Law Council
OF AUSTRALIA

Inquiry into the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* as it relates to the 'Alan Johns' matter

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Acknowledgement

The Law Council is grateful to its National Criminal Law Committee and National Human Rights Committee for its assistance in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Independent National Security Legislation Monitor's (**INSLM**) review of the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**).

2. The Law Council notes that the INSLM is not conducting a full review of the NSI Act, but rather will focus on addressing specific issues raised by the criminal proceedings concerning 'Alan Johns', namely whether the NSI Act should be amended to include provision for:

   - a contradictor, such as media interests, or a Special Advocate (such as is now provided for in control order matters) to be heard;
   - at least some details of the charges and orders to always be publicly known; and
   - reasons to always be given by the presiding judge for the exceptional step of departing from the strong presumption of open criminal justice.

3. In December 2019, the Law Council wrote to the Commonwealth Attorney-General expressing concern with criminal proceedings conducted in complete secrecy following revelations that a person known by the pseudonym of 'Alan Johns' had been prosecuted and imprisoned in closed proceedings. These court proceedings only came to light following the publishing of a decision of the Supreme Court of the Australian Capital Territory for a subsequent matter concerning the administration of the offender's prison sentence.[1]

4. 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'[2] 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* (**ICCPR**) protects the human right to a public trial and a public judgment for criminal proceedings, with limited exceptions.[3]

5. The Law Council notes that very little is publicly known concerning 'Alan Johns', only that it has been reported he received a prison sentence of two years and seven months for serious national security offences. Questions on notice by Senator Rex Patrick in Parliament have also yielded some limited additional information, as have several subsequent media publications.[4] The Law Council considers that based on the information available, the extent of the secrecy surrounding these proceedings is *prima facie* a disproportionate response to the requirements to protect national security. Very little information regarding the proceedings has been made available

[1] *Johns v Director-General of The ACT Justice and Community Safety Directorate* [2019] ACTSC 31.
[2] *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465.
[3] *International Covenant on Civil and Political Rights*, opened for signature, ratification and accession on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[4] See for example, Christopher Knaus 'Are We Now in a Totalitarian State: Case of Canberra's Mystery Prisoner Alarms Judge', *The Guardian* (online, 21 November 2019) <www.theguardian.com/law/2019/nov/21/are-we-now-a-totalitarian-state-case-of-canberras-mystery-prisoner-alarms-judge>, Jack Snape, 'Witness J: How to Hide a Criminal Trial from the Public Despite Australia's Principle of Open Justice', *ABC News* (online, 5 December 2019) <www.abc.net.au/news/2019-12-05/witness-j-how-can-a-trial-be-kept-secret/11739288>.

to the public, including the charges and the provision of any reasons why the proceedings were conducted entirely *in camera*.

6. While it may be that the case involving 'Alan Johns' 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.

7. Key recommendations of this submission include:

- There should be an added legislative step for the public interest in open justice to be considered by a court before *in camera* proceedings take place under the NSI Act. A Special Advocate scheme should be utilised for this step, which could be modelled on the *Public Interest Advocate Scheme in the Telecommunications (Interception and Access) Act 1997* (Cth).
- Alternatively (or in addition to) the above, consideration should be given to the development of federal legislation which would seek to ensure the principles of open justice, such as a Commonwealth Open Courts Act.
- Exercising the powers under section 6 of the *Independent National Security Legislation Monitor Act 2010* (Cth), the INSLM should review, the effectiveness of the role of the Special Advocate from time to time, and report and make recommendations to the Federal Parliament in relation to the role.
- The statement of reasons required pursuant to subsection 32(1) for orders which are made under section 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) should be made publicly available, albeit framed in such a way as to not disclose any information that could genuinely compromise national security.
- Where courts conduct proceedings *in camera*, they should be required to provide reasons for doing so, albeit framed in such a way as to not disclose any information that could genuinely compromise national security. When providing these reasons to the public, at least some details of the charges and orders should be included.
- A repository, similar to the 'library of closed decisions' established in 2019, should be created for *in camera* proceedings in Australia.

Operation of the NSI Act

8. The provisions of the NSI Act apply to 'federal criminal proceedings',[5] which include trials, bail proceedings, committal proceedings, discovery processes, sentencing and appeals.[6] The NSI Act also applies to 'civil proceedings', which means any proceedings in a court of the Commonwealth, State or Territory other than a criminal proceeding. Civil proceedings include *ex parte* applications, appeal proceedings and interlocutory proceedings.[7] The regime for civil proceedings is substantially similar to that for criminal proceedings.

9. In broad terms, the NSI Act establishes a scheme to protect information from disclosure during federal proceedings where the disclosure is likely to prejudice Australia's national security, which is defined as 'defence, security, international relations or law enforcement interests'.[8] This scheme requires parties to notify the Attorney-General at any stage of a proceeding where a party expects to introduce

[5] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 14.
[6] Ibid s 13.
[7] Ibid s 15A.
[8] Ibid s 3.

information or call a witness that may disclose information that relates to, or the disclosure of which may affect, national security.[9]

10. On receiving advice that the Attorney-General has been so notified, the court must order that the proceedings be adjourned until the Attorney-General decides whether to issue a non-disclosure or witness exclusion certificate.[10] Sections 26 and 28 of the NSI Act empowers the Attorney-General to issue a 'criminal non-disclosure certificate' or a 'criminal witness exclusion certificate' if he or she considers that disclosure in a criminal trial is likely to prejudice national security. A 'criminal non-disclosure certificate' must be provided to the court and the Attorney-General may also provide other materials.[11] For example, if the information is in the form of a document, the Attorney-General may provide a copy of the document with the information deleted or a summary of the information. A witness exclusion certificate must also be given to the court.[12]

11. When a section 26 or section 28 certificate is issued, the court must hold a closed hearing to decide whether to make one of the prescribed orders under section 31 (whether the ban imposed by the certificate will remain, be modified or removed).[13] The defendant and their legal representative may be excluded from the hearing if the disclosure would be likely to prejudice national security.[14]

12. Under section 31, the court may order that the information may be disclosed partially, or not at all.[15] The matters which must be considered by the court in making this determination are set out in subsection 31(7), which relevantly provides as follows:

> *31(7) The Court must, in deciding what order to make under this section, consider the following matters:*
>
> *(a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:*
>
> *(i) where the certificate was given under subsection 26(2) or (3)—the information were disclosed in contravention of the certificate; or*
>
> *(ii) where the certificate was given under subsection 28(2)—the witness were called;*
>
> *(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;*
>
> *(c) any other matter the court considers relevant.*
>
> *(8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).*

[9] Ibid s 24.
[10] Ibid ss 24(4), 26, 28.
[11] Ibid ss 26(2), (3).
[12] Ibid s 26(2).
[13] Ibid ss 27, 29.
[14] Ibid s 29(2). However, the defendant and his or her legal representative must be given the opportunity to make submissions to the court on arguments relating to the disclosure of information or the calling of witnesses: ss 29(2)-(4).
[15] Ibid ss 31(2), (4), (5).

13. The Law Council notes its concern that principles of open justice are not relevant to the determination undertaken by the court pursuant to section 31.

14. The NSI Act also includes a system for requiring legal practitioners to undergo security clearances before being permitted access to national security information in the context of the Special Advocate scheme adopted in relation to control order proceedings.[16]

15. The Law Council has previously identified a range of issues with the operation of the NSI Act, including concerns that:

    (a) the notification provisions place a heavy burden on parties and lawyers engaged in federal proceedings as well as the Attorney-General, and are not necessary in light of options that pre-dated the NSI Act for protecting national security information in court proceedings;

    (b) the security clearance system for lawyers prescribed in the NSI Act threatens the right to a fair hearing by potentially:

        (i) restricting a person's right to a legal representative of his or her choosing by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information;

        (ii) allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information; and

    (c) the court's discretion to maintain, modify or remove restrictions on disclosure of information is unduly fettered.

16. These issues are further discussed in the Law Council's submission to the then INSLM as part of the 2013 inquiry into the operation of the NSI Act.[17] However, the Law Council appreciates that the current inquiry is not intended to be a comprehensive review of the NSI Act, but rather focusses narrowly on issues of open justice as raised by the 'Alan Johns' matter. While the Law Council continues to advocate for broader reforms to the NSI Act and to secrecy offences across federal legislation, the following submissions are confined to the matters set out by the INSLM for the purposes of the current review, namely the potential role of a Special Advocate, and minimum requirements to publish certain particulars relating to criminal proceedings that might otherwise be supressed due to national security considerations.

Open justice and the NSI Act

17. A fundamental aspect of the common law, the administration of justice and the right to a fair trial is open justice.[18] The High Court has held that:

[16] Ibid pt 4 div 1.
[17] Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Inquiry into the Operation of the National Security Information (Criminal and Civil Proceedings) Act 2004* (19 July 2013).
[18] Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 674.

> *the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances*.[19]

18. In *Russell v Russell*,[20] Gibbs J said that:

> *Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'. To require a court invariably to sit in closed court is to alter the nature of the court.*[21]

19. The principle of legality offers some protection to the principle of open justice,[22] as:

> *a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle.*[23]

20. It has been long recognised by the common law that the principle of open justice is not absolute and may be limited, in particular when 'necessary to secure the proper administration of justice' or where it is otherwise in the public interest.[24] As noted above, Article 14(1) of the ICCPR provides, inter alia:

> *… 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*.[25]

21. Regarding the limitation on the principle of open justice by the NSI Act, the Law Council highlights that the issuance of a certificate under section 26 or 28 triggers the mandatory holding of a closed hearing. This is because, as detailed above, the court is required to commence a section 27 hearing upon a certificate being issued by the Attorney-General, which must be a closed hearing pursuant to section 29.

22. Further, when a certificate under section 26 or 28 is issued, a court is required to commence the section 27 hearing and section 31 orders process, without first having

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[19] *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
[20] (1976) 134 CLR 495.
[21] Ibid 520 [8].
[22] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (Report 129, 12 January 2016) [8.55].
[23] *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ).
[24] Ibid [21] (French CJ); *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).
[25] *International Covenant on Civil and Political Rights*, opened for signature, ratification and accession on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

a section 21 'national security information hearing', as this would 'have a potential to undermine the efficacy of the notice process, which in turn, would defeat the intention of the [NSI] Act.[26]

23. The Law Council is concerned that the obligation of the court to have a closed hearing subsequent to the issuance of a certificate by the Attorney-General, to determine whether it will maintain, modify or remove the ban on the disclosure of the information in question or the calling of witnesses,[27] does not offer the court the opportunity to make its own determination about the principle of open justice.

24. As the Law Council has previously submitted, prior to the introduction of the NSI Act, a range of mechanisms existed to protect against the unauthorised disclosure of national security information. Chief among these was the common law claim of public interest immunity, now also reflected in the uniform Evidence Acts. These mechanisms still exist alongside the NSI Act.[28]

25. These mechanisms place the judiciary at the centre of the inquiry as to whether certain material should or should not be disclosed. The public interest immunity principle recognises the need for the Government to protect certain information in the interests of national security, but also reflects the centrality of the concept of open justice to ensuring a fair trial. While the executive branch of Government is given the opportunity to provide the court with an opinion regarding whether or not the information would be likely to prejudice national security and should therefore not be disclosed, the court retains the discretion to reach an alternative conclusion, or to take appropriate action to address any risk to national security, having regard to the defendant's right to a fair trial.[29]

26. The Law Council is concerned that the issuance of certificates by the Attorney-General, and the consequences that flow from such certificates,[30] circumscribe the court's power to determine whether particular information should be disclosed and invest the executive with a broad discretion to limit or prohibit disclosure.[31] Further, there is no opportunity provided to the affected individual and their legal representative to interrogate the advice received by the Attorney-General upon which it is decided to issue a certificate.[32]

27. The Law Council considers there should be some added legislative step for the public interest in open justice to be considered by a court before a *in camera* proceedings take place. The Law Council considers that a Special Advocate should be involved in this step, as further discussed below.

28. Such an approach would align with other jurisdictions. For example, in the UK, if it stated by one party that there would be information disclosed in a civil proceeding that

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[26] *Peter Dean v Bernard Collaery (No 1)* [2018] ACTMC 29.
[27] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31.
[28] Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Inquiry into the Operation of the National Security Information (Criminal and Civil Proceedings) Act 2004* (19 July 2013) 34 [127].
[29] Ibid [128].
[30] In past submissions relating to the NSI Act, the Law Council also expressed concern that Part 3 of the NSI Act undermines the principle of legality and the right to a fair trial, by imposing restrictions on the defendant's ability to adduce evidence relevant to his or her case, or to challenge the prosecution case against him or her: ibid 35 [130].
[31] Ibid [129].
[32] The Law Council recognises that the affected individual and their legal representative may receive the information in question in amended or redacted form, or a summary of the information, but they do not have an opportunity to contest that this information ought to lead to a certificate being issued: see *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 26(2), (3), (8).

is damaging to national security,[33] the court may declare that the proceedings are of such a nature that a 'closed material applications' can be made only if 'it is in the interests of the fair and effective administration of justice that this information not be disclosed'.[34] This is discussed further below.

29. Further, the principles of open justice are a factor for consideration in the context of suppression or non-publication orders in Australian jurisdictions. For example, in New South Wales, section 6 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) requires the court, when deciding to make a suppression or non-publication order, to take into account that a 'primary objective of the administration of justice is to safeguard the public interest in open justice'. Similarly, in Victoria, subsection 28(1) of the *Open Courts Act 2013* (VIC) states:

> *In determining whether to make any order, including a closed court order, a court or tribunal must have regard to the primacy of the principle of open justice and the free communication and disclosure of information which require the hearing of a proceeding in open court.*

30. The Law Council considers it necessary in the context of the NSI Act for a court to similarly consider the principle of open justice as this would allow for the court to direct proceedings or part of the proceedings to be conducted *in camera* only when satisfied that it is in the interests of Australia's national security which has been weighed against the principles of open justice. A provision to this effect could be inserted into both the NSI Act and section 93.2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). Alternatively, the Law Council supports in principle the development of Federal legislation which would seek to ensure the principles of open justice, such as a Commonwealth Open Courts Act, while recognising that this may fall outside the scope of the INSLM's current inquiry.

31. Section 93.2 applies to a hearing of an application or other proceedings before a federal court, a court exercising federal jurisdiction or a court of a Territory, whether under the *Criminal Code* or otherwise. It authorises the judge or magistrate, or other person presiding or competent to preside over the proceedings, if satisfied that it is in the interest of the security or defence of the Commonwealth, to:

    (a) order that some or all of the members of the public be excluded during the whole or a part of the hearing;

    (b) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or

    (c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.[35]

[33] *Justice and Security Act 2013* (UK) s 6(4)(a).
[34] Ibid s 6(5).
[35] Such an order can be made at any stage of the proceedings. A person commits an offence punishable by up to five years imprisonment if the person contravenes an order made or direction given under this section.

Use of a contradictor or Special Advocate

32. The INSLM has sought views on whether the NSI Act should be amended to include provision for a contradictor or a Special Advocate to challenge the necessity for *in camera* proceedings.

33. In this regard, the Law Council agrees in principle that there should be some means by which an advocate can effectively challenge whether or not it is in the public interest that the presumption of open justice be departed from.

34. The Law Council notes that while the NSI Act does not specifically provide for the use of 'special defence counsel' (with the exception of control orders), in *R v Lodhi*[36] the court held that the provisions of the NSI Act were not inconsistent with the appointment of special counsel and were in fact sufficiently wide to allow a person appointed as special counsel to take part in certain hearings under the NSI Act.

35. The Law Council notes that in the United Kingdom, a Special Advocate acts in 'closed material proceedings' when the court determines whether the proceedings are of a nature whereby 'closed material applications' can be made, as is explained below.

Media interests

36. The INSLM's terms of reference specifically refer to 'media interests' when raising the prospect of a contradictor. Certainly, the media would have an interest in maintaining open court proceedings and could be given standing under the NSI Act to be heard on any application for proceedings to be conducted *in camera*. This type of legislative provision has been adopted in New South Wales where paragraph 9(2)(d) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) provides that a news media organisation is 'entitled to appear and be heard by the court on an application for a suppression order or a non-publication order'.

37. In Victoria, the *Open Courts Act 2013* (VIC) also makes provision for media organisations to be notified of any application for a suppression order so that they may be heard on the application.

38. In the UK, rules 6.6 to 6.8 of the *Criminal Procedure Rules 2015* (UK) govern the procedure for when a court can order a private trial.[37] An application in writing must be received no less than five business days before the start of the trial.[38] The application must be displayed within the vicinity of the courtroom and give notice to the media.[39] The media should be given an opportunity to make representations in opposition to the application.[40] The application for a case to be heard in private must explain why no measures other than trial in private will suffice.[41] It follows that if the court can prevent the anticipated prejudice to the trial process by adopting a lesser measure, it should adopt that course.[42] The court must not commence the trial in private until the following business day or until any appeal against the order has been disposed of (if later).[43]

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[36] *R v Lodhi* [2006] NSWSC 586.
[37] *Criminal Procedure Rules 2015* (UK) r 6.6(1).
[38] Ibid r 6.6(2).
[39] Ibid r 6.6(5).
[40] Ibid r 6.7.
[41] Ibid r 6.6(3)(c).
[42] Judicial College, 'Reporting Restrictions in the Criminal Courts' (Guide, May 2016) 9 <https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>.
[43] *Criminal Procedure Rules 2015* (UK) r 6.6(8).

39. However, it is noted that there is a distinction between the interests of a contradictor acting on behalf of media interests, and a Special Advocate acting on behalf of the administration of justice in criminal proceedings. The former category is likely to have an interest in the open administration of justice and transparency. The latter may, depending on the nature of the charge and evidence, also play an important role in guarding against the unfairness that might flow from a defendant being prosecuted *in camera*.

Special advocate or contradictor

40. The Law Council considers that the use of a Special Advocate or contradictor, who is tasked with promoting the public interest in open justice, in a determination of whether to hold proceedings *in camera*, could provide a useful safeguard if implemented correctly.

41. This section discusses the use of Special Advocates in the United Kingdom and in Australian context of control orders, as well as the use of Public Interest Advocates for journalist information warrants.

Special Advocates in United Kingdom

A Special Advocate or contradictor on necessity for *in camera* proceedings

42. In the United Kingdom (**UK**), a Special Advocate is involved from the beginning of a process to determine whether civil proceedings are of such a nature that the court should permit applications for withholding information that may damage national security, as well as during the hearing when the court has determined that information cannot be provided to the individual party and their legal representative.

43. The legal basis for 'closed material applications' in civil trials in the UK is found in the *Justice and Security Act 2013* (UK) (**Justice and Security Act**). Section 6 of the Justice and Security Act provides that the court may make a declaration that the proceedings are one in which 'closed material applications' may be made to the court.[44] A 'closed material application' is an application whereby the relevant person[45] has the opportunity to make an application to the court for permission not to disclose material otherwise than to the court, a Special Advocate and the Secretary of State (when the Secretary of State is not a party to the proceedings).[46] These applications can only be made once the court has made a declaration under section 6 that such applications are permitted in the proceeding.

44. The court may make such a declaration, on the application of the Secretary of State, any party to the proceedings, or on its own motion,[47] if it considers that two conditions are met:[48]

    (a) a party to the proceedings would be required to disclose 'sensitive material' in the course of the proceedings to another person;[49] or

[44] *Justice and Security Act 2013* (UK) s 6(1).
[45] The party or parties to the proceedings who would be required to disclose the sensitive material: ibid s 6(8).
[46] Ibid s 8(1)(a).
[47] Ibid s 6(2).
[48] Ibid s 6(3).
[49] Ibid s 6(4)(a).

(b) a party to the proceedings would be required to make such a disclosure were it not for, inter alia, the possibility of a claim for public interest immunity in relation to the material;[50] and

(c) it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.[51]

45. 'Sensitive material' is defined to mean 'material the disclosure of which would be damaging to the interests of national security'.[52] The court must not consider this type of application by the Secretary of State under unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.[53]

46. A Special Advocate is appointed to represent the interests of a party in any section 6 proceedings from which the party (and any legal representative of the party) is excluded.[54] In this instance, where the individual and their legal representative is excluded from the hearing, the functions of the Special Advocate are to:

(a) make submissions to the court at any hearing or part of a hearing from which the specially represented;

(b) adduce evidence and cross-examining witnesses at any such hearing or part of a hearing;

(c) make applications to the court or seeking directions from the court where necessary; and

(d) make written submissions to the court.[55]

47. Part 82 of the *Civil Procedure Rules* requires that a hearing of the application for a declaration under subsection 6(2) is held in the absence of the individual and their legal representative.[56] Therefore, upon the Secretary of State (as well as the court and every other party to the proceeding) receiving notice that a person intends to make an application under subsection 6(2) for a declaration,[57] or upon the Secretary of State applying for a declaration, the Secretary of State must inform the Attorney-General, who has the power to appoint a Special Advocate.[58] A party to the proceedings can also request the appointment of a Special Advocate.[59]

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[50] Or a party to the proceedings would be required to make such a disclosure were it not for: the fact that there would be no requirement to disclose if the party chose not to rely on the material; section 17(1) of the *Regulation of Investigatory Powers Act 2000* (exclusion for intercept material); or any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section: ibid ss 6(4)(b)(i)-(iv).
[51] Ibid s 6(5).
[52] Ibid s 6(11).
[53] Ibid s 6 (7).
[54] Ibid s 9(1).
[55] *Civil Procedure Rules* (UK) r 82.10.
[56] Ibid r 82.9(4).
[57] Part 82 of the *Civil Procedure Rules* requires that any person (other than the Secretary of State) who intends to make an application under subsection 6(2) for a declaration must give 14 days' notice before making the application: ibid r 82.21. This application must contain a statement of reasons to support the application and any additional written submissions, material in relation to which the court is asked to find that the first condition in section 6 of the Act is me and the details of any special advocate already appointed: Ibid r 82.22
[58] Ibid r 82.9(1).
[59] Ibid r 82.9(4).

48. Notice of the application for a declaration is then served on the Special Advocate.[60] Subsequently, a directions hearing is held, which specifies by when the parties and the Special Advocate must file and serve any written evidence or submissions.[61] A hearing then takes place without the individual and their legal representative.[62] If a declaration is made, the court can give further directions for management of the case, such as for a hearing of a closed material application.

A Special Advocate or contradictor when affected individual and their legal representation excluded

49. Pursuant to section 8 of the Justice and Security Act and Part 82 of the Civil Procedure Rules, an application for permission to not disclose sensitive material otherwise than to the court, any Special Advocate, and the Secretary of State – a 'closed material application' – is considered at a hearing in the absence of every other party to the proceedings and their legal representative.[63] Instead, a 'closed material application' is determined at a hearing whereby the Special Advocate and the Secretary of State can make oral representations,[64] whereby the court considers this sensitive material with the assistance of the Special Advocate. The Special Advocate examines issues such as the relevance of the secret intelligence information to the case, its admissibility and the legitimacy of its classification.[65]

50. A Special Advocate is permitted to disclose to the individual a simplified summary or 'gist' of sensitive material used in the closed hearing.[66] The Special Advocate is instructed to protect the appellant's interests and may argue against admitting material on the grounds that it would prevent a fair trial,[67] but they may not communicate with the appellant without the government's permission,[68] and they can never communicate about the secret evidence.[69]

51. The court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security.[70] If permission is given by the court not to disclose material, it must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings (and every other party's legal representative), but must ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security.[71]

52. Previously, the Law Council has raised some of the issues with the Special Advocate system in the United Kingdom, as identified by Special Advocates themselves:

    (a) prohibition on any direct communication with open representatives;

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[60] Ibid r 82.23(1).
[61] Ibid r 82.23(3).
[62] Ibid r 82.23(4).
[63] Ibid r 82.14(5); *Justice and Security Act 2013* (UK) r 8(1)(b).
[64] Ibid r 82.8(b).
[65] Directorate-General for Internal Policies, European Parliament, 'national Security and Secret Evidence in legislation and Before the Courts: Exploring the Challenges (Study Report, 2014) 22 <https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU%282014%29509991_EN.pd>.
[66] Ibid. See *Civil Procedure Rules* (UK) r 82.11.
[67] Directorate-General for Internal Policies, European Parliament, 'national Security and Secret Evidence in legislation and Before the Courts: Exploring the Challenges (Study Report, 2014) 22.
[68] *Civil Procedure Rules* (UK) r 82.11(4), (5).
[69] Ibid r 82.11(1), (2).
[70] Ibid r 82.13(10).
[71] Ibid r 82.13 (7).

(b) the inability effectively to challenge non-disclosure;

(c) the lack of any practical ability to call evidence;

(d) the allowance of 'second or third hand hearsay to be admitted, or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings';[72]

(e) a systemic problem with prejudicially late disclosure by the Government;

(f) where *SSHD v AF (No 3) [2009] 3 WLR 74* applies, the Government's approach of refusing to make such disclosure as is recognised would require to be given until being put to its election, and the practice of 'iterative disclosure';

(g) the increasing practice of serving redacted closed documents on the Special Advocates, and

(h) the lack of a searchable database of closed judgments.[73]

53. Regarding the last point, the Law Council notes that in January 2019, the Lord Chief Justice of England and Wales and the Senior President of Tribunals published a Practice Direction setting out the rules for a library of closed judgements following a 'closed material procedure'[74] covering cases in England and Wales. In the Royal Courts of Justice, each closed judgment must be lodged within 14 days of being delivered or handed down, for consideration for inclusion in the library of closed judgments.[75] The library can be accessed only by security-cleared Special Advocates and judges.[76]

Special Advocates in the NSI Act for necessity of *in camera* proceedings

54. The Law Council notes that the first INSLM, Mr Bret Walker SC, identified that the 'question of whether special advocates should be introduced as a component of the NSI Act regime arises most acutely in relation to closed hearings required by subsections 27(3) or 28(5)'. Mr Walker noted that:

> *These hearings are voir dire hearings to determine whether or not information must be disclosed (and if so, in what form) or why a witness should not be called to give evidence. While the defendant and their lawyers must be given the opportunity to make submissions to the court about the prosecutor's non-disclosure argument their ability to be meaningfully heard on why the information sought to be redacted or summarized should be put to the jury is hindered by subsec 29(3) of the NSI Act. This provides that the court may order that the defendant or their lawyers must not be present during any part of the hearing in which the*

[72] Ibid.
[73] Law Council of Australia, Submission to the National Security legislation Monitor, *Adequacy of Safeguards Relating to the Control Order Regime* (30 September 2015) 13, citing Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, Justice and Security Consultation, (December 2011) [17]
[74] Pursuant to the provisions of Part 1 of the *Justice and Security Act 2013* (UK), proceedings in relation to *Terrorism Prevention and Investigation Measures Act 2011* (UK) sch 4; or in any Tribunal established under the *Tribunals, Courts and Enforcements Act 2007* (UK): Lord Chief Justice of England and Wales and the Senior President of Tribunals, 'Practice Direction: Closed Judgments' (14 January 2019) [1].
[75] Ibid [2].
[76] Ibid [3]. See also Owen Bowcott, 'Secret Judgments Database Opened to Special Advocates and Senior Judges', *The Guardian* (online, 24 January 2019) <https://www.theguardian.com/law/2019/jan/23/secret-judgments-database-opened-to-special-advocates-and-senior-judges>.

> *prosecutor or Attorney-General's representative gives details of the information or gives information in arguing why the information should not be disclosed or the witness should not be called to give evidence.*[77]

55. Mr Walker SC concluded:

> *In this context, lawyers for both sides and the court have adopted measures to avoid the disclosure of the secret information without the need to prevent lawyers' access to the [public interest immunity] hearing altogether. The INSLM sees no reason why such a practical approach would not continue to be applied to proceedings under the NSI Act as a way of preventing the information from being disclosed during the hearing and thus satisfying the court that the information would not be disclosed to the defendant or uncleared lawyer, obviating the need to order they not be present during the hearing.*[78]

56. For this reason, alongside his view of the fundamental problems associated with using special advocates to overcome fair trial deficiencies in criminal proceedings, Mr Walker SC did not recommend Special Advocates at that point in time. [79]

57. The Law Council has previously recommended to the INSLM a system of Special Advocates to participate in control order proceedings under the NSI Act, which was subsequently recommended by the second INSLM,[80] and since been introduced with the passage of the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth). This system permits each Australian jurisdiction to have a panel of security-cleared barristers who can participate in closed material procedures where the subject of a control order has sensitive information withheld from them and their legal representative within the framework established by Subdivision 3 within Part 3A of the NSI Act.

58. The Law Council has also previously expressed the view that the unfairness inherent in closed court processes cannot necessarily be remedied by the appointment of a Special Advocate.[81] In particular, as a Special Advocate has no knowledge of the instructions held by those representing the accused or a civil party due to prohibitions on such communication, their role in addressing this unfairness is limited.

59. However, the Law Council considers that the use of the Special Advocate who is tasked with promoting the public interest in open justice could provide a useful safeguard in challenging the necessity of *in camera* proceedings, if implemented correctly.

60. To this end, while the Law Council supports the introduction of a contradictor or a Special Advocate to challenge the necessity for *in camera* proceedings, it is essential for fundamental minimum safeguards to be met. These safeguards include:[82]

    (a) there must be a legislated requirement of a minimum standard of information to be disclosed to an affected individual. The minimum standard should be that the

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[77] Independent National Security Legislation Monitor, *7th Annual Report* (2013) 112 [VII.13].
[78] Ibid.
[79] Ibid 113.
[80] Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (January 2016) 6 [4.1] <https://www.inslm.gov.au/sites/default/files/control-order-safeguards-part1.pdf>.
[81] Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Inquiry into the Operation of the National Security Information (Criminal and Civil Proceedings) Act 2004* (19 July 2013) [173].
[82] Ibid 55 [217].

person is given sufficient information about the allegations against him or her, or the reasons for the relevant decision under consideration, to enable effective instructions to be given in relation to those allegations or reasons;[83]

(b) Special Advocates must be appointed under a process that is subject to the full and free discretion of the court. In making a decision that a Special Advocate is necessary, the court must be able to give unfettered weight to the principles of open justice, natural justice and the right to a fair trial, as well as to the likelihood of damage to the interests of national security if relevant material were disclosed. It should be acknowledged that there will be cases in which it would not be fair and justifiable to rely on Special Advocates;[84]

(c) the appointment of the Special Advocate should be a last resort, where the trial judge is satisfied that no other alternative will adequately meet the interests of fairness to the affected individual.[85] The available alternatives could include restricting disclosure to the legal advisers of the parties, *in camera* proceedings, or orders restricting reporting of the proceedings;

(d) Special Advocates are provided with access to the affected individual, his or her counsel, the case against him or her as well as access to the information subject to the closed hearing;

(e) practical support must be available which assists Special Advocates to fulfil their role to the maximum extent possible. For example:

(i) they must be provided with adequate administrative and research support and resources. This must include practical access to resources and expertise which would enable them to challenge expert security evidence, to which courts are almost bound to defer given the absence of any evidence or expert opinion to the contrary; and

(ii) they must be able to search closed judgments to identify precedents;

(f) Special Advocates should be fully funded by Government without burdening existing legal aid funding;

(g) In light of their different role, Special Advocates should be exempt from liability in relation to the conduct obligations which ordinarily attach to legal representatives;[86] and

(h) Care must be taken to ensure that a wide range of suitably qualified Special Advocates is available, including on a geographic basis, in order to ensure that an affected individual has an effective right of choice regarding the person to act as his or her Special Advocate.

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[83] This is similar to Recommendation 31 of the COAG Review Report, which calls for a minimum standard of disclosure to be legislated in the anti-terrorism control order context: Australian Government*, Council of Australian Governments Review of Counter-Terrorism Legislation Report* (5 May 20130).

[84] *R (Roberts) v Parole Board* [2005] UKHL 45, [144] (Lord Carswell), cited in Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 63rd sess, Agenda Item 67(c), UN Doc A/63/223 (6 August 2008) 19.

[85] *R v Lodhi* [2006] NSWSC 586, [45] (Whealy J).

[86] See, eg, *Immigration Act* (NZ) s 268.

61. In addition, particular consideration must be given to the issue of communication between the Special Advocate and the affected individual or his or her ordinary legal representatives, following disclosure of classified information to the Special Advocate.

62. UK Special Advocates have consistently raised the bar on further communication as a fundamental difficulty. The Law Council considers that the parameters of communication must be considered carefully, in light of the need to ensure that information remains secure *and* the need to assist Special Advocates to perform their roles effectively. It is concerned that a Special Advocate may be placed 'in the position of having to challenge the state's case without the ability to freely consult with the person who is often best placed to refute the state's allegation and who may have a ready explanation for them'.[55]

63. Consideration should also be given to the less restrictive approach taken under Canada's *Immigration and Refugee Protection Act 2001*, under which the Special Advocate must gain the permission of the Court to further communicate with the affected individual, but is not required to notify the Government.[87]

64. If a Special Advocate model is to be adopted, the Law Council considers that the INSLM should review, pursuant to section 6 of the *Independent National Security Legislation Monitor Act 2010* (Cth), from time to time, the effectiveness of the role of the Special Advocate, and report and make recommendations to the Federal Parliament in relation to the role.

65. The Law Council considers that this oversight mechanism would be more effective than, for example, a sunset clause for a legislative provision authorising the role of Special Advocate, or a mandated review of its operation by a certain date. This is because the kind of trial in relation to which a Special Advocate may be required is likely to be extremely rare, and it may prove difficult to set a time period by which there is expected to be sufficient data to conduct an effective review.

66. Further, one objective of the INSLM is to ensure that Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting the rights of individuals. Given that it is critical to the effectiveness of a Special Advocate that the individual's right to a fair trial is upheld, the Law Council considers that the INSLM is an appropriate authority to undertake this assessment.

Public Interest Advocate

67. The Law Council considers that the provisions of the NSI Act as they relate to closed court hearings could include provisions similar to the approach taken to journalist information warrants issued pursuant to Division 4C of Chapter 4.1 of the *Telecommunications (Interception and Access) Act 1997* (**TIA Act**) which sets out the requirements and procedure for a law enforcement agency to apply and for Australian Security Intelligence Organisation (**ASIO**) to request a journalist information warrant to be issued.

68. Under this scheme, the Attorney-General or the issuing authority must not issue a journalist information warrant unless satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the source in connection with whom authorisations would be made.

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[87] United Kingdom Joint Committee Human Rights Report: *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (Ninth Report of Session 2009-2010, 26 February 2010) [76].

69. The applications for this type of warrant are also subject to the scrutiny of the Public Interest Advocate (**PIA**). Subparagraphs 180L(2)(b)(v) and 180T(2)(b)(v) of the TIA Act require an issuing authority have regard to any submissions made by a PIA in relation to whether the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.

70. The Law Council considers that a Special Advocate could play a similar role in assisting the court to make a determination regarding the necessity to hold a hearing *in camera*, assisting the court to determine whether the fundamental public interest in open justice is outweighed by the need to protect Australia's national security interests. The Special Advocate could assist the court in tailoring appropriate orders so as to safeguard the public interest in open justice and address any relevant national security concerns, without necessarily requiring that the proceeding take place *in camera*. This could be similar to the requirement in rule 6.6 of the *Criminal Procedure Rules 2015* (UK) that if the court can prevent the anticipated prejudice to the trial process by adopting a lesser measure than a private hearing, it should adopt that course.[88]

Recommendations

- **There should be an added legislative step for the public interest in open justice to be considered by a court before *in camera* proceedings take place under the NSI Act. A Special Advocate scheme should be utilised for this step, which could be modelled on the Public Interest Advocate Scheme in the *Telecommunications (Interception and Access) Act 1997*.**
- **Alternatively (or in addition to) the above, consideration should be given to the development of federal legislation which would seek to ensure the principles of open justice, such as a Commonwealth Open Courts Act.**
- **Exercising the powers under section 6 of the *Independent National Security Legislation Monitor Act 2010* (Cth), the INSLM should review the effectiveness of the role of the Special Advocate from time to time, and report and make recommendations to the Federal Parliament in relation to the role.**

Publication of charges and reasons

71. The INSLM has sought views on the extent to which at least some details of criminal charges and orders made under the NSI Act should always be publicly known, as well as the reasons given by a presiding judge for the exceptional step of departing from the presumption of open criminal justice.

72. On the former point, the Law Council notes that if court orders are made under section 31 regarding a non-disclosure certificate or a witness exclusion certificate, the court must give a written statement of its reasons for making an order under section 31 to the:

    (a) person who is the subject of the order;

    (b) prosecutor;

    (c) defendant and any legal representative of the defendant; and

[88] Judicial College, 'Reporting Restrictions in the Criminal Courts' (Guide, May 2016) 9 <https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>.

(d) Attorney-General and any legal representative of the Attorney-General.[89]

73. Prior to the court giving its statement, it must be given to the Attorney-General who can request that the court vary the proposed statement so as to not disclose certain information if the disclosure is likely to prejudice national security.[90]

74. The Law Council considers that this statement of reasons should also be made publicly available, albeit framed in such a way as to not disclose any information that could genuinely compromise national security. This safeguard is already somewhat apparent in the legislation, as the Attorney-General can request amendments to the statement before its distribution if it is considered to contain information that would be prejudicial to national security.

75. On the latter point above in paragraph 68, the Law Council agrees with the proposition that it should be a requirement in either the application of the NSI Act, or indeed any other federal legislation that permits criminal proceedings to be conducted *in camera*, including proceedings for convictions arising from judge alone trials and sentencing proceedings, that the presiding judge should broadly state the reasons for the departure from conducting proceedings in open court.

76. For criminal trials in the UK, if an order is made for the private trial, the court must record its reasons for the decision and as soon as reasonably practicable, arrange for the notice of the decision to be displayed somewhere prominent in the vicinity of the courtroom and communicated to reporters.[91]

77. The pronouncement of 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. The Law Council notes that in Victoria, section 14A of the *Open Courts Act 2013* (VIC) requires that the court 'must give a statement of reasons' that sets out the reasons for the terms of the suppression order, however, under paragraph 14A(2)(d), the court is not required to give the statement of reasons if to do so would render the suppression order ineffective.

78. This provision was introduced by the *Open Courts and other Acts Amendment Act 2019* (Vic) in order to implement recommendation 6 of the *Open Courts Act Review* by Frank Vincent AO QC,[92] who noted in his final report that this requirement to produce a statement of reasons:

> *…is necessary to impose an additional level of discipline to the process that regrettably is required. There will be circumstances in which the public dissemination of a statement of reasons for the order may well negate its efficacy but it certainly does not follow that nothing at all need be said or that one should not be available to the court in any subsequent challenge or review.*
>
> *…*
>
> *The provision of reasons in all circumstances when an order is made would also assist interested parties, such as media organisations, to*

[89] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 32(1).
[90] Ibid s 32(2), (3).
[91] *Criminal Procedure Rules 2015* (UK) r 6.8(2).
[92] Explanatory Memorandum, Open Courts and Other Acts Amendment Act 2019 (Vic) 1.

> *assess whether the making of the order or its terms should be challenged.*[93]

79. The Law Council submits that such an approach could be adapted to in camera proceedings under the NSI Act. That there was such secrecy in the case of 'Alan Johns' to not disclose to the public any details at all of the charges and the reasons for such measures would appear to involve at least one breach of Australia's international human rights obligations. The Law Council highlights that Article 14(1) of the ICCPR, set out in full above, stipulates that:

> *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.*[94]

80. The United Nations Human Rights Committee expanded on the requirement to publish details of judgments (in this case the conviction, sentence and sentencing remarks) in General Comment No. 32, the relevant passage which states that:

> *Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.*[95]

81. Notwithstanding these international human rights obligations, at present there is no requirement in the NSI Act for the court to provide any reasons if the court decides to conduct federal criminal proceedings behind closed doors, or to not provide details of the charges. However, under subsection 29 of the NSI Act, which sets out the closed hearing requirements in federal court proceedings in relation to hearings conducted under subsections 27(3) or 28(5) of the NSI Act, the court must make a record of the hearing and make the record available to:

    (a) a court that hears an appeal against, or reviews the decision of the hearing;

    (b) the prosecutor; and

    (c) the Attorney-General and any legal representative of the Attorney-General only.

82. However, the court cannot make the record available to, nor allow to be accessed by, anyone except those mentioned above.

83. Further, while there are requirements to make the record of the proceedings, as noted above, there is no requirement under the NSI Act for the court to record any reasons for the making of the decision to conduct proceedings or part of the proceedings *in camera* pursuant to subsection 19(1A) of the NSI Act or section 93.2 of the Criminal Code, as permitted by section 20B of the NSI Act.

84. The Law Council submits that if the court is to make an order to conduct proceedings *in camera*, including proceedings for convictions arising from judge alone trials and sentencing proceedings, it be required to provide reasons for doing so, albeit framed

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[93] Frank Vincent AO QC, *Open Courts Act Review* (September 2017) 115-6.
[94] *International Covenant on Civil and Political Rights*, opened for signature, ratification and accession on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[95] Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial*, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007) [29].

in such a way as to not disclose any information that could genuinely compromise national security. In this regard the Law Council considers that in providing these reasons to the public, at least some details of the charges and orders should be included.

85. The Law Council also suggests that a repository, similar to the 'library of closed decisions' established in 2019 discussed above, be created for *in camera* proceedings in Australia.

86. The Law Council considers that this statement of reasons should also be made publicly available, albeit framed in such a way as to not disclose any information that could genuinely compromise national security. This safeguard is already somewhat apparent in the legislation, as the Attorney-General can request amendments to the statement before its distribution if it is considered to contain information that would be prejudicial to national security.

Recommendations

- **The statement of reasons required pursuant to subsection 32(1) for orders which are made under section 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) should be made publicly available, albeit framed in such a way as to not disclose any information that could genuinely compromise national security.**
- **Where courts conduct proceedings *in camera*, they should be required to provide reasons for doing so, albeit framed in such a way as to not disclose any information that could genuinely compromise national security. When providing these reasons to the public, at least some details of the charges and orders should be included.**
- **A repository, similar to the 'library of closed decisions' established in 2019 should be created for in camera proceedings in Australia.**