Human Rights Law Centre

Grant Donaldson SC
Independent National Security Legislation Monitor
3-5 National Circuit
Barton ACT 2600

9 June 2023

Dear Monitor,

The Human Rights Law Centre welcomes the opportunity to make this submission to your review into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (***NSI Act***).

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. Our work includes supporting whistleblowers and upholding press freedom and open justice, critical safeguards of democratic accountability and rights protection in Australia.

We would welcome the opportunity to discuss our submission if hearings are held.

Kind regards,

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Open Justice, Closed Courts

Submission to the Independent National Security Legislation Monitor's review into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004*

Human Rights Law Centre

June 2023

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Executive Summary

Open justice is a fundamental democratic principle. It serves to promote accountability, safeguard rights and freedoms and ensure public confidence in the judiciary. Open justice is a common law principle with origins dating back to the 14th century; it is not for nothing that the principle has endured for almost a millennium. Open justice is an essential characteristic of Australian courts, required by the *Constitution*, and the right to a public trial is protected by international human rights instruments to which Australia is a signatory. Although open justice is not absolute, any derogations from it must be carefully contained and fully justified.

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (***NSI Act***) radically changed the operation of open justice in Australia, in matters relating to national security. The *NSI Act* is disproportionate and lacks robust safeguards and oversight; aspects of it may also be unconstitutional. The Human Rights Law Centre therefore welcomes the Independent National Security Legislation Monitor's (**INSLM**) review of the *NSI Act*. This represents an important opportunity to revise and improve a law that, over the past two decades, has significantly undermined open justice in this country.

Our submission seeks to address many of the questions raised by the INSLM in the call for submissions. Our submission is informed by practical experience with the *NSI Act*, as frequent observers of hearings in the prosecutions of Alan Johns (**Witness J**), Witness K, Bernard Collaery and David McBride – all matters where the *NSI Act* has been invoked. It is also informed by our participation in your review into the operation of Part 3, Division 1 of the *NSI Act* as it applies in the Alan Johns matter (**Witness J Review**). In preparing our submission and recommendations, we have liaised with Associate Professor Rebecca Ananian-Welsh at the University of Queensland – we broadly support the tenor and recommendations of her submission.

Together, our recommendations, if adopted, would:

- Put open justice at the heart of the *NSI Act* and ensure any departures from it are permitted only to the extent necessary and proportionate;
- Institute practical safeguards to mitigate the impact of the *NSI Act* on open justice in cases where a degree of secrecy is necessary and proportionate;
- Safeguard the constitutionality of the *NSI Act*; and
- Rebuild public confidence in the *NSI Act* and ensure that the level of secrecy in cases like *Witness J* and *Collaery* cannot be repeated.

We are not open justice absolutists. We recognise that, in appropriate circumstances, the interests of justice are best served by departing from open justice. Particularly in national security cases, there will be an inherent tension between transparency and secrecy. The *NSI Act* should provide a framework for appropriately resolving that tension. At present, the law is significantly tilted towards secrecy and away from transparency. The excessive levels of secrecy we have seen in *Witness J* and *Collaery* are the result; levels of secrecy that undermine public confidence in our legal system. That must change.

Recommendations

Recommendation 1: The INSLM should recommend the Attorney-General, as a matter of urgency, implement the outstanding recommendations of the Witness J Review.

Recommendation 2: The *NSI Act* should be retained, subject to significant amendment to better balance the interests of secrecy and transparency. In the absence of such significant amendments, the *NSI Act* should be repealed.

Recommendation 3: If retained, s 3 of the *NSI Act* should be amended to expressly recognise the importance of open justice and that the preservation of open justice is among the law's aims.

Recommendation 4: Section 29 of the *NSI Act* should be amended to provide the court with discretion as to the extent to which the hearing is held in closed court.

Recommendation 5: Consideration should be given to the Attorney-General's Department publishing guidance material for courts in relation to practical transparency measures desirable in *NSI Act* proceedings. Consideration should be given to additional funding being provided to courts hearing *NSI Act* proceedings to ensure such guidance can be considered and, where agreed by the court, implemented.

Recommendation 6: The *NSI Act* should be amended to expressly preclude any additional confidentiality obligations being imposed on court staff.

Recommendation 7: The *NSI Act* should be amended to clarify the power of the Attorney-General to deny inclusion of nominated legal representatives under a certificate. Consideration should also be given to whether it might be desirable to specify a timeframe for the process of such nominations.

Recommendation 8: The *NSI Act* should be amended to expressly override any legal profession regulations where compliance would be contrary to the *NSI Act*.

Recommendation 9: Consideration should be given to special funding arrangements being established to contribute to the legal fees of defendants in *NSI Act* proceedings.

Recommendation 10: Section 31(8) of the *NSI Act* should be repealed. Open justice considerations should be expressly added to the list of factors considered under s 31(7).

Recommendation 11: The *NSI Act* should be amended to narrow the scope of 'national security information' to ensure the law is only engaged where necessary and proportionate to the risk to national security posed.

Recommendation 12: The *NSI Act* should be amended to provide a scheme for the appointment of special advocates.

Recommendation 13: The *NSI Act* should be amended to require, in certain circumstances where orders sought would derogate from open justice, a suitably-qualified 'Open Justice Advocate' be appointed to make submissions. In addition to these circumstances giving rise to the mandatory appointment of an Open Justice Advocate, the court should also be empowered to appoint one at any time where it considers it necessary.

Recommendation 14: The *NSI Act* should be amended, with consequential amendments to the *NSI Regulations*, to facilitate the retention and periodic review of closed court materials, and to allow for appropriate access to such materials.

Introduction

Open justice serves a critical rights-protecting function in Australia. It protects the rights of individual litigants, to be subject to a fair criminal or civil process, and it contributes to the rights of all Australians, by ensuring appropriate scrutiny on the judicial branch and the legal activities of the legislative and executive branch. As Bentham famously said, 'where there is no publicity there is no justice'.[1]

The importance of open justice is recognised by its constitutional and human rights salience in Australian and international law. The *Human Rights Act 2004* (ACT), for example, provides that:

> *Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.*[2]

Article 10 of the *Universal Declaration of Human Rights*, which Australia voted for at the United Nations General Assembly, similarly provides:

> *Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*[3]

The constitutional significance of the principle has been recognised by the High Court. In *Dickason v Dickason*, in 1913, the High Court endorsed the seminal British open justice case of *Scott v Scott*, with Barton ACJ holding that '*one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings*'.[4] That open justice is a core characteristic of Chapter III courts in Australia has been repeatedly underscored by the High Court in recent decades.[5]

But open justice is not absolute. It is 'is a means to an end, and not an end in itself.'[6] Particularly in cases involving national security matters, a tension will arise between the public interest in open justice and the public interest in the non-disclosure of sensitive national security information. The *Human Rights Act* therefore provides, following the passage extracted above, *'[h]owever, the press and public may be excluded from all or part of a trial— (a) to protect morals, public order or national security in a democratic society'*.[7] It is the balance to be struck between these competing interests, and the framework for doing so, that is at the heart of this review.

In recent years, the Human Rights Law Centre has sought to closely monitor a number of proceedings which, in our view, gave rise to serious democratic concerns. These have included the prosecutions of Witness J, Witness K, Bernard Collaery and David McBride. We have sought to attend as many of the hearings held in these prosecutions as possible (where they were held in open court). We have, from time to time, sought advice from counsel in relation to the constitutional validity of aspects of the *NSI Act*,

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[1] Jeremy Bentham, quoted in *Scott v Scott* [1913] AC 417, 477 (Lord Shaw).
[2] Section 21(1) (emphasis added). The Australian Capital Territory's human rights framework is particularly salient given many *NSI Act* cases take place in the Supreme Court of the Australian Capital Territory.
[3] (emphasis added)
[4] (1913) 17 CLR 50, 51.
[5] See, e.g., *Re Nolan; ex parte Young* (1991) 172 CLR 460, 496-7 (Gaudron J); *Grollo v Palmer* (1995) 184 CLR 348, 379–80 (McHugh J), 394 (Gummow J).
[6] *Hogan v Hinch* (2011) 243 CLR 506, 530 (French CJ).
[7] *Human Rights Act 2004* (ACT), section 21(2).

and we assisted a media outlet to retain counsel to seek leave to intervene in the Witness J matter (leave was not granted). We also made a submission and appeared at the hearing in relation to the Witness J Review. These experiences collectively inform this submission. We note at the outset that our submissions are largely confined to the operation of the *NSI Act* in criminal proceedings. Similar considerations may be relevant in the civil context, but as our experience has been exclusively in relation to criminal proceedings, and given the heightened public interest in open justice in criminal matters, we confine ourselves accordingly. However, the Human Rights Law Centre acknowledges that where amendments are made to the *NSI Act* in respect of criminal proceedings, consistency should be sought in respect of amendments to the *NSI Act* provisions concerning civil proceedings, where appropriate.

In preparing this submission, we have found it helpful to consider a document prepared by the Attorney-General's Department as part of the Senate Legal and Constitutional Legislation Committee's inquiry into the Bill that became the *NSI Act*. This compared the then National Security Information (Criminal Proceedings) Bill 2004 with the recommendations of the seminal Australian Law Reform Commission (**ALRC**) Report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*. As is evident from the side-by-side comparison, the *NSI Act* as enacted lacked many of the safeguards and balancing mechanisms proposed by the ALRC in its considered review of the issue. As a result of the failures to implement a number of the ALRC's recommendations, it has now become necessary to seek to retrofit the *NSI Act* with a view to appropriately upholding open justice. We have also reviewed the *Independent report on the operation of closed material procedure under the Justice and Security Act 2013*, prepared by Sir Duncan Ouseley, which considers similar issues in the British context. We note these two documents in the hope they may assist the INSLM in undertaking this review.

Witness J and s 22

Before we consider the questions posed, we wish to begin by welcoming the INSLM's recommendations in the Witness J Review, and the Attorney-General's commitment to implementing them. However, as we understand it, those commitments that required legislative or regulatory change have not yet been implemented. It may be that the Government is awaiting this review before proceeding to implement the recommendations of the Witness J Review and any recommendations of this review in tandem. We understand the practical desirability of that approach. We are concerned, though, that until those recommendations are fully implemented, the secrecy that shrouded the Witness J prosecution could happen again. The Witness J saga showed us that we could not trust the operation of the *NSI Act* to avoid unprecedented levels of secrecy. Prior to public awareness of the Witness J case, it would have been preposterous to suggest that a fully-secret criminal process could have taken place in Australia. But it did. Until these changes are fully implemented, we cannot say with any certainty that one could not happen again.

> **Recommendation 1: The INSLM should recommend the Attorney-General, as a matter of urgency, implement the outstanding recommendations of the Witness J Review.**

We will now address the questions raised by the INSLM in turn.

Response to Questions

Question One: Whether the interaction of the protection of national security information and the public adjudication of disputes according to law would better occur if the NSI Act were repealed. In particular, whether powers available to courts, in the absence of the NSI Act, can more appropriately deal with this interaction than the processes required by the NSI Act.

Secret trials have no place in Australia. The unprecedented level of secrecy in the case of Witness J, facilitated by the provisions in the current *NSI Act*, demonstrated that preserving the current status quo may have grave ongoing consequences for the administration of justice, which in turn undermines transparency and accountability in our democracy. Australia therefore requires a better legislative scheme to correct the current inappropriate imbalance enshrined in the *NSI Act,* which favours the protection of national security information over the public adjudication of disputes according to law. The Human Rights Law Centre considers that the *NSI Act* could more effectively address the tension between competing public interests, to better manage the protection of national security information –where necessary and proportionate – and the public interest in open justice, subject to the introduction of substantial amendments to the *NSI Act* as detailed in this submission.

If the *NSI Act* were repealed, in the absence of any replacement legislation, in cases concerning national security information, courts would revert to the application of common law principles such as the public interest immunity (**PII**) doctrine, the application of legislative provisions such as section 130 of the *Evidence Act 1995* (Cth), and the respective courts' powers to, *inter alia,* make suppression or non-publication orders, orders restricting access to documents, orders to give effect to undertakings where national security information is involved, and/or orders to close the court on certain occasions, which should always be a measure of last resort.[8] We note that the *NSI Act* does not preclude the court's use of such mechanisms at present. However, such an approach absent the *NSI Act* would rely on the relevant court to manage the interaction of the protection of national security information (i.e. with levels of secrecy, as appropriate) and the public adjudication of disputes according to law. Such an approach has the potential to facilitate inconsistency and leaves unresolved the disadvantages that arise for the respective parties where sensitive material is either included or excluded under PII claims, for example. This formed the basis for the introduction of the *NSI Act* in 2004, following the outcome in *R v Lappas*.[9]

Accordingly, the ALRC and the then government considered that the prior status quo was undesirable as greater clarity and a more refined and consistent set of procedures were considered necessary.[10] Caution should be exercised when giving consideration

[8] The Australian Law Reform Commission has stated that the authorities establish that less drastic measures should be adopted, where possible – a proposition with which the Human Rights Law Centre agrees: See Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (2004, Report 98) [9.7].

[9] *R v Lappas* [2001] ACTSC 115.

[10] Australian Law Reform Commission, 'ALRC media release: justice system must adapt to meet terror challenges', (Media Release, 23 June 2004) cited in Commonwealth of Australia, '*National Security Information (Criminal and Civil Proceedings) Act 2004: Practitioners' Guide*', (June 2008) (**Practitioners' Guide**) 5; Senate Legal and Constitutional Legislation Committee, Parliament of Australia, 'Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004'

to the repeal of the *NSI Act* in its entirety having regard to the outcome in cases such as *R v Lappas*. Reliance on the current powers of courts and the common law alone risks returning to the same problems identified in the past. While we are not unsympathetic to the benefits of leaving these matters to case-by-case, discretionary decision-making by judges, on balance we consider it desirable that the *NSI Act* be amended to introduce better safeguards and, subject to the introduction of such safeguards, we recommend that the *NSI Act* be retained.

In the absence of the introduction of appropriate and necessary further legislative amendments to ensure that the *NSI Act* more effectively recognises the necessity of fair trials and open justice (with legitimate exceptions), the Human Rights Law Centre recommends that the *NSI Act* in its current form be repealed.

> **Recommendation 2: The *NSI Act* should be retained, subject to significant amendment to better balance the interests of secrecy and transparency. In the absence of such significant amendments, the *NSI Act* should be repealed.**

The shortcomings in the case of Witness J, which have been acknowledged by the INSLM,[11] have demonstrated that it is in matters concerning national security that we need to be most vigilant to ensure that the rule of law and human rights continue to be upheld. In the Human Rights Law Centre's submission to the review into Witness J Review, we reiterated that open justice is a requirement of international human rights frameworks, including under the *Universal Declaration of Human Rights* (Article 10) and the *International Covenant on Civil and Political Rights* (Article 14).[12] Given the comprehensive nature of the present review of the *NSI Act*, the Human Rights Law Centre is of the view that, if the *NSI Act* is retained, its objects should be amended to underscore and more effectively reflect the balancing act recognised in the Explanatory Memorandum[13] between the administration of justice and in particular, open justice, and the prevention of disclosures which are likely to prejudice national security. Section 3 of the *NSI Act* provides that the object of the *NSI Act* is to:

> *…prevent the disclosure of information in federal criminal proceedings and civil 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.*

Under the present object, the prevention of disclosure appears to be the default position, albeit the establishment of a 'serious interference with the administration of

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(Report, August 2004) (**Senate Legal and Constitutional Legislation Committee 2004 Report**) [2.19], [2.21-2.22]; Senate Legal and Constitutional Legislation Committee, Parliament of Australia, 'Provisions of the National Security Information Legislation Amendment Bill 2005' (Report, 11 May 2005) [3.22].

[11] Commonwealth of Australia, Independent National Security Legislation Monitor (INSLM) Report into the operation of Part 3, Division 1 of the National Security Information (Criminal and Civil Proceedings) Act 2004 as it applies in the Alan Johns matter' (17 June 2022) (**INSLM Report**) 40; see also Kieran Pender, '*Witnesses J, K — and L? Open Justice, the NSI Act and the Constitution'*, Australian Public Law (Blog Post, 12 October 2021) <https://www.auspublaw.org/blog/2021/10/witnesses-j-k-and-l-open-justice-the-nsi-act-and-the-constitution/>.

[12] Human Rights Law Centre, Submission to INSLM, '*Opaque Justice: the operation of section 22 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) as it applies in the 'Alan Jones' matter (a pseudonym)'* (30 April 2021) 6.

[13] Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth) 1.

justice' operates as an exception. The Human Rights Law Centre submits that the section 3 of the *NSI Act* should be amended to expressly include an object which concerns the need to ensure, where appropriate, that a balance be sought between open justice and the prevention of disclosure of information that would likely prejudice national security. This amendment would naturally inform the further *NSI Act* amendments recommended by the Human Rights Law Centre in this submission.

> **Recommendation 3: If retained, s 3 of the *NSI Act* should be amended to expressly recognise the importance of open justice and that the preservation of open justice is among the law's aims.**

Question Two: If the NSI Act is to be retained; whether amendments ought to be made to better accommodate the protection of national security information and the public adjudication of disputes according to law. The INSLM particularly welcomes submissions that deal with practical improvements to the NSI Act, including in respect of delay and complexity.

Any departure from open justice requires robust scrutiny. Departures must be necessary, proportionate and only permitted to the extent required by other interests, such as national security. These statements are true of any case arising under the *NSI Act*. But the nature of cases that have recently been subject to the *NSI Act* have underscored these considerations and heightened concern that the present regime does not adequately accommodate public adjudication of disputes according to law.

Particularly, the prosecutions of whistleblowers – respectively Witness K, Bernard Collaery and David McBride – raise significant democratic and press freedom considerations that might not always be as acute in other matters falling under the *NSI Act*. In a way, these cases have served as 'stress tests' for the *NSI Act* – and showed it to be lacking. The *Collaery* case is the most troubling example. As is now well-known, Collaery – a former ACT Attorney-General – was alleged to have disclosed information to the media contrary to secrecy laws. The relevant information related to Australia's alleged espionage against Timor-Leste in the early 2000s for commercial gain. To successfully prosecute Collaery, the Commonwealth Director of Public Prosecutions would have been required to prove the truth of that underlying information. It is not a crime to make things up. However, the Australian government has never admitted that it spied on Timor-Leste and certainly never apologised for that conduct. The *NSI Act* was therefore engaged to enable the continuation of the policy of 'neither confirm nor deny' publicly, while – had the case gone to trial – effectively conceding the espionage in closed court. As much was made abundantly clear by Mossop J in *R v Collaery (No 7)*,[14] where his Honour said:

> *The substance of the application made by the Attorney-General is that orders should be made which permit the evidence led by the Crown that establishes what part of the matters communicated by Mr Collaery were true, to be confined to those immediately involved in the case and not otherwise disclosed. By this mechanism the Attorney-General hopes to maintain a position of 'neither confirm nor deny' (NCND) in relation to the subject matter of the [redacted]. The Attorney-General contends that to do otherwise would create a risk of prejudice to "national security", as that expression is defined in s 8 of the NSI Act.*

It is one thing to use the *NSI Act* to prevent public knowledge of sensitive intelligence information that may directly threaten Australia's public interest. It is another thing

[14] [2020] ACTSC 165 (26 June 2020).

entirely for the secrecy imposed by the *NSI Act* to be used to enable the Australian Government to deceive the Australian people in relation to a matter of heightened national interest. It is in this context that the below observations in relation to parts of the *NSI Act* are made.

Section 29

Section 29 of the *NSI Act* requires the hearing in relation to certificates issued by the Attorney-General under ss 27 or 28, which lead to the making of a s 31 order, to be held in closed court. It is a mandatory provision; there is no discretion afforded to the court.

The Human Rights Law Centre takes the view that s 29 may be unconstitutional, for undermining the integrity of a court contrary to Chapter III of the *Constitution* and/or for disproportionately burdening political communication contrary to the implied freedom. The absence of any judicial discretion to control a court's processes has been the primary vice in a number of Chapter III cases that saw legislation invalidated. The nature of s 29 is not dissimilar to the provision invalidated in *Russell v Russell*.[15] Such arguments were rejected in *R v Lodhi*, by Whealy J. His Honour characterised the hearing held pursuant to s 29 narrowly: '*In my opinion, the function is a very limited one and is concerned only with the disclosure of information. It is quite clear that a s 31 hearing is concerned essentially with disclosure as between the parties*'.[16] This characterisation was central to his constitutional analysis: '*the fact that the … hearing is to be a closed hearing does not place an undue burden given the legitimate aim of such a hearing and the subject matter with which it deals. It is a limited hearing dealing with a limited topic as I have indicated*'.[17]

Not all s 29 hearings are apt to be described in this way. In *Collaery*, the s 29 hearing involved matters of significant public interest with evidence given from current and former senior public officials, including the heads of the intelligence agencies, a former foreign minister and former leaders of Timor-Leste.[18] The first-instance hearing, held entirely in closed court, would have elicited significant public interest; the hearing on appeal, held over two days, also in entirely closed court, even more so. It would therefore be erroneous to suggest that the appeal, on such matters of public interest, where, presumably, much of the argument was legal rather than factual given the nature of an appeal, was as narrow as set out in *R v Lodhi*. At least in such matters, and possibly in all s 29 hearings, the requirement to hold the hearing in closed court and the attendant absence of judicial discretion undermines judicial integrity and burdens the political communication. Accordingly, to preserve the constitutional validity of the *NSI Act*, section 29 should be amended.

Recommendation 4: Section 29 of the *NSI Act* should be amended to provide the court with discretion as to the extent to which the hearing is held in closed court.

Court Processes

The next set of observations we wish to make concerns the practical operation of the *NSI Act*. In our experience, there is very little transparency from courts operating

[15] (1976) 134 CLR 495.
[16] [2006] NSWSC 571 (7 February 2006) [82].
[17] Ibid [123].
[18] *R v Collaery (No 7)* [2020] ACTSC 165 (26 June 2020) [56]–[60].

under the *NSI Act* in relation to the level of openness in any particular hearing. While we appreciate this may be a matter of resourcing – and we note that the ACT Supreme Court did not, until recently, employ a dedicated communications officer – it has the unfortunate consequence of compounding the opacity of these matters. We offer two examples which, while seemingly benign, have had real practical implications for media scrutiny of these proceedings, and such implications will persist unless and until the practical matters below are addressed.

In Witness J, in the early part of 2023 there were a number of hearings held in the ACT Supreme Court in relation to potential publication (with redactions) of sentencing remarks. Despite being held in open court, these hearings were **not** listed on the daily court list published by the Supreme Court. It was only thanks to notice by one of the parties that journalists and the Human Rights Law Centre knew to attend. We understand, although are not certain, that the reason for this issue related to the ACT Supreme Court's systems and the need for the charges (which were in this case national security information) to be entered to enable a matter to be publicly listed. Suffice to say this is an extremely unsatisfactory state of affairs – especially when the original sin in the Witness J matter was the unprecedented level of secrecy. If a hearing is held in open court but that fact is not made public, does it make a sound? The concern is heightened given media companies have a special interest in these matters, and possible standing to seek leave to intervene, as indeed *Guardian Australia* did. How can that special interest be exercised if the occurrence of a hearing is not notified beyond the parties?

This criticism can be levelled more generally in relation to the *Collaery* proceedings. The level of opacity around the proceedings meant that it was never entirely clear, even to informed observers like us, whether a hearing would be in open court, partially closed court (where observers were excluded after an initial period) or entirely closed court. We would joke with colleagues, upon attending court, that it was hard to know how much money to put in the parking meter – because it was never clear whether we would be at the court for five minutes or five hours. This may sound frivolous, but it made it extremely difficult for observers, including journalists, to know whether and how to cover the proceedings. And it is not as if these matters are unknown to the court – at least on the morning of the proceedings, the parties and the court presumably have a fair idea of the likely status of the proceedings. Except in s 29 proceedings (as discussed above), no other *NSI Act* criminal proceedings are in mandatory closed court. Practical transparency about when and why *NSI Act* hearings are closed would improve reporting on these cases and mitigate perceptions of unjustified secrecy.

> **Recommendation 5: Consideration should be given to the Attorney-General's Department publishing guidance material for courts in relation to practical transparency measures desirable in *NSI Act* proceedings. Consideration should be given to additional funding being provided to courts hearing *NSI Act* proceedings to ensure such guidance can be considered and, where agreed by the court, implemented.**

Another facet of the impact of the *NSI Act* on the court concerns attempts by intelligence services to intrude on the operation of the court. In *R v Collaery*,[19] Mossop J considered an attempt to require his Honour's two associates, and the court registrar,

[19] [2019] ACTSC 278 (9 October 2019).

to enter into agreement with the Australian Secret Intelligence Service (ASIS) under Part 6 of the *Intelligence Services Act 2001* (Cth) to be permitted to handle documents relating to the *NSI Act* application. Entering into such agreements would have exposed the court staff to potential criminal liability if they mishandled relevant documents. This liability would be in addition to that provided by the *NSI Act* itself, and to the court's inherent power to punish for contempt. Mossop J declined to make the orders sought:

> *I am not presently persuaded that such a measure which interferes with the operation of the court and exposes court officers to criminal penalties not imposed by the NSI Act itself would be appropriate.*[20]

His Honour reached this position in part because he considered it was unnecessary to involve the registrar in the management of the matter. Mossop J observed:

> *It is therefore unnecessary to determine whether the sensitivity of the material to be disclosed warrants such a restriction or whether it would ever be appropriate to compel the Registrar or Principal Registrar of the Court exercising jurisdiction at the instigation of the Commonwealth Crown to subject himself or herself to such restrictions where they are not compelled to do so by legislation.*[21]

More recently, in a hearing relating to the potential publication of sentencing remarks in the Witness J case, these matters again arose before McCallum CJ. Her Honour remarked that an intelligence agent had applied 'a measure of pressure' to require associates to sign an undertaking. McCallum CJ described this as 'inappropriate', adding: '*I don't want to sound "judgey" but this is my court and I won't have it*.'[22]

It seems grossly inappropriate for Australia's intelligence services to intrude on the operation of the court in this manner. This is no reason to believe that a judge or judicial staff will act otherwise than with the highest propriety in relation to confidential information. Given the judiciary's independence as guaranteed by the separation of powers embedded in the *Constitution*, attempts by the executive branch to pressure judicial staff in this manner raise serious constitutional questions. The *NSI Act* already provides for the confidentiality of information under the scheme, and court staff would be subject to contractual and equitable confidentiality obligation as an element of their employment agreement.

> **Recommendation 6: The *NSI Act* be amended to expressly preclude any additional confidentiality obligations being imposed on court staff.**

<u>Access to justice</u>

The third observation is on the impact of the *NSI Act* on access to justice. It is extremely difficult for legal practitioners to operate under the current *NSI Act*. That is a major deterrent. There is a significant risk that the onerous regime imposed by the *NSI Act* serves as a barrier to obtaining legal representation for defendants in such proceedings. That is extremely undesirable. We offer some instructive examples.

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[20] Ibid [12].
[21] Ibid [13].
[22] Hannah Neale, 'ACT Supreme Court hears some details about Witness J court case to be revealed', *Canberra Times* (online, 23 February 2023) <https://www.canberratimes.com.au/story/8095585/details-about-secret-witness-j-court-case-to-be-released-in-some-form/>.

In *Collaery v The Queen (No 1)*,[23] Collaery applied to vacate appeal dates in his challenge to the s 31 orders made by the trial judge. Collaery had sought to brief Bret Walker AO SC in the appeal; his lawyers therefore applied to the Attorney-General to have Mr Walker AO SC added to the s 26 certificate. In an email sent by the Australian Government Solicitor (acting for the Attorney-General), it was said:

> *Relevant Commonwealth officials have been considering your request to add Bret Walker SC to the certificate. A guiding principle in these considerations is ensuring that access to the highly sensitive national security information disclosed in this proceeding is restricted to active and necessary participants in the proceeding. We understand Mr Walker SC is proposed to be briefed to lead the appeal, but is presently unavailable for the listed dates of the appeal (15-16 February 2021). We propose to await the outcome of your client's application to vacate the hearing dates, which is presently listed on 27 January, before determining Mr Walker SC's status under the certificate. Please let us know if Mr Walker SC is to play an active role regardless of his availability to appear for your client on 15-16 February. Having a clear picture of the expected involvement for Mr Walker SC will assist the Commonwealth to properly action this request.*[24]

Burns J, for the ACT Court of Appeal, granted Collaery's application to vacate on the basis of the delay caused by the Attorney-General in approving Mr Walker AO SC. His Honour was critical of the Attorney-General's position.

> *The power reposed in the Attorney-General by the NSI Act effectively enables the Attorney-General to veto an election by an accused person to instruct a particular lawyer in proceedings to which the NSI Act applies. Because of the extraordinary nature of this power it becomes the Attorney-General to exercise it with the greatest efficiency that the particular case permits, and strictly for the purposes for which the power was given. The power to refuse to include a lawyer nominated by an accused person should not be exercised in order to gain a forensic advantage. Nor is it any part of the role of the Attorney-General to base his or her decision on whether he or she thinks that it is necessary for the accused to instruct that particular lawyer. The email from AGS to the appellant's solicitors on 22 January 2021 … carries a disturbing suggestion that those who represented and advised the Attorney-General perceived that their satisfaction at the necessity for Mr Walker to be briefed by the appellant was in some way relevant. It clearly was not.*[25]

The situation was all the more disturbing given that Mr Walker AO SC was a former INSLM and therefore not unfamiliar with matters of national security and consequent confidentiality requirements.

> **Recommendation 7: The *NSI Act* should be amended to clarify the power of the Attorney-General to deny inclusion of nominated legal representatives under a certificate. Consideration should also be given to whether it might be desirable to specify a timeframe for the process of such nominations.**

More practical considerations were detailed in *McBride v Commonwealth Director of Public Prosecutions (No 2)*, also an application to vacate, on the basis of the

[23] [2021] ACTCA 1 (9 February 2021).
[24] Ibid [12].
[25] Ibid [17].

combination of Covid-19 complications and the requirements of the *NSI Act*.[26] Elkaim J recounted, in granting the application:

> *The essential basis for the application is that the plaintiff is not able to get his case ready. This is through no personal fault of his own but rather a result of the COVID-19 pandemic. Mr Davis, in his affidavit, sets out the restrictive effects, on the gathering and compilation of evidence, of the [NSI Act]. To give but one example, in order to deal with some of the relevant information, the plaintiff's lawyers need to be in Security Cleared Premises. They need to "communicate in-person absent the presence of transmitting devices". Although the Australian Government Solicitor has endeavoured to assist the plaintiff's lawyers to overcome the difficulties, no completely satisfactory solution has been found. The application describes the geographical spread of the plaintiff's lawyers. They are located in Sydney, Adelaide and Canberra. They cannot come together because of the assorted travel restrictions imposed, in particular by New South Wales, and perhaps to a lesser degree by the Australian Capital Territory and South Australian governments.*[27]

Even absent a pandemic and associated border restrictions, the strictures of the *NSI Act* and the associated practical requirements impose an enormous burden on legal representatives litigating these cases.

Another example of which we are aware relates to the common practice of solicitors requiring clients to place funds in trust, which is closely regulated by the relevant law society or legal profession regulator. We are aware of at least one instance where the identity of a client is subject to the *NSI Act*, such that the client's solicitors are unable to identify the client on the trust fund accounts. That is contrary to legal professional regulation. While, probably, any such requirement would bend to the force of s 109 of the *Constitution*, it should not require a constitutional challenge to trust fund regulations for solicitors to simultaneously comply with their legal professional obligations and *NSI Act* obligations.

> **Recommendation 8: The *NSI Act* should be amended to expressly override any legal profession regulations where compliance would be contrary to the *NSI Act*.**

These instances point to a wider problem: it is extremely onerous to represent a client under the *NSI Act*. Solicitors and barristers are required to have specialised safes installed by intelligence agents, conferences between clients and legal representatives can only take place in person, materials need to be drafted through secure workflows and legal documents often need to be hand-delivered given the inability to communicate electronically. Some of these requirements may be justifiable given the national security risk involved. But there is a significant risk that such burdens will lead to representatives declining to act in such matters, or the costs of such representation may increase to a position where clients cannot afford it.

> **Recommendation 9: Consideration should be given to special funding arrangements being established to contribute to the legal fees of defendants in *NSI Act* proceedings.**

Question Three: If the NSI Act is to be retained; whether, in federal criminal proceedings the balancing of factors by the Court required by section 31(7) and the requirement of section 31(8) that the Court give greatest weight to the factor

[26] [2021] ACTSC 201 (27 August 2021)
[27] Ibid [9]–[12].

provided for in section 31(7)(a), is appropriate. Whether the equivalent provisions in respect of civil proceedings in section 38J and 38L are appropriate.

Section 31(8) of the *NSI Act* requires that the court, in determining what orders to make under s 31, '*must give greatest weight*' to s 31(7)(a), being '*whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if*' information was disclosed or witnessed called contrary to the certificate. In our view, this provision is inappropriate, unduly tilts the scales in favour of secrecy, and may well be unconstitutional. It should be repealed.

The constitutional validity of s 31(8) was challenged on Chapter III grounds in *R v Lodhi*, with Whealy J upholding its validity. However, subsequently, former High Court Justice Michael McHugh wrote in an academic paper:

> *It is no doubt true that in theory the [NSI Act] does not direct the court to make the order which the Attorney wants. But it goes as close to it as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing … How can a court realistically say I am going to make an order in favour of a fair trial even though, in exercising my discretion, I give the issue of a fair trial less weight than the Attorney-General's certificate.*[28]

McHugh concluded that various aspects of the *NSI Act*, including s 31(8), in totality '*combine to make a strong case that the legislation is an attempt by parliament to usurp the judicial power of the Commonwealth*'.[29] Justice Whealy, in a subsequent paper, acknowledged: '*there is plainly a highly respectable school of thought that thinks [the NSI Act is unconstitutional] … it appeared that the more powerful arguments in favour of invalidity had not been presented before me … I am sure we have not heard the last of this contention*.'[30]

The Human Rights Law Centre considers it to be possible, perhaps even probable, that s 31(8) is unconstitutional. For this reason, it should be repealed. But even putting aside the constitutionality question, s 31(8) is deeply inappropriate for seeking to direct the exercise of judicial decision-making in accommodating different interests, in preserving national security, in upholding the right to a fair trial and in protecting open justice. The *NSI Act* sets out various factors for a court to consider in making a s 31 order. Currently, open justice is not among them – although was accepted in *R v Collaery (No 7)* that open justice can be considered as part of s 31(7)(c), '*any other matter the court considers relevant*'.[31] We recommend that s 31(7) be amended to expressly require consideration of open justice. With the range of criteria set out, the court should then be able to reach its own view as to the correct outcome – s 31(8) unreasonably, and possibly impermissibly, seeks to constrain that exercise of judicial power. It should not do so.

Recommendation 10: Section 31(8) of the *NSI Act* should be repealed. Open justice considerations should be expressly added to the list of factors considered under s 31(7).

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[28] Michael McHugh, 'The Constitutional Implications of Terrorism Legislation' (2007) 8 *Judicial Review* 189, 209.
[29] Ibid.
[30] Justice Anthony Whealy, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials' (2007) 8 *Judicial Review* 353, 365.
[31] [2020] ACTSC 165 (26 June 2020) [124].

Question Four: If the NSI Act is to be retained; whether the definition of the key integer of "national security information" in the NSI Act is too broad, and in this respect its relation to "matters of state" in section 130 of the Evidence Acts.

The definition of "national security information" in the *NSI Act* is extremely broad. The definition is at the crux of the *NSI Act*'s operation and accordingly, its breadth has a critical impact on the non-disclosure of information.[32] At present, the scope of the definition is tilted too far in favour of secrecy over open justice, and the definition should therefore be amended to narrow the definition of "national security information", in the interests of striking a better balance.

The *NSI Act* defines "national security information" as information:

> *"(a) that relates to national security; or*
>
> *(b) the disclosure of which may affect national security."*

The meaning of "national security", in turn, is defined in section 8 of the *NSI Act* as follows:

> *"In this Act, national security means Australia's defence, security, international relations or law enforcement interests."*

For completeness, we note that the term 'information' imports the definition of the term from s 90.1(1) of the *Criminal Code Act 1995* (Cth).

As to whether information 'may affect national security', this is inherently vague, and has the potential to capture information beyond the intended scope of the *NSI Act* articulated in section 3, which concerns the prevention of the disclosure of information where disclosure is 'likely to prejudice national security'. The current definition in section 8 of the *NSI Act* also includes several vague and broad terms, with the result that the scope of information that would be captured under the current definition of 'national security information' is unclear. For example, the term 'defence' is not defined in the *NSI Act*, which leaves the term open to subjective interpretation. Further, the current definition of 'international relations' in section 10 of the *NSI Act* includes '*political, military and economic relations with foreign governments and international organisations'*. This may capture all manner of information that is not likely to prejudice Australia's national security. There also appears to be a dearth of cases involving judicial interpretation of the respective definitions in ss 8, 9, 10, and 11 of the *NSI Act* so there is limited practical guidance available to practitioners as to the scope of information that may be captured under them. Considered amendments are therefore required to refine the definition of 'national security information' to provide clarity and to better serve the objects of the *NSI Act*. We note our joint submission, with Transparency International Australia and Griffith University, to the Attorney-General's Department's review of secrecy provisions, which advocated for a serious harm-based approach. We would suggest that a similar approach is appropriate here.

The meaning of 'national security' in section 8 of the *NSI Act* was based on the definition which then appeared in the *Commonwealth Protective Security Manual* (**PSM**).[33] The reference to 'national interests' was subsequently removed from the

[32] Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth) 1.
[33] Above n. 13, 5.

definition.[34] However, as was recognised in a submission made to the Senate Standing Committee on Constitutional and Legal Affairs,[35] the *PSM* itself is an internal policy document that is not available to the public and its access was then limited to government departments, agencies and government contractors.[36] Accordingly, the *PSM* is subject to change, without judicial or legislative oversight, or public scrutiny.[37] Relevantly, the *PSM* was subsequently given a security classification such that its current status and content are unknown to the Human Rights Law Centre.[38] Such a broad definition of 'national security information' as presently appears in section 8 of the *NSI Act,* based on an internal point-in-time policy document, is not therefore appropriate in legislation that has such far-reaching consequences, including for defendants and their right to a fair trial, to members of the public, and for the public interest in open justice overall.

In these circumstances, it is unclear whether the current definition of the term 'national security information' has kept pace with current national security concerns. As the Senate Standing Committee on Constitutional and Legal Affairs stated: '*One of the main challenges is to capture the meaning of a condition or state of affairs that is constantly changing'*.[39] The Human Rights Law Centre acknowledges that there are difficulties that may arise with the changing nature of national security. However, this does not justify the retention of an unnecessarily broad definition of 'national security information' at the cost of fairness and open justice. In our view, the offences in the *NSI Act* based on the current definition are likely to cause over-notification to trigger the operation of the *NSI Act,* in favour of non-disclosure.

The definition of 'national security information' in the *NSI Act* is also inconsistent with the definition of similar terms in other relevant statutes. For example, Section 90.4 of the *Criminal Code* contains a slightly narrower definition of 'national security', albeit with references to the national security of a foreign country. It provides that the term 'national security' has the following meaning:

> *(1) The* ***national security*** *of Australia or a foreign country means any of the following:*
>
> > *(a) the defence of the country;*
> >
> > *(b) the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by subsection (2);*
> >
> > *(c) the protection of the integrity of the country's territory and borders from serious threats;*
> >
> > *(d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or an activity covered by subsection (2);*

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[34] Above n. 32, 2.
[35] Joo-Cheong Tham, Submission No. 9 to Senate Legal and Constitutional Committee, *'Inquiry into the provisions of the National Security Information (Criminal Proceedings) Bill 2004 (Cth) and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth)*' 3, cited in Above n. 10: Senate Legal and Constitutional Legislation Committee 2004 Report [3.117].
[36] Ibid.
[37] Ibid [3.118]
[38] Australian Law Reform Commission, '*Secrecy Laws and Open Government in Australia'* (2010, Report 112) [14.17]
[39] Above n. 10: Senate Legal and Constitutional Legislation Committee 2004 Report [3.12].

(e) the country's political, military or economic relations with another country or other countries.

(2) For the purposes of subsection (1), this subsection covers the following activities relating to a country, whether or not directed from, or committed within, the country:

(a) espionage;

(b) sabotage;

(c) terrorism;

(d) political violence;

(e) activities intended and likely to obstruct, hinder or interfere with the performance by the country's defence force of its functions or with the carrying out of other activities by or for the country for the purposes of its defence or safety;

(f) foreign interference.

Further, the term 'security' is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), which is adopted in section 9 of the *NSI Act,* as:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

As to the relationship between the *NSI Act* definition and section 130 of the *Evidence Act 1995 (Cth)* (***Evidence Act***) and its state and territory equivalents, the *Evidence Act* provision applies to the admission of information or documents into evidence in court[40] and it concerns the basis for the potential exclusion of such evidence (i.e. at a hearing or at trial, and some jurisdictions extend this to pre-trial disclosure requirements).[41] The provision otherwise largely reflects the PII doctrine.[42] The non-

[40] See, for example, *Tasmania v Farhat (No 2)* (2017) 29 Tas R 17 at [23] per Pearce J.
[41] Note that in certain jurisdictions, the operation is extended by s 131A of the relevant *Evidence Act* to disclosure requirements also.
[42] Above n. 8 [8.148].

exhaustive list of circumstances in which information relates to 'matters of state' are set out in section 130(4) in the *Evidence Act* for the purpose of the court's assessment. The *NSI Act* does not affect the operation of s 130 of the *Evidence Act*.[43] However, it has been recognised that the *NSI Act* may replace it in many circumstances.[44] The Human Rights Law Centre acknowledges that there can be a distinction between cases involving PII (the ALRC has rightly noted not all such cases involve national security)[45] and cases involving the application of the *NSI Act*. These provisions therefore serve distinct but important purposes and while the definition of 'national security information' in *the NSI Act* should be narrowed to more clearly focus on national security concerns, it need not be conflated with 'matters of state' in section 130 of the *Evidence Act,* in our view.

The Human Rights Law Centre recommends that the definition of 'national security information' in the *NSI Act* be amended (with consequential amendments to ss 8, 9, 10 or 11 of the *NSI Act,* as necessary). It would be preferable if the term 'international relations' was removed entirely from the definition in section 8 of the *NSI Act* (and section 10 would accordingly require deletion), or at least heavily confined, as such matters can arguably fall under PII in any event.[46] While there are alternative definitions available in other statutes such as section 90.4 of the *Criminal Code* (albeit with reference to Australian national security only) and section 4 of the *ASIO Act*, careful consideration should be given to narrowing the definition of 'national security information' in the *NSI Act* to ensure reforms are made with reference to the object in section 3 of the *NSI Act* and the need to balance the public interests in the protection of national security, and fair and open justice.

> **Recommendation 11: The *NSI Act* should be amended to narrow the scope of 'national security information' to ensure the law is only engaged where necessary and proportionate to the risk to national security posed.**

Part of our concern in relation to the over-broad definitions in the *NSI Act* arises from the current consequences of the Attorney-General issuing a criminal non-disclosure certificate. Section 27(1) of the *NSI Act* provides that, if the Attorney-General issues a certificate under section 26 of the *NSI Act* prior to trial, then the certificate is 'conclusive evidence' that disclosure of the relevant information in the proceeding is likely to prejudice national security, until a hearing is held in which the court decides whether to make an order under section 31 of the *NSI Act*.[47] Section 27(1) therefore affords unfettered discretion to the Attorney-General at a pre-trial stage, and in the absence of any review mechanism,[48] regarding the non-disclosure of information until the Attorney-General decides to revoke the certificate or if the court makes a final order.[49] The Human Rights Law Centre understands that concerns have previously been raised concerning the non-reviewable nature of the Attorney-General's certificate.[50] While we do not make submissions in this regard, we recognise that some

[43] See section 18 of the *NSI Act* which concerns the operation of other acts.
[44] Australian Law Reform Commission, *'Uniform Evidence Law'*, (2006, Report 102)15.166
[45] Ibid.
[46] Such an argument was advanced in the United Kingdom: See Ministry of Justice (UK), '*Independent report on the operation of closed material procedure under the Justice and Security Act 2013'*, (November 2022) 49–50.
[47] *NSI Act,* section 26(5); Above n. 10: Practitioners' Guide, 18 and Appendix 2.
[48] See *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 9A(1) and 9A(4)(b).
[49] *NSI Act,* section 26(5).
[50] Above n. 10: Senate Legal and Constitutional Legislation Committee 2004 Report [3.94] – [3.97].

stakeholders may consider it undesirable for the certificate to be reviewable. However, given the current provisions in the *NSI Act* concerning the issuing of certificates give rise to such issues, we consider that it would be desirable for the INSLM to consider any further checks and balances that may be introduced to afford greater fairness to defendants at the pre-trial stage in particular. Such a limited ability on a defendant's part to challenge the 'conclusive' nature of certificates underscores the necessity of the safeguards we recommend throughout this submission.

Question Five: If the NSI Act is to be retained; whether the NSI Act should expressly provide for appointment of a special advocate, and if so, how, when and on what terms.

In addressing Question Five, the Human Rights Law Centre has considered below whether the *NSI Act* should provide for the appointment of a 'Special Advocate' and/or an 'Open Justice Advocate', respectively. As a preliminary matter, we note that the use of 'court-only' or 'secret' evidence, which the court can rely on but which a party (typically the defendant) cannot see, represents a significant departure from ordinary principles of procedural fairness. With respect, we were concerned by Mossop J's judgment in *R v Collaery (No 11)*,[51] agreeing to consider court-only evidence. We would encourage the INSLM to consider whether it is ever appropriate, given the wider system of checks and balances occasioned by the *NSI Act*, including secrecy offences for misuse of information, to allow a court to consider court-only evidence which the defendant cannot see or respond to.

(a) 'Special Advocate'

Subject to the above, and notwithstanding that Mossop J found that he could appoint a Special Advocate under the court's inherent jurisdiction,[52] we consider that amendments to the *NSI Act* which allow for the appointment of Special Advocates may improve the fairness of certain processes during the course of proceedings. However, consistently with the above, Special Advocates must not be treated as a substitute for the chosen legal representatives of a particular party or as a panacea for the present shortcomings of the *NSI Act*. Provision in the *NSI Act* for the appointment of Special Advocates should be subject to the *NSI Act* amendments recommended in this submission and in the submission of Associate Professor Ananian-Welsh.

In theory, the appointment of a Special Advocate in *NSI Act* proceedings would be for the purpose of seeking to mitigate procedural unfairness in proceedings, particularly in circumstances where a party is unable to access materials which form the basis for a court's determination.[53] However, careful consideration must be given to when and how Special Advocates are to be chosen and appointed, and how they should operate. Special Advocates should also have a certain level of communication with the party for whom they are appointed, sufficient access to national security information (including any 'secret judgments' library), and adequate support and resources to perform their functions effectively. Measures should also be introduced to ensure that protracted delays which may result from their appointment are minimised. A review into the United Kingdom Special Advocates system under the *Justice and Security Act 2013*

[51] [2022] ACTSC 40 (11 March 2022).
[52] *R v Collaery (No 11)* [2022] ACTSC 40 at [75]-[76] per Mossop J.
[53] *SDCV v Director-General of Security and Another* (2022) 405 ALR 209; [2022] HCA 32 at [258] per Edelman J.

(UK) has revealed that shortfalls in these areas have caused a number of difficulties in practice.[54]

At a practical level, a record should be kept of the persons for whom Special Advocates have advocated and the cases in which they have appeared, to assist with preventing any difficulties with appointments including actual conflicts or at least any perceptions of a conflict.[55] The Human Rights Law Centre acknowledges such an initiative may be more appropriately addressed with amendments to the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth) (**NSI Regulations**).

Recommendation 12: The *NSI Act* should be amended to provide a scheme for the appointment of special advocates.

(b) 'Open Justice Advocate'

On the assumption that the *NSI Act* is retained, the Human Rights Law Centre considers that the *NSI Act* should also be amended to expressly provide for the appointment of a 'special advocate', to function as a contradictor to protect the public interest in open justice. In the Human Rights Law Centre's submission to the INSLM in its 2021 review of the operation of Part 3 Division 1 of the *NSI Act*, in relation to the 'Alan Johns' matter,[56] we stated:

> *The Human Rights Law Centre considers it is eminently desirable for the NSI Act to be amended to require a court to consider, via submissions from a contradictor, the public interest in open justice prior to making orders pursuant to s 22 of the NSI Act. We propose that this contradictor would be called the 'Open Justice Advocate'.*[57]

In its subsequent Report, the INSLM made two recommendations for section 22 of the *NSI Act* to be amended to provide the court power to appoint a contradictor to make submissions to the court when either:

(a) closed court orders are sought under section 22; or

(b) any orders are sought under section 22.[58]

Notably, our 2021 submission and the INSLM's recommendations for the appointment of a contradictor were limited to section 22 of the *NSI Act*. Given the present comprehensive review of the *NSI Act,* it is also desirable and appropriate for the *NSI Act* to be amended to include provisions which expressly *require* a court to appoint a contradictor to make submissions, which the court must duly consider, when any orders are sought under provisions of the *NSI Act* which may have an impact on the public interest in open justice. Such circumstances may include when orders are sought, or proposed on the court's own motion, respectively, under various *NSI Act* provisions including (but not limited to) those in Part 3, Division 1B, Division 1, and Division 3; Part 3A, Division 1B and Division 1, and Division 3. To ensure the contradictor operates as an effective safeguard without hampering the efficiency of the court's processes, the appointment of the contradictor should occur as soon as

[54] Above n. 46, 144-147, 157.
[55] This was also a recommendation made in the UK – see: Above n. 46, 71, 119.
[56] Above n 12.
[57] Ibid.
[58] Above n 11: INSLM Report 41.

practicable once the court becomes aware of the relevant proposed orders and should continue throughout any appeal.

Additionally, the *NSI Act* provisions allow 'record recipients' or 'statement recipients' in certain circumstances to review the court's proposed record of hearing and statement of reasons, respectively, and requests may be made so that certain information likely to prejudice national security will not be disclosed.[59] The Human Rights Law Centre proposes that, in the interests of balancing open justice and national security considerations, the *NSI Act* be amended to provide that, prior to the provision of any record, statement or judgment by the court under the *NSI Act*, a contradictor is also afforded an opportunity to make submissions in the public interest. Such submissions should concern the nature or extent of any proposed withholding of information, including any redactions,[60] delays in the provision of any record, statement or judgment (or any part thereof, including any judgment summaries or sentencing remarks), with added requirements that such submissions must be duly considered by the court, and the court must make a decision with respect to the submissions.

The Human Rights Law Centre also proposes that this contradictor or 'special advocate' be called the 'Open Justice Advocate', particularly given confusion may otherwise arise from the existing 'special advocate' provisions in the *NSI Act*[61] and potentially also from any amendments which follow this review. The HRLC considers that this 'Open Justice Advocate' should be a suitably qualified and independent individual with appropriate security clearances.

> **Recommendation 13: The *NSI Act* should be amended to require, in certain circumstances where orders sought would derogate from open justice, a suitably-qualified 'Open Justice Advocate' be appointed to make submissions. In addition to these circumstances giving rise to the mandatory appointment of an Open Justice Advocate, the court should also be empowered to appoint one at any time where it considers it necessary.**

Questions Six, Seven and Eight

The Human Rights Law Centre will not make any submissions in relation to these questions.

Additional Questions: Standards of Review

In exchanges with the INSLM, the view of the Human Rights Law Centre was sought in relation to appeals and standards of review in *NSI Act* matters. Our views are set out below.

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[59] See, for example, *NSI Act*, ss 29(6), 29(7), 32(2) and 32(3), 38M.

[60] Note that in the United Kingdom, there analogous provisions were included in the *SIAC (Procedure) Rules 2003* (SI 2003/1034), r 47(5), for special advocates in the immigration context. In the National Security context, in relevant UK civil proceedings, there is no express rule which provides that a Special Advocate can make requests for disclosure of judgments (or parts thereof) on open justice grounds. However, there is no rule preventing this from occurring and the court would be bound to consider such representations for its open judgments, and does in fact do so: see Above n. 46, 38.

[61] See Part 3A, Division 3, Subdivision C of the *NSI Act*.

Part 3, Division 4 and Part 3A, Division 4 of the *NSI Act* contain provisions relating to appeals against court determinations made under stipulated *NSI Act* provisions in federal criminal proceedings and in civil proceedings, respectively. The Human Rights Law Centre acknowledges that, on the present state of the authorities, the principles in *House v King* (1936) 55 CLR 499 would typically apply to the review of a determination in circumstances where there were a range of potential outcomes (i.e. where a discretion was to be exercised), and where a determination 'demands a unique outcome',[62] the 'correctness standard' would instead apply.[63] In the *NSI Act* context, the ACT Court of Appeal has held that the decision to be made under s 31 of the *NSI Act* was to be reviewed in accordance with the 'correctness standard' and not on the basis that it involved the exercise of a discretion (such that *House v King* did not apply).[64] On the other hand, it may be arguable (and has been argued[65]) that there is a sufficient discretion required under s 31 of the *NSI Act* such that a court's decision made under that it is a determination to which *House v King* principles apply. As the Court of Appeal's judgment in *Collaery v The Queen (No 2)* is not yet published, pending the Court's consideration of the Attorney-General's application for redactions, it is difficult to say too much about this issue.

The Human Rights Law Centre recognises that there is the potential for a degree of uncertainty to arise when standards to be applied in appeals are not expressly set out. However, given the extensive volume of instructive jurisprudence in myriad areas of law devoted to the issue of whether established common law principles in either *House v King* or *Warren v Coombes*[66] are to apply, unless there is a serious unfairness or injustice occurring in practice that supports the need for a specific amendments to the *NSI Act* in this regard, the Human Rights Law Centre considers that the question of the standard to be applied in appeals in relation to these particular *NSI Act* provisions to be a matter which is more appropriately dealt with by the courts at the appropriate time. Accordingly, the Human Rights Law Centre does not presently recommend that the *NSI Act* be amended to include express references to the standard to be applied in appeals under specific parts of the *NSI Act*.

Moreover, the Human Rights Law Centre recognises that the fragmentation and delay of criminal proceedings is not desirable. We also acknowledge that the case brought against Bernard Collaery was characterised by delays and procedural disputes; at one point, Mossop J observed, of yet another interlocutory issue, that 'the parties allowed it to become another front in their greater war'.[67]

Despite this, the Human Rights Law Centre does not support the introduction of measures designed to limit the ability of any parties or the Attorney-General to appeal orders made under section 31 of the *NSI Act*. As such orders relate to the level of

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[62] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [49] per Gageler J.
[63] Ibid at [49]- [50] per Gageler J. For the 'correctness standard' principles, see: *Warren v Coombes* (1979) 142 CLR 531.
[64] *R v Collaery (No 10)* [2021] ACTSC 311 at [3], referring to *Collaery v The Queen (No 2)* [2021] ACTCA 28.
[65] For example, Mr Collaery advanced this argument in submissions to the High Court of Australia in response to the Attorney-General's application for special leave to appeal the decision of the ACT Court of Appeal in *Collaery v The Queen (No 2)* [2021] ACTCA 28: B. Collaery 'Response of First Respondent' Submission in *Attorney-General of the Commonwealth v Bernard Collaery & Anor*, Case No. C22/2021, 13 January 2022, 5.
[66] (1979) 142 CLR 531.
[67] *R v Collaery (No 6)* [2020] ACTSC 164 (26 June 2020) [1].

secrecy to be imposed on proceedings, there is a significant public interest in ensuring the correct outcome. Fettering the ability of a party to appeal would limit appropriate checks and balances. Importantly, section 22 of the *NSI Act* currently allows agreements to be made about the disclosure, protection, handling, and treatment of national security information in proceedings. Appeals under section 31 of the *NSI Act* are therefore more likely to be limited to a smaller subset of cases in which a court has not made orders to give effect to a relevant arrangement under section 22 in relation to the national security information. Given the narrow pool of cases likely to proceed to s 31 orders, placing limits on the ability of any parties or the Attorney-General to appeal such orders is unnecessary. It is a disproportionate response to the undesirable procedural complications in the *Collaery* proceedings.

Other Matters: 'Secret Judgments Library'

The INSLM has previously acknowledged that it would be sensible for a repository or library of suppressed judgments and transcripts to be established and foreshadowed that the present comprehensive review into the *NSI Act* is the best forum for this issue to be considered.[68] The Human Rights Law Centre agrees and considers it necessary for such a repository or library to be established for the reasons we outline below, which are further to the comments we made in our prior submission and during our participation in the hearing relating to the earlier Witness J Review. In addition to this, the Human Rights Law Centre considers that departure from open justice must be as minimal as possible; while national security considerations necessitate methods of protecting the secrecy of the information that would be retained in such a library, periodic review with a view to releasing documents once the national security concerns have passed is critical for adherence to open justice principles and to encourage public confidence in the implementation of such methods.

Our prior submission included the following recommendation:

> *Recommendation 6: The HRLC recommends that the NSI Act be amended to require the establishment of a 'library of secret judgments', together with a periodic review requirement to ensure maximum openness to the full extent possible. The NSI Act should be amended to require all 'secret judgments', including judgments in relation to a s 22 order, be provided to the library.*[69]

This recommendation was supplemented by the comments made at the hearing which included, relevantly, the following two reasons why such a library or repository is important (in summary):

1. It enables learnings to flow to assist with the development of safeguards and judicial reasoning in the *NSI Act* context; and
2. There is a benefit that is likely to be derived by historians (and the public in turn) from the maintenance of such records (particularly if they are subsequently released once the relevant national security concerns have passed).[70]

A further and related reason for such a library includes the substantial benefit that may be derived by judges and practitioners, including the Attorney-General and any

[68] Above n 11: INSLM Report [195] – [196].
[69] Above n 12, 5 & 12.
[70] Kieran Pender, evidence to INSLM public hearing, 9 June 2021, pp 31—32, cited in Above n. 11 [194].

Special Advocates or Open Justice Advocates, if they were each provided with access to such a library. We acknowledge that this access must be subject to strict conditions, appropriate levels of restriction, necessary clearances, and document management requirements. In this way, the library would function as a valuable resource for security-cleared legal practitioners given they, in addition to judges, are also likely to obtain greater assistance and training with access to such information (which is particularly relevant for newly-appointed Special Advocates or Open Justice Advocates). We anticipate this would ultimately assist the courts when they are required to make determinations under relevant *NSI Act* provisions.

The value of 'secret judgments' as potential precedents in the *NSI Act* context cannot be overlooked. However, on principle, we support an approach which ensures that judicial interpretation is with reference to public case law[71] (including formerly 'secret judgments', if and when they are subsequently made public as a result of periodic review). We acknowledge that the maintenance of appropriate security and the management of suitable access to such a library appear of paramount importance for the INSLM's purposes.[72] The Human Rights Law Centre considers that the expected benefits which may be derived from such an important initiative should not be undermined due to national security concerns; equally, it should be carefully maintained and managed by the courts with appropriate support from relevant government departments tasked with its oversight. Alternatively, consideration should be given to whether a government department is better placed to manage such a repository, with cooperation from the courts, subject to consideration of the impact of such an approach on judicial independence.

The Human Rights Law Centre therefore recommends that the *NSI Act* be amended (with consequential amendments to the *NSI Regulations* as necessary) to provide for the following requirements:

(a) Maintenance by courts of records of proceedings (including but not limited to proceedings held in closed court) and the provision of written reasons (including in the form of 'secret judgments', where necessary) for decisions made under the *NSI Act*;
(b) the establishment and maintenance of a 'secret judgments' library or repository, to hold all 'secret judgments', closed court transcripts and similar material;
(c) the provision of such material by courts to the library as soon as is practicable; and
(d) ongoing periodic review of the secrecy of materials held by the library (whether by a limited appointment of an Open Justice Advocate or otherwise) to ensure maximum openness to the full extent possible.

The Human Rights Law Centre considers that the processes and procedures for the library are matters which can be addressed in greater detail in the *NSI Regulations* and/or in the practice notes of relevant courts, as appropriate.

Against the introduction of such a repository, it might be said that it would constitute a significant administrative and financial burden, for perhaps minimal immediate return. We do not deny the considerable logistical hurdles posed by the establishment of a secret judgments library, and it seems likely that may judgments and other

[71] This was recommended by Special Advocates in the United Kingdom: Above n. 46, 140.
[72] Above n 11: INSLM Report [195].

documents contained within may not be accessible for quite some time. In the Witness J matter, it was suggested that the unredacted sentencing remarks may not be publishable for two decades or more. It might therefore be suggested that the return on investment is marginal. We strongly disagree. These burdens are the cost of secrecy. Open justice is a fundamental democratic principle with constitutional and human rights salience. Any departures from it must be carefully contained – to the extent necessary. It cannot be said that any of the secrecy imposed today by the *NSI Act* will likely still be necessary in, say, 50 years' time. For that reason, the system that permits these departures from open justice must also facilitate the resolution of that departure, at an appropriate point in the future, through proper means. The establishment of the safeguard and oversight mechanisms proposed in this submission, including a secret judgments repository, is the price of secrecy – a price to ensure the ultimate cost, to our democracy, is not too much.

Recommendation 14: The *NSI Act* should be amended, with consequential amendments to the *NSI Regulations*, to facilitate the retention and periodic review of closed court materials, and to allow for appropriate access to such materials.