



Law Council
OF AUSTRALIA

Review into the operation of section 22 of the NSI Act as it applies in the 'Alan Johns' matter

Independent National Security Legislation Monitor, Grant Donaldson SC

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to its National Criminal Law 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 into the operation of Part 3, Division 1, which includes section 22, of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**), as emerged in the 'Alan Johns' matter.
2. The Law Council notes that the INSLM is focussing on Part 3, Division 1 of the NSI Act and in particular section 22. These provisions provided the legal basis for the agreed arrangements and orders which led to the 'Alan Johns' matter being wholly suppressed.
3. 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'¹ 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.²
4. The Law Council notes that little information regarding the 'Alan Johns' proceedings has been made available to the public, including the charges and any reasons why the proceedings were conducted entirely *in camera*. 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.
5. While this case may be 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.
6. The Law Council therefore makes recommendations that:
 - (a) primarily, section 22 of the NSI Act should be amended to prohibit the making of orders which are capable of suppressing all information about a criminal matter, and orders created under that provision should allow the disclosure of at least the most fundamental information about a criminal proceeding; or
 - (b) alternatively, there should be an added statutory precondition for the public interest in open justice, and a requirement to consider less restrictive alternatives, to be considered by a court before *in camera* proceedings take place under the section 22 of the NSI Act. A public interest advocate (**PIA**) scheme should be established for this step, which could be modelled on the Public Interest Advocate Scheme in the *Telecommunications (Interception and Access) Act 1997* (Cth).

¹ *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465.

² *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).

Preliminary comments

Background

7. In November 2019, a judgment of the Supreme Court of the Australian Capital Territory and media reports revealed that a person had been charged, arraigned and sentenced for an offence under entirely closed court proceedings before that Court.³
8. In December 2019, the Commonwealth Attorney-General, the Honourable Christian Porter, provided a response to a question on notice providing some detail of the matter, including that:
 - Alan Johns communicated confidential information contrary to a lawful obligation not to do so, and that information was of a kind that could endanger the lives or safety of others;
 - Mr Johns was charged, and the matter was ultimately heard in the Supreme Court of the Australian Capital Territory;
 - the NSI Act was invoked, and orders were made under section 22 protecting the national security information; and
 - Mr Johns was represented by counsel of his choice, pleaded guilty, and was sentenced to a term of imprisonment of two years and seven months across an aggregate of five charges.
9. The Attorney-General remarked that the matter was unique in his experience and that he was not aware of any other similar cases.
10. The Law Council notes that little information regarding the 'Alan Johns' proceedings has been made available to the public, including the charges and any reasons why the proceedings were conducted entirely *in camera*. Questions on notice by Senator Rex Patrick in Parliament have also yielded some limited additional information, as have several subsequent media publications.⁴

Operation of the NSI Act

11. 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 applying to criminal proceedings.
12. 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

³ *Johns v Director-General of The ACT Justice and Community Safety Directorate* [2019] ACTSC 31.

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>.

⁵ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 14.

⁶ *Ibid* s 13.

⁷ *Ibid* s 15A.

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 information or call a witness that may disclose information that relates to, or the disclosure of which may affect, national security.⁹ The NSI Act provides the Attorney-General or her representative the right to attend and be heard at federal criminal proceedings where an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.¹⁰

Part 3, Division 1

13. Part 3, Division 1 of the NSI Act provides for the management of information in federal criminal proceedings, including the holding of hearings to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, including the making of an arrangement of the kind mentioned in section 22.
14. Section 22 provides that, at any time during a federal criminal proceeding, the Attorney-General, prosecutor and the defendant may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information. The court may then make any such orders as it considers appropriate to give effect to that arrangement.
15. The Law Council notes that in the 'Alan Johns' matter the Australian Capital Territory Magistrates and Supreme Courts made five sets of orders pursuant to sections 19(1A) & 22 of the NSI Act, section 93.2 of the *Criminal Code Act 1995* (Cth) and 85B of the *Crimes Act 1914* (Cth). These orders had the ultimate effect of suppressing the entirety of the proceedings before both of those courts in the 'Alan Johns' matter.

Other NSI Act issues

16. 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.¹¹
17. 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;

⁸ Ibid s 3.

⁹ Ibid s 24.

¹⁰ Ibid s 20A.

¹¹ Ibid pt 4 div 1.

- (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.

18. These issues were 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.¹² 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.

Open justice

19. A fundamental aspect of the common law, the administration of justice and the right to a fair trial is open justice.¹³ The High Court has held that ‘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’.¹⁴ In *Russell v Russell*,¹⁵ 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.¹⁶

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.¹⁷ 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

¹² 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).

¹³ Jason Bosland and Ashleigh Bagnall, ‘An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12’ (2013) 35 *Sydney Law Review* 674.

¹⁴ *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹⁵ (1976) 134 CLR 495.

¹⁶ *Ibid* 520 [8].

¹⁷ *Ibid* [21] (French CJ); *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).

*interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*¹⁸

21. Critically, the Law Council highlights that section 22 of the NSI Act places no requirement on the court to consider the principles of open justice or to consider the necessity of *in camera* proceedings when considering whether it is appropriate to give effect to the arrangements agreed by the parties under subsection 22(1) by making orders under subsection 22(2).

Responses to Terms of Reference

The appropriateness of orders such as those made in the 'Alan Johns' matter

22. The Law Council submits that orders prohibiting disclosure of the fact that a person has been charged with an offence, convicted on a plea of guilty and sentenced, such that occurred in the 'Alan Johns' matter, should not be made pursuant to subsection 22(2) of the NSI Act.
23. Instead, if there is a legitimate need to suppress essentially all information about a criminal matter then it should be done through a transparent process with a clear public interest test – namely, suppression orders made by the court to prevent public dissemination of certain information, or through a claim of public interest immunity over evidence sought to be withheld from the defence.
24. The Law Council recommends that subsection 22(2) should be amended to prohibit the making of orders which are capable of suppressing all information about a criminal matter and require that orders created under that provision should allow the disclosure of at least the most fundamental information about a criminal proceeding. The following information could represent a baseline of that which orders under section 22(2) should allow to be publicly disclosed:
 - the number of charges and the offence provisions the defendant is alleged to have contravened, or, only if the court is satisfied that it is in the interest of national security, a broad description of those offence provisions;
 - a broad indication of the dates particularised in the charges;
 - whether the Attorney-General was required to consent the commencement or continuation of the prosecution;
 - if convicted, the penalty imposed on the defendant referable to each charge;
 - the portion of terms of imprisonment actually served or suspended by way of entry into recognisance or on parole; and
 - whether the defendant is subject to any legal obligations after the completion of his or her sentence – including prohibitions on disclosing information.
25. Despite the 'Alan Johns' matter being unprecedented, the information subsequently released reveals that even in such a case, the key parameters of such a case can be made available without prejudicing national security.

Rationale for position

26. The Law Council notes that a range of mechanisms already exist to protect against the unauthorised disclosure of national security information. Chief among these is

¹⁸ *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).

the common law claim of public interest immunity, now also reflected in the uniform Evidence Acts. These mechanisms still exist alongside the NSI Act.¹⁹

27. 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.²⁰
28. The Law Council is concerned that the coming to arrangements by parties, and the consequences that flow from section 22 orders made by a court giving effect to such arrangements, circumscribe the court's power to determine whether particular information should be disclosed and invests parties (in particular those acting on behalf of the executive) with a broad discretion to limit or prohibit disclosure.
29. Considerations of open justice may not be in forefront of the interests of the prosecution, defence and the Attorney-General when negotiating arrangements under subsection 22(1). Instead, the prosecution maintains a primary interest in adducing evidence to the court (not the public) which tends to prove the elements of the offence, the Attorney-General's relevant interest is in preventing the disclosure of national security information, and the defence has an interest in creating reasonable doubt about the whether the prosecution has proved its case – including by raising objections to the admission of evidence. None of these aims are necessarily aligned with an interest in preserving open justice.
30. Therefore, an interest in preserving the open nature of proceedings is not something that can, or should, be left primarily to a private arrangement between the parties to a prosecution and vested in a court by an unstructured judicial discretion to make (or decline to make) orders reflecting that private arrangement.
31. The Law Council submits that the social compact which exists between the state and the public, which allows the prosecution (on behalf the state) to conduct a prosecution for a criminal offence and allows a person to be subject to conviction and punishment by a court (again on behalf of the state), is agreed to on the basis that those prosecution proceedings must occur under, and the evidence relied upon by the prosecution should be exposed to, public scrutiny for the reasons averted to above.
32. This compact comes implicitly with a condition that only specific evidence or other information (such as the identity of a party) should suppressed, and that suppression of evidence and proceedings should only occur upon an application to, and determination by, a court (under either its inherent jurisdiction or that conferred by statute) for suppression or non-publication orders.
33. The Law Council submits that section 22 in its present form has the potential to violate this social compact, because it allows for private arrangements between the parties and orders to be made by which have the effect of suppressing essentially all

¹⁹ 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].

²⁰ *Ibid* [128].

information about a criminal matter, and that this suppression occurs without the effective oversight of a court.

The desirability of a contradictor at any stage of a proceeding when orders, such as those made in the 'Alan Johns' matter, are proposed

34. If the above position is not accepted, Law Council considers there should be some added legislative step for the public interest in open justice, and a requirement to consider less restrictive alternatives, to be considered by a court before *in camera* proceedings take place under the section 22 of the NSI Act.
35. Further, the Law Council recommends that a court be required to give reasons when it considers that less restrictive alternatives are insufficient, and that the protection of national security information nonetheless requires orders which allow the holding of proceedings *in camera*.
36. In this regard, the Law Council agrees that there should be some means by which a PIA or similar contradictor can effectively challenge whether or not it is in the public interest that the presumption of open justice be departed from.
37. The Law Council has previously noted 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* 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.²¹
38. The PIA should be given a wide ambit to present relevant submissions, for instance addressing the impact of proposed orders on open justice and proposing less restrictive alternatives.
39. The role of the PIA should be given legal effect by the inclusion of their appearance and regard to their submissions as an added statutory precondition to a court making consent orders under section 22.

Rationale for position

40. As detailed above, the parties to a private arrangement under section 22 do not necessarily have the public interest in open justice, and less restrictive alternatives, at the forefront of their minds in reaching the agreement. Rather, they are likely to prioritise the protection of sensitive information. Potentially, the defendant may have an interest in enabling the suppression of potentially embarrassing information about their offending or preventing the disclosure of information that may have the effect of prejudicing their fair trial.
41. Additionally, it is not necessarily reasonable to expect a court to be the sole guardian of the public interest (including in open justice), without giving the court the assistance of counsel specifically on that point – especially where that public interest does not necessarily align with the interests of the party on behalf of which the present array of counsel appear.
42. The difficulty a court faces in taking into account open justice considerations is particularly acute in the absence of a guided statutory discretion about the matters

²¹ *R v Lodhi* [2006] NSWSC 586 at [28].

that must be considered in deciding whether to make orders under subsection 22(2) giving effect to a private arrangement.

43. The Law Council considers that those gaps could be filled by the appearance of a statutorily appointed contradictor, who is not representing the parties to the matter, as well as a requirement for the court to consider submissions from that contradictor about the impact of the proposed orders on the principles of open justice, and to whether less restrictive alternatives would sufficiently mitigate the risk to national security.
44. The Law Council continues to maintain that the appearance of a PIA 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.
45. The Law Council considers that a PIA could play a similar role in assisting the court to determine whether it is necessary to hold a hearing *in camera*, including whether the fundamental public interest in open justice is outweighed by the need to protect Australia's national security interests. That is, the PIA 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*.
46. This necessity requirement could be similar to that 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.²²
47. There is presently no requirement for the court to provide reasons for making orders under subsection 22(2). This stands in contrast to section 32 of the NSI Act, which requires the court to give reasons for making an order under section 31. The Law Council has previously recommended that the reasons required to be given for orders which are made under section 31 of the NSI Act should be made publicly available, albeit framed in such a way as to not disclose any information that could genuinely compromise national security.²³
48. Relevantly, the Law Council noted that providing reasons would 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. It also noted that such a requirement would align with jurisdictional comparatives such as section 14A of the *Open Courts Act 2013* (Vic) and principles under international law.²⁴
49. Similarly, and consistent with the Law Council's alternative recommendation that the added legislative test include a requirement that the court consider less restrictive alternatives, the Law Council recommends that subsection 22(2) be amended so that the court is required to give reasons when it considers that those alternatives are insufficient, and the protection of national security information nonetheless requires orders which allow the holding of proceedings *in camera*.

²² 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>>.

²³ 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* as it relates to the 'Alan Johns' matter (3 April 2020), 23.

²⁴ *Ibid*, 21-22.

The desirability of a requirement Attorney-General to make submissions that would facilitate publication of reasons that do not disclose national security information

50. The Law Council considers that its primary recommendation, together with the matters referred to in paragraph 24 would go some way to addressing the need to publish reasons (including sentencing remarks) that do not disclose national security information. That is, disclosure of those matters would go some way to preserving the open justice imperative to publish the basic facts surrounding the verdict and sentence in criminal proceedings arising from the social compact allowing the state to prosecute and punish a person for a criminal offence.

Whether reform is best effected by legislative change or by other means

51. As noted above, Law Council considers there should be some added legislative step or precondition for the public interest in open justice to be considered by a court before *in camera* proceedings take place in the form of a PIA framework.
52. The proposed role of a PIA could be 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)*. This Division sets out the requirements and procedure for a law enforcement agency to apply and for Australian Security Intelligence Organisation to request a journalist information warrant to be issued.
53. 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.
54. The applications for this type of warrant are also subject to the scrutiny of the 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.
55. To support this statutory precondition, the Law Council submits that a PIA scheme should be utilised, which could be modelled on Division 4C of the TIA Act. This scheme should be supported by the establishment of a statutory office and the PIA should have full access to all information necessary to perform these functions.

Whether there be a requirement for periodic 'review' of orders, such as those made in the 'Alan Johns' matter

56. The Law Council supports some form of periodic review as a means to ensuring a degree of ongoing oversight and consideration of previous orders such as those made in the 'Alan Johns' matter. Such an approach seems appropriate given the significance of the orders and potential to infringe upon basic principles of open justice.
57. Given the sensitivity of the material leading to the orders, it seems appropriate that such a review is undertaken by the court, on the basis of submissions received before it.