Human Rights Law Centre

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 Johns' matter (a pseudonym)*

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Human
Rights
Law
Centre

Kieran Pender
Senior Lawyer

Daniel Webb
Legal Director

Nikkie Xu
Secondee Lawyer

Human Rights Law Centre
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4400
F: + 61 3 8636 4455
E: kieran.pender@hrlc.org.au
W: www.hrlc.org.au

Human Rights Law Centre

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. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Introduction

The Human Rights Law Centre is a national not-for-profit legal centre which promotes and protects human rights in Australia.

We welcome the opportunity to provide input to the Independent National Security Legislation Monitor (**INSLM**) in its review of the operation of Part 3 Division 1, which includes section 22, of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**the NSI Act**), in relation to the 'Alan Johns' matter (**Witness J**). If it would assist the INSLM, we would be happy to participate in the scheduled hearing for this review.

There is no place for secret trials in Australia. Witness J was charged, arraigned, convicted on a guilty plea, sentenced and served his sentence without any public awareness of the prosecution. The Witness J case only came to public attention because of coincidental inquiries made by journalists in relation to closed court proceedings, civil proceedings subsequently commenced by Witness J and questions asked in parliament. But for those developments, which were by no means inevitable, the Australian public would still have no knowledge of the prosecution of Witness J.

The Human Rights Law Centre takes the view that orders of the nature and effect of those made by the ACT Magistrates Court and ACT Supreme Court in the Witness J matter should never have been made. While we acknowledge that *partial secrecy* has a legitimate place in judicial proceedings in certain limited circumstances, we believe that the *complete secrecy* imposed in the Witness J case is wholly unprecedented.[1] It should never be repeated. We urge the INSLM to recommend that the *NSI Act* be amended to include adequate safeguards.

Secret trials have a long history in authoritarian states. They have no place in liberal democracies like Australia.

[1] We note the comments of the prior INSLM: 'I stand by my statement to the Senate this week as follows: 'As far as we know there has never been another case, at least in peacetime in Australia, where all of it has been conducted in secret. That is something significant and different, and for my part, I would not like to see it repeated': Dr James Renwick CSC, SC, 'What are the right encryption laws for Australia?' (Speech delivered at the Lowy Institute, Sydney, 5 March 2020) [1.71].

2. Recommendations

The Human Rights Law Centre recommends that:

1. the INSLM consider undertaking a more comprehensive review of the operation of the *NSI Act* in due course;

2. s 22 of the *NSI Act* be amended to provide minimum standards of openness that must be satisfied in any s 22 order;

3. the *NSI Act* be amended to provide for an Open Justice Advocate to be heard by the court in any application for a s 22 order;

4. s 22 of the *NSI Act* be amended to require that a court, in issuing an order pursuant to s 22(2), be required to publish statement of reasons, with the scheme for such reasons in s 32 replicated, with the addition of a requirement that the reasons be made publicly available;

5. s 47 of the *NSI Act* be amended to require the Attorney-General's annual report include information in respect of agreements and orders made throughout the year pursuant to s 22;

6. 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; and

7. amendments to the *NSI Act* in the context of s 22 be replicated in relation to other provisions, where appropriate.

3. Open Justice and Closed Courts

3.1 Context

Open justice is a core common law principle,[2]serving as an important accountability mechanism and helping ensure public confidence in the justice system.

Open justice is also required by international human rights frameworks, to which Australia is a signatory. Article 10 of the *Universal Declaration of Human Rights* 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]

Similarly, Article 14 of the *International Covenant on Civil and Political Rights* offers:

> *1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent**, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*[4]

As Article 14 recognises, there are certain well-established, legitimate exceptions to the requirements of open justice. The common law, via the public interest immunity doctrine, and statute have sought to balance the requirements of secrecy with the need for open justice.

3.2 The *NSI Act*

The introduction of the bill that became the *NSI Act*, in 2004, came in the context of two significant developments. Firstly, following the 9/11 terrorist attack in the United States, Australia began to introduce anti-terrorism laws that would proliferate in subsequent years. The prosecution of charges laid under these laws often presented challenges in relation to the protection of classified information. Secondly, in 2001, the ACT Supreme Court heard the case of *R v Lappas*, the prosecution of an intelligence officer charged with seeking to sell classified documents to a foreign third party. While the accused was ultimately convicted of another charge, the trial judge stayed the prosecution of one charge on the basis that it was not possible to reconcile the defendant's fair trial rights with the public interest immunity in relation to certain evidence.[5] The object of the *NSI Act*, as articulated in s 3, is therefore 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.*

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[2] See, eg, *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50.
[3] Emphasis added.
[4] Emphasis added.
[5] [2001] ACTSC 115.

The Human Rights Law Centre recognises that balancing these two competing public interests is rarely straight-forward. It is notable, though, that the *NSI Act* was enacted against the backdrop of the Australian Law Reform Commission (**ALRC**)'s comprehensive report *Keeping Secrets: The Protection of Classified and Security Sensitive Information*.[6] The *Keeping Secrets* report was commissioned in April 2003 by the then Attorney-General Darryl Williams. The Howard Government introduced the bill that would become the *NSI Act* in May 2004, four days *before* the ALRC published *Keeping Secrets*. In a submission to the Senate Legal and Constitutional Affairs Committee in relation to the bill, the ALRC noted that it had not been consulted during the development of the bill, nor had the parallel process of the drafting of the *NSI Act* been discussed during the ALRC's consultation with the Attorney-General's Department.

In other words, rather than develop the *NSI Act* on the basis of the considered reflection by the ALRC as to the appropriate balance to be struck, drawing on extensive input from stakeholders, the Howard Government pressed ahead with the *NSI Act* on its own. While the *NSI Act* has been amended from time to time in the past decade and a half, it has not been subject to a comprehensive review[7] that might properly consider whether the balance it struck was – and remains – appropriate. While we acknowledge that the INSLM's scope in this review is necessarily limited, and we concur with the INSLM's reservations about the appropriateness of a wider review while several *NSI Act*-related proceedings are ongoing, a more comprehensive review would be desirable in due course.

Recommendation 1: The Human Rights Law Centre recommends that the INSLM consider undertaking a more comprehensive review of the operation of the *NSI Act* in due course.

3.3 Minimum Standards of Openness

The crux of the Human Rights Law Centre's position is that there must always be a minimum standard of openness in judicial proceedings. It is our view that, whatever the national security interests in secrecy, these can be sufficiently accommodated by partially-closed proceedings. We do not accept that there are ever circumstances that justify completely secret proceedings, comparable to what occurred in the Witness J case. We submit that the wide range of secrecy mechanisms that can be imposed by a court, following agreement between the parties pursuant to s 22 of the *NSI Act*, are sufficient to protect any national security interests, even where a minimum 'floor' of openness operates to sufficiently protect the public interest in open justice.

The British case of *Guardian News and Media v Incedal* is instructive.[8] In that case, involving the prosecution of two men on terrorism offences, the prosecution sought both a closed trial and the anonymising of the defendants' identities (the closest comparable circumstances to the Witness J case, to the best of our knowledge, in the United Kingdom). Several English media organisations challenged the orders sought, and the matter was heard by the Court of Appeal. It expressed 'grave concern over the cumulative effects' of the orders sought, and ultimately arrived at a set of

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[6] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (2004, Report 98) ('*Keeping Secrets*').
[7] We note, though, that the INSLM reviewed the operation of the *NSI Act* in 2013: INSLM, *Annual Report* (7 November 2013) ch vii.
[8] [2014] EWCA Crim 1861.

guidelines which the Court felt would properly accommodate the national security interest in secrecy and the public interest in transparency. These included that:

(a) The trial would be heard predominantly *in camera*;

(b) The media and the public would be allowed to attend certain limited parts of the trial, including the swearing-in of the jury, parts of the prosecution's opening remarks, the verdict and, where applicable, any sentencing;

(c) 10 journalists were permitted to attend closed parts of the trial, subject to executing a confidentiality agreement relating to the proceedings. The journalists notes were securely stored until the end of the trial;

(d) The identities of the defendants were publicised; and

(e) Transcripts of the proceedings would be kept.

In reaching this compromise, the Court of Appeal made various comments salient in the present context:

> *[10] Open justice is both a fundamental principle of the common law and a means of ensuring public confidence in our legal system; exceptions are rare and must be justified on the facts. Any such exceptions must be necessary and proportionate. …*
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> *[31] This case is exceptional. We are persuaded on the evidence before us that there is a significant risk – at the very least, a serious possibility – that the administration of justice would be frustrated were the trial to be conducted in open Court … The relevant test is thus satisfied. Indeed, we go further: on all the material, the case for the core of the trial to be heard in camera is compelling and we accede to it …*
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> *[44] Any decision to hold a criminal trial in camera is troubling. However, for the reasons given, we are persuaded there is a compelling case for doing so. We are further satisfied that the solution arrived at in this Court means that everything possible has been done to minimise the departure from the principle of open justice …*
>
> *[47] … We express grave concerns as to the cumulative effects of (1) holding a criminal trial in camera and (2) anonymising the Defendants. We find it difficult to conceive of a situation where both departures from open justice will be justified. Suffice to say, we were not persuaded of any such justification in the present case.*

Given Australia's shared common law history with Britain, we submit that this case is instructive in demonstrating that even the most compelling national security interests can be accommodated with the need for some degree of open justice. We echo the Court of Appeal's observation that it is difficult to conceive of a situation where total secrecy, and not only partial secrecy, will be justified. Indeed, we would go a step further and submit that such a cumulative secrecy will *never* be justifiable in light of the compelling public interest in open justice. It is our view that the *NSI Act* should be amended to implement minimum standards of openness, below which the parties cannot agree and the courts cannot order, in relation to s 22.

We consider that the need for these minimum standards is particularly acute because of the mutual interest of parties in secrecy in some cases. The s 22 regime involves three parties: the Commonwealth Director of Public Prosecutions (**CDPP**), the Commonwealth Attorney-General and the defendant. The CDPP and Attorney-General are usually aligned in seeking to prioritise national security interests. While there are some atypical cases where the defendant has resisted secrecy, s 22 is predicated on the parties reaching an agreement. Given the complexity of the non-agreed pathways in the rest of the *NSI Act*, there is considerable practical impetus for a defendant

to accede to secrecy preferences of the Commonwealth. Additionally, in many circumstances, it is in the defendant's self-interest for their prosecution, often for extremely serious offences, to be shrouded by secrecy. These aligned interests have led to a state of affairs where s 22 agreements are commonplace. In the INSLM's 2011-12 Annual Report, it was said that:

> *the awful prospect of the* NSI Act *operating to its full extent in a contested way has had the effect of producing in nearly every such case [s 22] agreements in place of contested adjudications … There is some perversity in approving the operation of a complicated law by observing that the unpalatable prospect of its application has produced prudent negotiation and agreement. Agreement among adversaries in litigation is not an unalloyed good thing. Rights and obligations may both be compromised by most such agreements.*[9]

Indeed, the Attorney-General's *Practitioners' Guide* to the *NSI Act* admits that s 22 arrangements 'have become common practice in most cases'.[10] Given the technical complexity, delay and expense brought about by interlocutory litigation in relation to the *NSI Act*, as currently playing out in the prosecution of Bernard Collaery, the effect of the legislative scheme is to push parties towards an s 22 agreement. For defendants, added impetus is given by virtue of the fact that s 22 agreements may influence sentencing. As the Practitioners' Guide explains:

> *It is important to keep in mind that whether a pre-trial conference is held or section 22 arrangements are entered into can have implications at the sentencing stage of a criminal proceeding. This is because the court has discretion to take into account the cooperation (or otherwise) of a convicted person during the pre-trial negotiations regarding the possible disclosure of NSI.*[11]

The cumulative effect – that (a) in some circumstances all parties may have a preference for secrecy rather than transparency; and (b) the wider scheme encourages the use of s 22 agreements – is that the adversarial interests of the parties is insufficient to protect open justice in reaching s 22 agreements. Minimum standards of openness are required in the *NSI Act* to prevent a repeat of the Witness J case. There is no place for secret trials in Australia.

Recommendation 2: The Human Rights Law Centre recommends that s 22 of the *NSI Act* be amended to provide minimum standards of openness that must be satisfied in any s 22 order.

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[9] See INSLM, Annual Report (16 December 2011) 61–2.
[10] Attorney-General's Department, *NSI Act – Practitioners' Guide* (June 2008) 13.
[11] Ibid 13-14.

4. Stronger Safeguards

Even in circumstances where a partially closed hearing is necessary and proportionate, the Human Rights Law Centre considers that further safeguards are needed in the *NSI Act* to protect the public interest in open justice.

4.1 Contradictor

The INSLM has sought input on whether it would be desirable for a contradictor to be involved in proceedings when orders are sought of the nature ordered in the Witness J matter.

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'.

We consider a contradictor necessary in light of the potential for parties to be aligned in a desire for secrecy, as outlined above. While we acknowledge that trial judges are not required to give effect to an agreement among the parties (s 22(2) only provides that they 'may', not 'must', make orders as it considers appropriate), it is our view that the ordinary adversarial process is the best means of protecting open justice. Accordingly, in the absence of a party making submissions in protection of open justice, a contradictor – an Open Justice Advocate – is necessary to safeguard the public interest in open justice.

Such a scheme might be modelled off the Public Interest Advocate in the *Telecommunications (Interception and Access) Act 1979* (Cth) (***TIA Act***) or schemes in Victoria and Queensland that operate as accountability mechanisms in relation to police use of investigative and surveillance powers. As in the *TIA Act*, such an individual would need to be suitably experienced and eminent – the requirement that they be a security cleared senior counsel or a former High Court, Federal Court or Supreme Court judge appear to be equally appropriate in the present context.

Recommendation 3: The HRLC recommends that the *NSI Act* be amended to provide for an Open Justice Advocate to be heard by the court in any application for a s 22 order.

4.2 Published Statement of Reasons

Given the significant departure from core democratic principles required by partially secret trials, courts should be required to explain and justify the necessity of that departure. In *Keeping Secrets*, the ALRC concluded that:

> *whenever there is any restriction on the basic principles of open courts and the right to a public hearing, the court's judgment on those issues should be set out in a statement of reasons.*[12]

Similarly, the Senate Standing Committee on Constitutional and Legal Affairs, in considering these the legislation that became the *NSI Act*, recommended that the bill be amended to include

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[12] ALRC, *Keeping Secrets* (2004, Report 98) 471.

obligations on the court or the Attorney-General to provide statements of reason (dependent on whether the decision was made by the court, with its discretion retained, or the Attorney-General).

The Human Rights Law Centre considers that the trial judge, in making an s 22 order, should be required to issue public reasons. We believe such reasons would aid the transparency and accountability required to mitigate the impact of partial secrecy in criminal prosecutions. Such reasons would be necessarily framed in a way that avoids the disclosure of information that could compromise national security. We note that s 32 of the *NSI Act* already provides a statement of reasons scheme, with opportunity given to the Attorney-General to consider a court's draft statement and make submissions in relation to variations to avoid prejudicing national security. The mirroring of this scheme, with an added requirement that the reasons be made public, would be a straight-forward way to provide an essential layer of transparency. We note the existence of similar obligations on British courts in relation to closed trials.[13] We also echo the comments of the Law Council, that an obligation to publish reasons:

> *would, in and of itself, serve to maintain public trust in the criminal courts and provide reassurance that the departure from the common law presumption of open justice is done on a principled basis, and not for reasons of political embarrassment or the convenience or discomfort of the parties.*[14]

Recommendation 4: The HRLC recommends s 22 of the *NSI Act* be amended to require that a court, in issuing an order pursuant to s 22(2), be required to publish statement of reasons, with the scheme for such reasons in s 32 replicated, with the addition of a requirement that the reasons be made publicly available.

4.3 Transparency

Agreements reached under s 22 of the *NSI Act* must be subject to appropriate accountability and oversight. Section 47 of the *NSI Act* requires the Attorney-General to give, as soon as practicable after 30 June each year, both Houses of Parliament a report stating the number of certificates the Attorney-General has given under ss 26 and 28 throughout the past year and identifying the criminal proceedings to which each certificate relates. Given that an agreement under s 22 may well have a similar practical effect to an Attorney-General's certificate, similar reporting requirements should be required.

Recommendation 5: The HRLC recommends that s 47 of the *NSI Act* be amended to require the Attorney-General's annual report include information in respect of agreements and orders made throughout the year pursuant to s 22.

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[13] *Criminal Procedure Rules 2015* (UK) r 6.8(2).
[14] Law Council of Australia, Submission to INSLM, 'Inquiry into the operation of the *NSI Act* as it relates to the 'Alan Johns matter' (3 April 2020) [77].

4.4 Retention and Review

In addition to the published statements of reasons proposed at 4.2, we also recommend that s 22(2) be amended to require the judge to provide a judgment inclusive of information derived from secret evidence and/or other materials that cannot be published. We recommend that this 'secret judgment', alongside subsequent judgments issued in each proceeding the subject of an s 22 order, be stored in a 'library of secret judgments' maintained by the courts. This library would be available to judges and the Open Justice Advocate. Such a library was established in 2019 in the United Kingdom, following a practice direction by the heads of relevant jurisdictions.[15]

Secret judgments kept in this library should be subject to periodic review. The requirements of secrecy at a given point will not remain static with the effluxion of time. Just as various archival documents, such as Cabinet documents, are kept secret for a certain period and then subsequently made public, the impact done by the *NSI Act* to open justice would be lessened if there was some ability for the subsequent publication of relevant documents, once the national security concerns that justified the secrecy have passed.

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.

4.5 Replicate Safeguards

Many of the safeguards articulated here are equally salient in relation to the operation of other parts of the *NSI Act*. While we are cognisant of the narrow focus of the INSLM's review, we consider that it would be desirable that these safeguards – if adopted – were mirrored elsewhere in the *NSI Act*, such as in relation to the Attorney-General's certificates in Division 2. Absent such replication, parties might be more likely to pursue other avenues provided by the *NSI Act* to avoid the safeguards in relation to s 22. That would be undesirable, given the principled position for the safeguards is just as compelling in relation to Division 2, as other dimensions of the *NSI Act*.

Recommendation 7: The HRLC recommends that amendments to the *NSI Act* in the context of s 22 be replicated in relation to other provisions, where appropriate.

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[15] See Law Council of Australia, Submission to INSLM, 'Inquiry into the operation of the *NSI Act* as it relates to the 'Alan Johns matter' (3 April 2020) [53].