Opening Statement

Law Council
OF AUSTRALIA

Thursday, 9 June 2021

Opening Statement: Review into 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).

Dr Jacoba Brasch QC, President, Law Council of Australia

The Law Council welcomes the opportunity to appear at this hearing before the Independent National Security Legislation Monitor as part of the review into the operation of Part 3, Division 1, which includes section 22, of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (or the NSI Act) as emerged in the 'Alan Johns' matter.

Open justice is one of the primary attributes of a fair trial. It is a fundamental rule of the common law that the administration of justice take place in an open court, and that secrecy or suppression is only ever appropriate where the rare exceptions to open justice have been appropriately considered and applied. At common law, these exceptions are premised on being 'necessary to secure the proper administration of justice' or as permitted by statutory provisions, such as the operation of the NSI Act. Article 14(1) of the *International Covenant on Civil and Political Rights* protects the human right to a public trial and a public judgment for criminal proceedings, with limited exceptions.

While the Law Council welcomes the release of the summary of offending document, little information regarding the 'Alan Johns' case has been made available to the public. We still do not know what offences he pleaded guilty to, why he was given a term of imprisonment, exactly why the proceedings were conducted entirely *in camera*, and why even the ACT Attorney-General was never made aware that he was imprisoned in a correctional facility he ultimately oversees. This information may never be revealed.

The Law Council recognises that there may be appropriate cases where suppression of information about criminal offending and closure of courts to the public are necessary to protect national security information. However, the Law Council considers that based, on the information available, the extent of the secrecy surrounding the 'Alan Johns' case *prima facie,* appears to be a disproportionate response to the requirements to protect national security.

While the previous Attorney-General said that this case was unprecedented, the available information suggests that the NSI Act requires some reform to recalibrate the balance between the requirements of open justice and protecting the community against the disclosure of information that may genuinely prejudice national security.

At present, the NSI Act offers accused persons a binary option between agreeing to consent arrangements and orders under section 22 or enduring a lengthy contested hearing with the aim of securing more appropriate orders under section 31 of the Act. An example is the process which Bernard Collaery is currently undertaking before the ACT Supreme Court and Court of Appeal. Even then, the odds are weighed in favour of suppressing information because the court is required to place preferential weight on doing so under ss 31(8) of the NSI Act. The difficulty and uneven outcome of this process inherently encourages accused persons to take the option of agreeing to section 22 orders – sometimes with disproportionate outcomes.

The Law Council's primary recommendations are directed at amending section 22 of the NSI Act to ensure that, even where an accused person feels they have little option to consent to such arrangements, those provisions carry sufficient safeguards to ensure that we never see the outcome in 'Alan Johns' again.

This matter may be unprecedented, however without a change in the law there is no guarantee that we will not see another secret trial or prisoner in Australia.

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