *Terrorism (Preventative Detention) Act 2006* (WA)) unless the Minister authorizes publication or it "could not conceivably prejudice national security and that its publication should be authorised in the public interest" (s.53(3) *Terrorism (Preventative Detention) Act* 2006 (WA)).

WHAT IS BEING KEPT SECRET?

It is difficult to know what is actually being kept secret in matters of terrorism. It is common knowledge that ASIO prepares reports on persons seeking admission as refugees or seeking asylum or to enter Australia as migrants and sometimes these reports are adverse and secret,[xiv] often available only to judges of the court and persons with appropriate security clearances (*Mansour Leghaei v Director-General of Security and Minister for Immigration and Multicultural and Indigenous Affairs*) But several important issues have surfaced. One has the hallmarks of Kafka as reported by the editor of the *Australian Law Journal*, Mr Justice P W Young AO:

> The Sydney *Daily Telegraph* of 2 November 2006 raised the concerns of some court staff in Sydney, such as court officers, recording monitors, and typists, who were told that they had to complete a long document including many personal details and provide five references including one from a Member of Parliament. The New South Wales Council of Civil Liberties spokesman was trenchant in criticism of this process. A government spokesman said that the form was voluntary, but added that participants would be breaching the Secrets Act if they disclosed that they were filling in the form. (Young, 2007, p. 8).

Others relate to the impact on the administration of justice and ensuring accused persons receive a fair trial. The latter is an unalienable right of persons' accused of serious criminal offences and most terrorism offences provide for cogent punishment. A fair trial is essential if the community is going to seriously punish persons who break the law. Sometimes a court will decide that accused persons cannot have a fair trial without access to secret evidence. This happened some years ago following a 1986 demonstration at Pine Gap in the Northern Territory where several protestors were arrested and charged. In this case the government decided to set an example and rather than charge the protestors with minor offences they were charged pursuant to the s. 9 and 17 *Defence Special Undertakings Act*, 1942 (Cth)[xv] and also under the Crimes Act 1914 (Cth). The four protestors were found guilty but both sides appealed, the protestors over the failure of the Crown to prove that Pine Gap was a top secret facility and the Crown over the leniency of sentences that were imposed. The Northern Territory Court of Appeal quashed the convictions (*The Queen v Law & Ors* [2008]). Ron Merkel QC summed up the situation in an Law Report on Australian Broadcasting Corporation radio show on the matter in 2008:

> But underlying that issue [the central issue here was whether the Defence could or couldn't argue that Pine Gap was in fact a defence facility, and therefore a prohibited area within the legislation?] was a much more fundamental question, and that is that Pine Gap had been a top secret facility since its creation in the 1960s. So secret were the activities there, that even parliamentary committees charged with investigating and understanding Australia's defence facilities were not ever given full information about what went on at Pine Gap. The irony of this case was that having brought a prosecution under the Act for the first time, the Commonwealth, through the DPP, had opened up to surveillance within the court before these four protesters, the very issue they'd kept in effect, secret for so long, and that was a consequence which ultimately led the accused to succeed, because the Crown hadn't been able to establish finally that it was a defence facility, nor could the accused challenge that issue on a final basis, because the trial judge did not allow those matters to be raised at trial, before trial, or as matters that could go to the jury.[xvi]

This is one example of how one type of secret information can have a direct effect on the administration of justice. It is possible to deduce with some accuracy other types of information being kept secret from experience gained in appearing in criminal trials and from what is reported about terrorism trials. In criminal trials it is not unusual in serious matters involving organised crime and drug importations for the Crown or Federal Police to ask the court for secrecy to be maintained in regard to certain matters. These matters include maintaining the anonymity of undercover police officers, non-disclosure of how access was gained to premises and not only the type of surveillance equipment used but how and where it was installed. In other words the police seek to

maintain a cloud of secrecy over matters concerned with how some information was obtained, how operations were planned, some of the procedures used in the investigation and the types of equipment used in executing the police investigation. The case for maintaining secrecy relies on a not unreasonable perceived need to conceal certain operational methods so as to not prejudice on-going and future operations, especially the identity of undercover operatives. In other words, if the techniques remain secret criminals cannot take preventative or evasive action and undercover operatives have some protection from retribution. This approach seems to have few, if any critics because the outcomes of such operations are the evidence revealed in court proceedings, in open court. In other words, though applications are made to keep operational matters secret, evidence obtained is not secret. Furthermore, an accused is not prevented from making an application to the court that in the interests of justice and obtaining a fair trial the police should be required to reveal operational matters.

In terrorism trials there is an additional layer of secrecy that is troubling. That is the use of national security grounds as a basis to have evidence used against an accused without the accused and/or accused lawyers having access to that evidence or closing the court and excluding the defendant and defendant lawyers while that secret evidence is considered. In the traditional criminal trial this is resolved by the court making an assessment with or without involving lawyers representing the accused. Because lawyers are also officers of the court it is not unreasonable to allow access on a confidential basis to all or part of the 'secret information'. But in the end the presiding judge will make a ruling on access or use in evidence that binds the parties. Justice Whealy raised the possible future option of using special counsel who hold appropriate security clearances to help the defendant and assist the judge. His Honour referred to discussions in the United Kingdom where it was held that such appointments should be "exceptional, never automatic; a course of last and never first resort" (Whealy, 2007, p. 751). Such appointments would clearly be approved by security agencies seeking to maintain control over information they deem should be kept secret because they would also have input into the conduct of security clearances giving them some sway over the appointment of counsel and the level of security clearance. However, the real issue is the maintenance of the criminal justice system to the benefit and confidence of the community. There is a long established tradition in common law that an accused person can choose their lawyer. Requiring lawyers to submit to security clearances or rely on lawyers appointed from a pool of security-cleared lawyers infringed upon this right. Justice Young AO makes the point:

> One emerging problem is that the security agencies appear to want to have the power to veto particular lawyers being involved in these trials. This is again understandable if the only concerns were security. However, the right to have the lawyer of one's choice has been a right held dear by generations of Australians and those of still earlier generations under the English Common Law (Young, 2007).

In terrorism trials there is an added layer of complexity relating to secret evidence. Justice Whealy wrote about this complexity and its impact on the administration of justice after presiding over the Lohdi trial (*R v Lohdi* (2006) a trial that included three months of pre-trial work including judgment and appeals. His Honour was critical of the complexity imposed on the trial process and by implication on the right of an accused to receive a fair trial by the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (Whealy, 2007, p.745-750). Justice Whealy identified several new important issues this legislation imposed on the trial process. Firstly, the requirements imposed by this legislation had the potential to impact on the defendant's right to a fair trial. This can be overcome to a significant extent by co-operation between counsel, security authorities and the court in pre-trial procedures. The second issue is the imposition of "highly unusual obligations on lawyers engaged in federal proceedings. In particular, lawyers must obtain security clearance to have access to information concerning national security" (Whealy, 2007, p.748). A similar obligation is required of court staff and court reporters, including their "spouses, partners and their financial and personal lives" (Whealy, 2007, p. 748). Thirdly, if at any time either the prosecutor or the defendant:

> knows or believes that information which relates to or may affect national security will be disclosed, each is required to notify the Attorney-General and take a number of other procedural steps as soon as possible. Failure to comply with the requirements exposes the practitioner concerned to imprisonment up to two years. (Whealy, 2007, p.748)

Other issues raised by the use of secret evidence include the use of pseudonyms, non-publication orders, screening of witnesses from view to provide confidentiality and the use of audio-visual links. All of these existed before terrorism trials and require the court to ensure open justice and a right to a fair trial are not unjustly infringed. Justice Whealy ruled out the use of screens in front of witnesses due to possible inferences of

dangerousness against the accused and opted for television monitors and audio-visual links with a non-operating monitor in front of the accused (Whealy, 2007, p. 753). This procedure had been used in an earlier criminal trial of Ngo, a successful Vietnamese business and local Cabamatta identity charged with the murder of a politician, John Newman (*R v Ngo* (2003).

The Australian Parliament has set in place statutory protections in the office of the Inspector-General of Intelligence and Security whose role is to provide'independent assurance for the Prime Minister, senior ministers and parliament as to whether Australia's intelligence and security agencies act legally and with propriety by inspecting, inquiring into and reporting on their activities' (IGIS website, 2011). Time will tell whether or not this is sufficient and whether the office can cover the potential workload, as it extends beyond classic security operations. Recent events have required commencement of investigations into community detention security arrangements and allegations of inappropriate vetting practices by Defence Security Authority,

CONCLUSION

Australian democracy is strong and resilient with strong institutions. However, our history has demonstrated that secrecy can be corrupting and affects the maintenance of good government. It can certainly impact upon the administration of justice. An over reliance on secrecy will eventually lead to adverse outcomes. In the United States of America the abuse of the law by covert wiretapping has resulted in a court in California awarding plaintiffs US$2.5 million in damages and attorneys' fees for government agents violating the *Federal Intelligence Surveillance Act* (*Al-Haramain v. Obama*). The government had illegally wiretapped an Islamic charity's lawyers in 2004 and this was not the first case.[xvii] Australia has yet to experience such litigation, but if history is anything to go by secret abuses of power aimed at collecting secret information against Australians, by Australian security agents whether they are federal intelligence officers or state police, may take place as it did some fifty years ago.

In a democracy the use of secrecy is a double-edged sword. The present situation in Australia gives too much emphasis on maintaining secret information that can only be assessed by those who want to maintain secrecy, and Judges and Ministers who take their advice from the same source. Anybody else who has a security clearance cannot speak out for fear of breaching the law. The general public, the citizens of the state, have no opportunity to assess whether or not any of the secret information really needs to be kept secret. Reliance on statutory officials like the Inspector-General of Intelligence and Security is not wise. Before too much time passes the government should start releasing some secret information used in early terrorism trials to maintain and build confidence in the present system. A one-sided system overseen by legislation that gives greater weight to keeping information secret (ss. 31(7)(a) & (8) *National Security Information (Criminal and Civil) Proceeding Act* (2004) (Cth)) has the potential to eventually invoke events not dissimilar to those recounted in Franz Kafka's 'The Trial'. When it comes to secrecy vigilance is essential for a healthy, safe and enduring democracy, a poisoned apple will generally look healthy until too late.

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[i] See, for example: Rachel Harris, Avoiding the worst of all worlds: Government accountability for outsourced employment services, 2007 *AIAL Forum No 54* at 15 -18; Nick Seddon, The Interaction of Contract and Executive Power, [2003] *FLR* 21.

[ii] See, for example: http://www.explodingmediamyths.org.au/data/shared/documents/atmosfear_australian_muslims_as_.pdf (17/10/2011) wherein Australian polls also indicated heightened levels of fear and anxiety about a possible terrorist attack in Australia referring to a poll published in the *Sydney Morning Herald* in April 2004, 68 percent of Australians believed that Australia was at threat of an imminent terrorist attack.

[iii] Convictions to date in Australian terrorism trials have all involved home-grown terrorist activity. See, for example; *Regina v Roche* [2005] WASCA 4; 188 FLR 336, *Lodhi v Regina* [2007] NSWCCA 360 and *Regina v Benbrika & Ors* [2009] VSC 21.

[iv] See, for example; Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43; Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Processes and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2)* 2005 (Cth) (2007) 10 *Flinders Journal of Law Reform* 17, George Williams, 'Australia's Legal Response to

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[v] The classic examples being the Dr Haneef and Ul-Harque cases – see: Media Releases on Dr Haneef: http://www.cdpp.gov.au/Media/Releases/20071012-Haneef.pdf (7/10/2010) and *R v Ul-Haque* [2007] NSWSC 1251 (5 November 2007) per Adams J.

[vi] The power of a court to stay proceedings to prevent an unfair trail was considered in the High Court of Australia in *Dietrich v The Queen* (1992) 177 CLR 292; 109 ALR 385.

[vii] Human rights legislation does exist at the state level in Victoria and the Australian Capital Territory: *Charter of Human Rights and Responsibilities Act* 2006 (Vic) available at: http://www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/ and *Human*and Human *Rights Act* 2004 (ACT) available at: http://www.austlii.edu.au/au/legis/act/consol_act/hra2004148/ (1/11/2011).

[viii] See, for example: *Privacy and Personal Information Protection Act* 1998 (NSW), *Information Privacy Bill* 2007 (WA).

[ix] http://www.smh.com.au/national/williams-murder-may-have-been-ordered-outside-20110929-1kzle.html (14/11/2011).

[x] Ibid.

[xi] See, for example: http://www.heraldsun.com.au/news/more-news/secret-files-allege-rogue-cop-was-paid-to-help-hit-squads-evade-police/story-fn7x8me2-1226191903110 (14/11/2011).

[xii] Although it is not contained in the subsequent sentencing judgement an application was made at the commencement of proceedings based on threats to the prisoner and his family: *Regina v Murrell* [2002] NSWSC 260 (5 April 2002) available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2002/260.html?stem=0&synonyms=0&query=crowley (1/11/2011)

[xiii] See, for example; s. 130 *Evidence Act* (1995) (Cth), *Sankey v Williams* (1978) 142 CLR 1 and *Alister v The Queen* (1984) 50 ALR 41 at 44-5 per Gibbs CJ.

[xiv] Secret evidence is often used in migration cases where persons are asked to answer allegations without knowledge of ASIO's assertions/case against them, see: for example; the matter of Mansour Leghaei wherein the Federal Court judge noted Leghaei's right to procedural fairness had been reduced to "nothingness" – reported at http://www.smh.com.au/opinion/politics/condemned-by-faceless-accusers-and-secret-evidence-20100606-xn26.html (15/10/2011) .

[xv] s. 9 Unlawful entry …(1) A person is guilty of an offence if:(a) the person is in, enters or flies over an area; and(b) the area is a prohibited area. Maximum penalty: Imprisonment for 7 years. And s.17 Use of cameras etc.(1) A person is guilty of an offence if:(a) the person is in or is passing over a prohibited area; and(b) the person has in his or her possession, carries or uses a camera or other photographic apparatus or material. Maximum penalty: Imprisonment for 2 years."

[xvi] http://www.abc.net.au/rn/lawreport/stories/2008/2203971.htm (17/10/2011).

[xvii] https://www.eff.org/deeplinks/2010/12/case-closed-court-issues-final-judgment-nsa-spying (15/10/2011).

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