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INSLM SUMMARY

Report into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004*

On 27 July 2022 the Attorney-General referred to me a review into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the *NSI Act*). This reference was prompted by public disquiet that accompanied the use of the NSI Act in the prosecutions of Alan Johns (a pseudonym) and those of Witness K and Bernard Collaery.

This report is the product of that review.

All advanced legal systems need mechanisms to deal with the protection of sensitive information during the course of resolving disputes. National security information is a kind of sensitive information in this sense, though there are others.

In its broad conception, and in practice, the NSI Act does important work. It enables information to be used in prosecuting serious crimes that, prior to the Act, could not be used. The Act also enables information to be seen and used by defendants in criminal proceedings and parties in civil proceedings that, prior to the NSI Act, was either kept from them or was less readily available.

These changes that the NSI Act has introduced are good and laudable things, but they come at too great a cost.

The prosecutions of Alan Johns, Witness K and Mr Collaery, that I discuss throughout the report, illustrate this cost. Even though the NSI Act provides for greater disclosure by executive government to parties in court proceedings, it requires that court processes are more secretive. Overweening secrecy of executive government is replaced by secrecy of some extremely important work of courts.

Although in broad terms, the NSI Act reposes in courts the power to decide what can be disclosed to and withheld from defendants and parties, the Act contorts this power by requiring courts to subordinate the administration of justice, and a defendant's right to a fair hearing, to the protection of national security. The Act also constrains courts' discretions in dealing with many procedural aspects of court processes that, in matters not involving the NSI Act, courts readily deal with and have always dealt with.

My recommendations for change to the NSI Act seeks to preserve the important work that the Act does, while reducing its undesirable impact on the administration of justice. Many of the changes that I recommend would be described, even by lawyers, as dense (if not turgid), but some go to the core of the proper administration of justice and the proper operation of executive government.

Most of my recommendations share or involve themes that can be broadly stated.

The first is to enhance open justice. I recommend repealing provisions of the NSI Act that require certain things to be done in closed court hearings. I also recommend introducing new obligations on the Attorney-General to conduct regular reviews of material that has been kept secret by reason of the NSI Act, to determine if secrecy is no longer required.

The second theme is to replace mandatory directions in the NSI Act, about how courts are to deal with and decide certain matters, with principled discretion by judges. In addition to recommending the repeal of mandatory closed hearings and other mandatory infringements of usual court practices, I recommend repeal of provisions of the NSI Act directing courts, when making certain decisions, to prioritise protection of national security over requirements of a fair trial.

The third broad theme is to ensure that certain longstanding and well understood rights of defendants in criminal proceedings are not over-ridden and overwhelmed by concerns about national security. I recommend change to the NSI Act to ensure that foundational principles of criminal justice, such as the presumption of innocence and the prosecution bearing the burden of proof, are not undermined. I recommend change to ensure that defendants are not required to disclose matters to the prosecution, if they would not otherwise be required to do so. I make recommendations to ensure that communications between defendants and their legal representatives are protected. I recommend amendments to the offence provisions in the NSI Act that risk criminalising the conduct of lawyers in properly representing defendants in criminal proceedings.

Sitting slightly to one side of these general themes are specific recommendations for the repeal of the "special court orders" regime under the NSI Act. This regime applies only in applications for control orders and extended supervision orders under the Commonwealth *Criminal Code.* In applications for these orders, the NSI Act empowers courts to make orders based on evidence that neither a defendant nor their lawyers see and where the reasons for making such orders are never known by the defendant let alone the public.

This review has highlighted that invocation of the NSI Act can result in a range of practical difficulties. When the Commonwealth invokes the NSI Act, it must be expected to resource courts and parties on whom onerous obligations in dealing with national security information fall, adequately. Throughout this report I identify matters and recommend work that the Commonwealth should undertake to enhance the efficiency of proceedings where the NSI Act is invoked.

I am hopeful that my recommendations will serve to demystify the operation of the NSI Act. The Act deals with important issues, and their understanding should not be overwhelmed by suspicion about the work of courts and intelligence agencies that unnecessary and oppressive secrecy creates.

It is critical that the public be capable of following and understanding the conduct of trials, particularly high-profile trials, in which the NSI Act is used. It is critical that the public can scrutinise decisions of Attorneys-General seeking to impose secrecy and understand the reasons of courts for ordering or rejecting secrecy that executive government seeks.

Grant Donaldson SC
Independent National Security Legislation Monitor
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