'Overreach from the start': Security monitor drops a bomb on secrecy act

An independent review has savaged the legislation used to attempt to cover up the trial of Bernard Collaery and called for significant amendments.

Bernard Keane in Crikey.com, Dec. 1, 2023

The outgoing independent national security legislation monitor (INSLM), Grant Donaldson SC, has called for significant reforms to the national security legislation abused by the Coalition in its prosecution of Witness K and Bernard Collaery, reducing the scope for misuse and elevating requirements for procedural fairness in national security trials.

Donaldson's review of the *National Security Information (Criminal and Civil Proceedings) Act 2004* makes a long list of recommendations to repeal or amend significant portions of the act, with the trial of Bernard Collaery furnishing a number of reasons for reforms to address aspects that disadvantage defendants and empower governments to use the law to prevent the exposure of embarrassing information.

Most significant is a recommendation to dump "economic relations" from the definition of national security information, which currently includes "economic relations with foreign governments and international organisations".

It was this definition that enabled Coalition Attorney-General Christian Porter to intervene in the prosecution of Bernard Collaery, which he had authorised, and attempt to keep secret information about how the Howard government had bugged the Timor-Leste cabinet to secure an advantage in treaty negotiations for Woodside, with which both foreign minister Alexander Downer and DFAT secretary Ashton Calvert would go on to secure employment.

Donaldson is blunt in his assessment:

> *I share the view of many who assisted with submissions to this review that the concept of 'economic relations with foreign governments and international organisations' should never have been in the definition. It is far too broad and imprecise. It is not reflected in the history of public interest immunity or matters of state privilege, upon which the NSI Act builds. The inclusion of the concept in the NSI Act was over-reach from the start.*

The bugging of the Timor-Leste cabinet to help Woodside was only the most egregious example of how "economic interests" have meant "corporate interests" for political donors. Edward Snowden revealed a decade ago how Five Eyes nations, including Australia, use intelligence resources to help corporate interests — in our case, the infamous bugging of Indonesian trade negotiators in order to help American tobacco companies.

Donaldson also wants the act significantly tightened to remove disadvantages, or potential disadvantages, for defendants:

* removing the possibility it could compel defendants to reveal information to the prosecution;

* requiring the Attorney-General to make submissions for why a trial should be conducted in secret;

* forcing the Attorney-General to seek reasons for court decisions to agree to secret trials, to avoid a repeat of the "shameful" secrecy of the "Alan Johns" (AKA "Witness J") matter, when the Coalition kept the decision to prosecute and jail a former intelligence officer, and the existence of proceedings against him, secret (separately, Attorney-General Mark Dreyfus approved publication of the sentencing remarks in the Alan Johns case last year, and they were published in June);

* clarifying that courts can appoint special advocates when defendants are excluded from receiving evidence and their legal representatives do not, or cannot, participate in proceedings;

* stripping out a suggestion that national security can override a defendant's right to procedural fairness without court discretion, which "is just bad law". Donaldson is scathing of a submission from security agencies on the issue, suggesting Australia's enemies would exploit the repeal: "I simply do not accept that our adversaries would think us weak if s 31(8) of the NSI Act were repealed. I would be astounded if adversaries worth worrying about were this stupid."

Donaldson also gave a serve to Christian Porter for his extraordinary abuse of s 39, which requires security clearances for legal representatives. In early 2021, Porter and his bureaucrats tried to stop Bret Walker SC from joining Collaery's legal team due to the lack of a security clearance (Walker is a former INSLM himself).

> *The court's discretion and power under s 39, to which I refer above, is sufficient to deal with these concerns about injustice to defendants. In the Collaery proceeding, the Commonwealth's delay in 'approving' Mr Walker caused vacation of hearing dates on the basis that the delay, resulting in Mr Walker's inability to appear, which was unfair to Mr Collaery. But, even in this circumstance, injustice to a defendant was likely only avoided because of the unenergetic progress of the proceeding.*

The review also recommends repealing the entire control orders section of the act which, despite hyping by then-Attorney-General George Brandis, hasn't been used. They have "been imposed on low-hanging fruit. Those convicted of terrorism offences and those suspected of being involved in terrorism offending garner little public sympathy. But laws like these tend never to be repealed nor their scope reduced. More often they turn out to be the thin end of an expanding wedge."

Donaldson is clear, however, to point the finger of blame more broadly not at the legislation itself, but at its abuse by the previous government:

> *There have been two principal concerns arising from the prosecutions of Alan Johns and of Witness K and Mr Collaery. First, overweening secrecy in the processes of courts that have dealt with the proceedings. Second, rabid claims for secrecy by the Commonwealth executive government in the prosecutions. As to the latter, unjustifiable executive governmental secrecy is not created by the NSI Act. The Act is a tool, and one of several, and generally a means not a cause.*

Mark Dreyfus is now considering the dozens of recommendations.