Law Council
OF AUSTRALIA

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

Independent Monitor of National Security Legislation, Mr Bret Walker SC

19 July 2013

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Acknowledgement 2

Executive Summary 3

Introduction 5

Key Features of the NSI Act 5

Federal criminal proceedings 6

Civil proceedings 8

Security clearances in civil and criminal proceedings 8

Background to the NSI Act 9

Pre-existing mechanisms to protect security sensitive information 9

Public Interest Immunity 9

Statutory Mechanisms to Protect Sensitive Information in Criminal Proceedings 12

Professional Responsibilities for Lawyers relating to Disclosure of Sensitive Information 13

Australian Law Reform Commission's Inquiry 14

Introduction of NSI Act regime to Federal Criminal Proceedings 18

Extension of NSI Act to Certain Civil Proceedings 21

2010 Amendments 23

Judicial Consideration of the NSI Act 24

Lodhi 25

Monitor's Questions 32

The operation of the NSI Act and agreements under the Act 32

Use of Attorney‑General's certificates in place of judicial determination of national security matters 34

Concerns regarding the breadth of the notification provisions 35

Concerns relating to section 31 orders 38

Security clearances for defence counsel and special advocates 39

Law Council's Opposition to Security Clearances for Lawyers 39

Special Advocates or Special Defence Counsel 42

Issues for Consideration regarding the use of Special Advocates under the NSI Act 49

Law Council position on the Use of Special Advocates 55

Conclusion 57

Attachment A: Profile of the Law Council of Australia 59

Acknowledgement

The Law Council thanks the Law Council's National Criminal Law Liaison Committee for its assistance in the preparation of this submission.

Executive Summary

1. The Law Council of Australia is grateful for the opportunity to contribute to the inquiry currently being undertaken by the Independent Monitor on National Security Legislation (the Monitor) into the *National Security Legislation (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act).

2. The key features of the NSI Act, and the history of this legislation, are outlined in detail in the submission. 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.

3. 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. 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.

4. Any certificates that have been issued under these provisions must be considered at a closed hearing. The Attorney-General may intervene in the proceedings and take part in the closed hearing. The court is given discretion to determine issues in relation to the certificates but must make one of a range of prescribed orders.

5. The NSI Act also includes a system for requiring legal practitioners to undergo security clearances before being permitted access to national security information.

6. The Law Council has previously raised a range of concerns with these provisions, including concerns that:

   (a) The notification provisions are unworkable and too broad. They 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 pre-existing options for protecting national security information in court proceedings;

   (b) The security clearance system for lawyers which is prescribed in the NSI Act threatens the right to a fair trial by:

      (i) potentially 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; and

      (ii) potentially 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;

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

7. These issues, and specific recommendations for reforms to the NSI Act, are outlined in detail in this submission.

8. This submission also seeks to address a range of questions outlined by the Monitor in his 2011-2012 Annual Report that relate to the practical operation of the NSI Act. Drawing upon the experience and expertise of its National Criminal Law Committee, the Law Council submits that:

(a) although the more intrusive features of the NSI Act have been used infrequently, the existence of these provisions continue to cast a shadow over the expedient and fair conduct of proceedings, particularly terrorism related criminal proceedings, and if triggered, threaten to undermine the defendant's right to a fair trial and the independence of the legal profession;

(b) the security clearance requirements for legal practitioners continue to be intrusive, disruptive to proceedings and unnecessary in light of other obligations on legal practitioners and other mechanisms for protecting security information;

(c) the notification provisions in the Act create a time consuming set of obligations on each of the parties and the Attorney-General. These requirements in turn lead to delay and disturbance to the trial process, including the possibility of a disruption to the trial itself; and

(d) the need for the system of non-disclosure and witness exclusion certificates, in conjunction with the onerous notification requirements, remains unsubstantiated particularly when regard is had to the pre-existing mechanisms for protecting national security information.

9. The Law Council also examines the possible use of security cleared 'special advocates', who may access national security information or participate in relevant proceedings rather than the defendant or a party or his or her legal representative. The Law Council concludes that the use of special advocates under the NSI Act would not necessarily mitigate the unfairness experienced by the defendant or a party to the proceedings who is excluded from accessing national security information. However, if further consideration is to be given to the use of special advocates, the Law Council has examined the experience of the United Kingdom (the UK) and other comparable jurisdictions to compile a preliminary list of the advantages and disadvantages of a special advocate system in matters involving national security information. These experiences point to the need to ensure a number of fundamental safeguards are met if such a system is to be adopted. These safeguards are outlined in detail in this submission.

Introduction

10. The Law Council is pleased to provide the following comments in response to the inquiry of the Monitor into the provisions of the NSI Act.

11. The Law Council has a long history of advocacy in relation to the NSI Act and has raised concerns with certain key provisions and made recommendations for reform in a number of forums.[1] The Law Council has also expressed concern that the scope of NSI Act has been steadily increased over time, with major amendments occurring in 2005 to provide coverage of any civil proceeding in a court of the Commonwealth, State or Territory.[2]

12. The Law Council welcomes this opportunity to reiterate its long standing concerns with a number of the key provisions of the NSI Act. These concerns are also outlined in the Law Council's Anti-Terrorism Reform Project.[3]

13. The Law Council also welcomes the opportunity to respond to the questions posed by the Monitor in his 2011-2012 Annual Report concerning the NSI Act. In its responses, the Law Council is pleased to draw upon the experiences and insights of its National Criminal Law Liaison Committee, comprised of experienced criminal law practitioners from around the country including a number of senior counsel with direct experience in proceedings involving national security information.

14. The Law Council has also examined some alternative models to protect national security information in civil and criminal proceedings such as the use of an additional legal representative with authority to consider such information and assist the court in its determinations regarding disclosure of that information, sometimes described as a 'special advocate' or 'special counsel'.

Key Features of the NSI Act

15. The purpose of the NSI Act is to protect information from disclosure during a court proceeding where the disclosure is likely to prejudice Australia's 'national security', which is defined as 'defence, security, international relations or law enforcement interests'. As will be discussed later in this submission, these expressions are given very broad meanings in the definition sections of the NSI Act. For example, under section 10 of the NSI Act 'international relations' mean 'political, military and economic relations with foreign governments and international organisations'.

16. The provisions of the NSI Act apply to 'federal criminal proceedings',[4] which include trials, bail proceedings, committal proceedings, discovery processes, sentencing and appeals.[5] The NSI Act also applies to 'civil proceedings', which means any

[1] For example see Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* (2 July 2004); Law Council of Australia Submission to the Australian Law Reform Commission, *Inquiry into Protecting Classified and Security Sensitive Information* (12 September 2003); Law Council of Australia Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document* (29 August 2008).
[2] 'Civil proceeding' is defined in NSI Act s15A.
[3] See http://www1.lawcouncil.asn.au/lawcouncil/index.php/10-divisions/144-anti-terrorism-reform-project
[4] "Federal criminal proceeding' is defined in NSI Act s14 as 'a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against the law of the Commonwealth'.
[5] The meaning of 'criminal proceeding' is set out in NSI Act s13.

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.[6]

Federal criminal proceedings

17. In relation to federal criminal proceedings, the NSI Act provides for a system of notice requirements, which can lead to the issue of non-disclosure and witness exclusion certificates and the holding of closed hearings regarding such certificates. In particular, Part 3 of the NSI Act:

    (a) permits the Attorney-General and/or his or her representative to be present at any proceeding where an issue arises relating to the disclosure, protection, storage, handling or destruction in the proceeding, of national security information;

    (b) enables the Attorney-General, the prosecutor and the defendant or his or her legal representative to apply to the court to hold a pre-trial 'national security information hearing' to consider issues relating to the disclosure, protection, storage, handling or destruction of national security information;[7]

    (c) provides for the making of 'arrangements' about the disclosure, protection, storage, handling or destruction of national security information by agreement between the Attorney-General, the prosecutor and the defendant or his or her legal representative.[8] The court is authorised to make an order that it considers appropriate to give effect to such an arrangement;[9]

    (d) requires a prosecutor or defendant or his or her legal representative to give written notice to the Attorney-General if he or she believes that he or she will disclose national security information; or that a person whom he or she intends to call as a witness will disclose national security information in giving evidence or by his or her mere presence.[10] Notice must also be given to the court, and the other relevant parties[11] and must include a description of the information, unless the advice is being given by the defendant or his or her representative to the prosecutor;[12]

    (e) requires a prosecutor or defendant (or the defendant's legal representative) to give the Attorney-General written notice if he or she knows or believes that "on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal court proceeding";

    (f) prevents a witness from disclosing information orally if the prosecutor, defendant or his or her legal representative knows or believes that it is national security

[6] The meaning of 'civil proceeding' is set out in NSI Act s15A.
[7] NSI Act s21.
[8] NSI Act s22 (1).
[9] NSI Act s22(2).
[10] NSI Act s24. Certain exceptions to this requirement, such as where the disclosure is covered by an agreement under section 22, are provided in subsection 24(1A). The requirements for written notice are outlined in subsection 24(2).
[11] NSI Act s24(3).
[12] NSI Act s24(4).

information. [13] In such circumstances, notice to the court must be given, and the witness will be generally required to answer the question in writing.[14] This written answer must then be shown to the prosecutor and if present, the Attorney-General and his or her representative.[15] If the prosecutor knows or believes that the written answer relates to or may affect national security, the prosecutor must advise the court and the Attorney-General. An adjournment must then be called while the Attorney-General determines whether or not to issue a criminal non-disclosure certificate or a witness exclusion certificate;[16]

(g) empowers the Attorney-General to issue the relevant certificate if he or she considers that disclosure is likely to prejudice national security.[17] A criminal non-disclosure certificate must be provided to the court and the Attorney-General may also provide other materials.[18] 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;[19]

(h) requires the court to hold a closed hearing when a relevant certificate has been issued to determine whether it will maintain, modify or remove the ban on disclosure or the calling of witnesses;[20]

(i) provides the court with the discretion to exclude the defendant, non security cleared legal representatives of the defendant or non security cleared court officials from the closed hearing. 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;[21] and

(j) requires the court to consider making an appropriate order under a general power to make orders in relation to disclosure, protection, storage, handling or destruction of national security information[22], or an order under the *Criminal Code Act 1995* (Cth) (the Criminal Code) in relation to imposing restrictions on the conduct of the hearing, reporting or access to relevant documents in the interests of the defence or security of the Commonwealth.[23]

---

[13] NSI Act s25.
[14] NSI Act s25(3).
[15] NSI Act s25(4).
[16] NSI Act s25(8).
[17] NSI Act s26 and 28.
[18] Cf NSI Act s26(2) with s26(3).
[19] NSI Act s26(2)).
[20] NSI Act s29.
[21] NSI Act s29(2) (3) and (4).
[22] NSI Act s 19(1A)
[23] *Criminal Code Act 1995* (Cth) s93.2 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; or (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. 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.

18. In addition to these specific provisions, the power of the court to control the conduct of a proceeding is generally reserved.[24] For example, subsection 19(2) of the NSI Act provides that an order in relation to a relevant certificate does not prevent the court from later ordering that a proceeding be stayed if the order would have a substantial adverse effect on a defendant's right to receive a fair hearing.

Civil proceedings

19. Part 3A of the NSI Act deals with the protection of information disclosure of which in civil proceedings is likely to prejudice national security. The regime for civil proceedings is substantially similar to that for criminal proceedings. However, some differences appear due to the nature of proceedings. For example, Part 3A contains specific provisions to address situations in which the Attorney-General is a party to the civil proceeding.[25]

20. Part 3A sets out a process for conducting a pre-trial conference to consider issues relating to any disclosure of information that relates to or may affect national security,[26] and a mechanism for the parties to make arrangements for the disclosure of national security information.[27] Like Part 3, Part 3A also provides for a system of notification, the issue of certificates by the Attorney-General and the conduct of closed hearings in certain circumstances. [28]

Security clearances in civil and criminal proceedings

21. Part 4 Division 1 of the NSI Act provides for a system of security clearances for legal representatives of the defendant in federal criminal proceedings.

22. These provisions apply when, during a federal criminal proceeding, a legal representative of a defendant receives written notice from the Secretary of the Attorney-General's Department (the Secretary) that an issue is likely to arise in the proceedings relating to the disclosure of information that is likely to prejudice national security.[29] A person who receives such a notice must apply to the Secretary for a security clearance.[30] He or she must do so within 14 days of receiving a notice.

23. If the legal practitioner does not apply for such a clearance, or if he or she is unsuccessful in obtaining such a clearance, then it is possible that he or she will not be able to view all the relevant evidence in the case and thus will not be able to continue to effectively represent the client.[31] In these circumstances, the court may recommend that the defendant retain a different legal representative.[32] If a legal representative is denied a security clearance, he or she may seek a review of the decision by the Administrative Appeals Tribunal (the AAT). [33]

---

[24] NSI Act s19.
[25] NSI Act s6A.
[26] NSI Act s38A.
[27] NSI Act s38B.
[28] See NSI Act ss38D-38L.
[29] NSI Act s39(1).
[30] NSI Act s39(2).
[31] If the person does not obtain the security clearance, anyone who discloses relevant information to the person will, except in limited circumstances, commit an offence, NSI Act s39(3).
[32] NSI Act s39(5)(b)(ii).
[33] Attorney General's Department *Practitioner's Guide to the National Security Information (Criminal and Civil Proceedings) 2004 Act* (June 2008) page 29 available at http://www.ag.gov.au/Publications/Pages/PractitionersGuidetotheNationalSecurityInformationCriminalandCivilProceedingsACT2004.aspx

24. Part 4 Division 2 of the NSI Act provides for a system of security clearances for parties to civil proceedings, legal representatives and a person assisting a legal representative in proceedings where an issue is likely to arise relating to a disclosure, or information in the proceeding, that is likely to prejudice national security. A similar process for obtaining a security clearance applies as in relation to federal criminal proceedings.

25. Self represented litigants in civil proceedings who are required to obtain a security clearance under Part 4 Division 2 of the NSI Act but are refused such a clearance may be able to access financial assistance to engage a security cleared legal representative under the Commonwealth funded Special Circumstances Legal Assistance Scheme.[34]

Background to the NSI Act

Pre-existing mechanisms to protect security sensitive information

Public Interest Immunity

26. Prior to the introduction of the NSI Act, the common law doctrine of public interest immunity was the main mechanism by which the Commonwealth could seek to protect national security information from disclosure during court proceedings. As Gray J observed in *R v Lappas and Dowling* [2001] ACTSC 115 (*Lappas*) a claim for public interest immunity:

> *… involves the balancing of two aspects of the public interest. On the one hand, the public interest in admitting into evidence information or a document that relates to matters of state and, on the other hand, the public interest in preserving secrecy or confidentiality in relation thereto.*[35]

27. A claim of public interest immunity may be made under the common law and is also available under section 130 of the uniform Evidence Acts.

28. The common law formulation of public interest immunity is stated in *Sankey v Whitlam* (1978) 142 CLR 1:

> *[T]he court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to do so.*[36]*.*

29. This is reflected in section 130(1) of the uniform Evidence Acts, which provides:

> *If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.*

[34] See Attorney General's website containing information about the Special Circumstances Legal Assistance Scheme http://www.ag.gov.au/LegalSystem/Legalaidprograms/Commonwealthlegalfinancialassistance/Documents/Commonwealth%20Guidelines%20for%20Legal%20Financial%20Assistance%202012.pdf

[35] *R v Lappas and Dowling* [2001] ACTSC 115 [17]

[36] *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).

30. Public interest immunity can be distinguished from a claim of privilege in that a claim of public interest immunity can be made by the state, a non-governmental party to the proceedings, or by the court on its own motion.[37] Such claims may arise at an interlocutory stage or at the trial, and be made by the party against whom the evidence is tendered, a witness, the judge or the state. The onus is on the party claiming immunity to show why non-disclosure should be ordered.

31. When determining whether the information or the document relates to matters of state, the court is empowered to inform itself as it sees fit. However, subsection 130(4) of the uniform Evidence Acts provides that the information or document is taken to relate to matters of state if adducing it as evidence would:

    (a) prejudice the security, defence or international relations of Australia, or

    (b) damage relations between the Commonwealth and a State or between 2 or more States, or

    (c) prejudice the prevention, investigation or prosecution of an offence, or

    (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law, or

    (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State, or

    (f) prejudice the proper functioning of the government of the Commonwealth or a State.

32. Under the uniform Evidence Acts, when deciding whether to give a direction that information or a document not be adduced as evidence under subsection 130(1), the court may inform itself in any way it thinks fit. However, guidance is provided by subjection 130(5) which provides that the court should take into account the following matters:

    (a) the importance of the information or the document in the proceeding,

    (b) if the proceeding is a criminal proceeding -whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor,

    (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding,

    (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication,

    (e) whether the substance of the information or document has already been published,

[37] See *Evidence Act 1995* (Cth) s130(2).

(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant - whether the direction is to be made subject to the condition that the prosecution be stayed.

33. The grounds of what constitutes public interest under the common law are not closed, but generally relate to the interests of central government.[38] Some commonly made claims for public interest immunity include claims by the government in relation to Cabinet deliberations, high level advice to government, communications or negotiations between governments, national security, police investigation methods, and in relation to the activities of Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives. [39]

34. Public interest immunity also may arise in respect of documents relating to police matters and other government agencies investigating possible offences. This includes documents created in the course of an internal inquiry and communications received from the public. The immunity extends to protect the identity of police informants. However, disclosure of the identity of an informer will be ordered when required to establish the innocence of an accused. Overall, the question for the court is whether disclosure would inhibit the performance of the relevant statutory function.

35. When determining a claim for public interest immunity the court will:[40]

    (a) identify the precise public interest that arises and whether there is a risk that disclosure would be injurious to that interest. Generally, evidence is required to support a claim for public interest immunity and this may be a certificate from the relevant Minister. However, usually the evidence will be an affidavit from one of the parties or a Minister, or other responsible government official who has directed his or her mind to the question, in respect of each document or class of documents for which immunity is claimed;

    (b) identify whether the public interest in the judicial process requires disclosure and examine the relevance of the documents for the determination of the litigation; and

    (c) balance the claimed public interest against the public interest in the administration of justice to see which should prevail. The court may examine the documents to determine whether the claim is justified, although it will only do so where the decision is provisionally in favour of disclosure or there is doubt about the balance. Disclosure may be stayed pending an appeal.

36. The court may direct that the information or document not be adduced as evidence either on its own initiative or on the application of any person, if public interest immunity is established.[41] The court may order: partial disclosure; restricted disclosure; the holding of proceedings *in camera*; or restricted reporting of the proceedings.

37. The effectiveness of public interest immunity and section 130 of the uniform Evidence Acts as mechanisms to protect classified and security sensitive information in court proceedings was considered by the Australian Law Reform Commission (ALRC) in its

[38] J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102]. See also ALRC Uniform Evidence Law (ALRC Report 102) Chapter 15.
[39] Ibid.
[40] Ibid.
[41] Uniform Evidence Acts s130(2).

2003 inquiry into the Protection of Classified and Security Sensitive Information (Keeping Secrets inquiry), discussed below.

Statutory Mechanisms to Protect Sensitive Information in Criminal Proceedings

38. In addition to claims of public interest immunity there are a number of other mechanisms designed to protect against the public disclosure of security sensitive information in criminal proceedings.

39. Both the *Crimes Act 1914* (Cth) (Crimes Act) and the Criminal Code provide mechanisms which authorise courts to exclude the public from a hearing or prohibit the publication of a report of the whole or part of particular proceedings.

40. Section 85B(1) of the Crimes Act provides that:

> *At any time before or during the hearing before a federal court, a court exercising federal jurisdiction or a court of a Territory of an application or other proceedings, whether in pursuance of this Act or otherwise, the judge or magistrate, or other person presiding or competent to preside over the proceedings, may, if satisfied that such a course is expedient in the interest of the defence of the Commonwealth:*
>
> *(a) order that some or all of the members of the public shall be excluded during the whole or a part of the hearing of the application or proceedings;*
>
> *(b) order that no report of the whole or a specified part of or relating to the application or proceedings shall be published; or*
>
> *(c) make such order and give such directions as he thinks necessary for ensuring that no person, without the approval of the court, has access, either before, during or after the hearing of the application or the proceedings, 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.*
>
> *(2) A person who contravenes or fails to comply with an order made or direction given in pursuance of this section shall be guilty of an offence.*
>
> *Penalty: Imprisonment for 5 years.*

41. Subsection 93(2) of the Criminal Code also provides for material which may raise security concerns to be considered in *in camera* hearings. It provides:

> *(2) At any time before or during the hearing, the judge or magistrate, or other person presiding or competent to preside over the proceedings, may, if satisfied that it is in the interest of the security or defence of the Commonwealth:*
>
> *(a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or*
>
> *(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.

(3) A person commits an offence if the person contravenes an order made or direction given under this section.

Penalty: Imprisonment for 5 years.

42. Both of these mechanisms were considered by the court in the proceedings against Faheem Lodhi, discussed below. There were also considered by the Keeping Secrets inquiry described below.

Professional Responsibilities for Lawyers relating to Disclosure of Sensitive Information

43. In addition to common law and statutory mechanisms designed to protect against the disclosure of sensitive information, lawyers' professional obligations guard against disclosure of national security information in court proceedings.

44. These obligations include general duties to the court and to the administration of justice, as well as particular responsibilities relating to confidentiality of information and honouring undertakings given to the court and to other practitioners relating to non-disclosure. For example, the NSW Solicitors Conduct Rules provide that:

Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.[42]

45. Conduct rules also prohibit solicitors from disclosing any information which is confidential to a client to any person who is not a solicitor or employee of the solicitor's law practice or a barrister, except in very limited circumstances, for example for the purpose of preventing imminent serious physical harm to the client or to another person. [43] Under these conduct rules a solicitor is also prohibited from publishing or taking steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.[44]

46. A breach of the conduct rules may lead to a lawyer's practising certificate being immediately suspended or cancelled on specified grounds.[45]

47. A court also has jurisdiction over lawyers as officers of the court, which includes a jurisdiction to remove a person's status as a legal practitioner and power to enforce

[42] *Revised Professional Conduct and Practice Rules 1995* (NSW) Statement of Principles for Rules 17-24. *The Revised Professional Conduct and Practice Rules 1995* (commenced on 11 December 1995. The *Rules* were made by the Council of the Law Society of New South Wales, pursuant to its power under section 57B of the *Legal Profession Act 1987* on 24 August 1995. A copy of the Rules is available at http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ruleslegislation/SolicitorsRules/index.htm

[43] Law Council's Australian Solicitors Conduct Rules 2011 Rule 9.1. These rules reflect and consolidate solicitor's conduct rules around the country and represent the culmination of two years work by the Law Council of Australia and its constituent bodies to develop a single, uniform set of professional conduct rules. Law Societies continue to work towards adoption of the Rules in each state and territory, according to the processes and approvals set out in their respective local legal profession regulatory arrangements. Further information is available at http://www1.lawcouncil.asn.au/lawcouncil/index.php/divisions/national-profession-project/australian-solicitors-conduct-rules

[44] Law Council's Australian Solicitors Conduct Rules 2011 Rule 28.

[45] See for example *Legal Profession Act 2004* (NSW) Division 6.

the practitioner's duty to the court.[46] For example, where a lawyer has given an undertaking to the court, it is within the court's jurisdiction to order that the undertaking be enforced, punish the lawyer accordingly for failing to do so, and/or order the lawyer to pay compensation to a person who has suffered loss as a result of the breach of undertaking.[47] A lawyer who has breached his or her duty to the court may be ordered to pay costs personally, be punished for contempt and/or be the subject of professional disciplinary sanction. In addition, breach by the lawyer of the duty to the court can, most commonly in criminal matters, cause a miscarriage of justice and the ordering of a new trial. [48]

48. As will be discussed later in this submission, these professional obligations, and the serious consequences that flow from any breach of these obligations, provide a robust system for ensuring that sensitive information disclosed in court proceedings remains confidential.

Australian Law Reform Commission's Inquiry

49. In April 2003, the ALRC began the Keeping Secrets inquiry. The purpose of this inquiry was to examine measures to safeguard classified and security sensitive information during court or tribunal proceedings, or in the course of other investigations - including those relating to criminal prosecutions, civil suits, immigration matters or freedom of information applications.[49] The establishment of the inquiry was in part motivated by the prosecution of Australian intelligence officers Simon Lappas (in Australia) and Jean-Philippe Wispelaere (in the US) for attempting to sell classified national security information.[50]

50. The terms of reference for this inquiry asked the ALRC to assess the effectiveness of the various existing mechanisms designed to prevent the disclosure of classified and security sensitive information in the course of official investigations and criminal or other legal proceedings. The ALRC also was asked to report on whether there were any other approaches, including non-regulatory alternatives, which would improve performance in this area.

---

[46] *Re Davis* (1947) 75 CLR 409 at 414 per Latham CJ, at 419 per Starke J, at 423 per Dixon J, at 427 per McTiernan J.
[47] See for example *R v Khazaal* (2006) 167 A Crim R 565; [2006] NSWSC 1353 at [20] per Whealy J
[48] See for example *Re Knowles* [1984] VR 751
[49] Further information about this inquiry, including copies of the Background Paper, Discussion Paper and Report can be found at http://www.alrc.gov.au/inquiries/classified-and-security-sensitive-information
[50] Mr Lappas was a former employee of the Defence Intelligence Organisation (DIO) charged with espionage and related offences. During the proceedings against Mr Lappas, the court was required to deal with highly sensitive documents, some of which were prepared by foreign powers. Initially, the sensitive documents were considered in camera and by counsel with security clearances. A claim for public interest immunity was also made and granted, however the trial judge also ruled that to exclude the particular documents from evidence would hinder the defence's ability to adduce relevant evidence before the jury and would preclude the ability for the accused to get a fair trial. Accordingly, the trial judge stayed the prosecution of one of the charges against Mr Lappas. Subsequent proceedings against Mr Lappas took place with a defence counsel who did not hold security clearances and declined to seek them. Despite this, defence counsel made a series of undertakings regarding the sensitive documents, however these undertakings apparently did not satisfy the foreign power from which the two highly sensitive documents were sourced and this power continued to refuse to permit them to be tendered in the proceedings. The Crown conceded that the judge was exempt from the requirement to hold a security clearance. It also stated that, although the jurors were not cleared and therefore the relevant government agencies did not want them to see the sensitive documents, they had to so that the trial could proceed at all. The trial resumed in November 2002. Mr Lappas was ultimately found guilty by the jury of the espionage offence under s 78(1)(b) of the Crimes Act in addition to pleading guilty to an alternative offence in relation to other highly sensitive documents. A more detailed summary of the *Lappas* proceedings is available at http://www.austlii.edu.au/au/other/alrc/publications/dp/67/Appendix_4_Summary_of_Lappas_case.html#Heading3

51. The ALRC was asked to give consideration to a range of compelling, and sometimes competing public interests, such as the public interests in:

    - safeguarding national security and strategic interests;
    - facilitating the successful prosecution of individuals who engage in acts of terrorism or espionage;
    - maintaining the fundamental fairness, integrity and independence of judicial processes; and
    - adhering, to the greatest extent possible, to the principles and practices of both 'open justice' and open and transparent executive government.

52. The ALRC released a background paper in July 2003 and a discussion paper in January 2004. The ALRC's background paper recognised that tensions existed between the right to a fair trial, guaranteed in Australian and international law, and the need to protect certain classified and security sensitive information from general disclosure.

53. A number of organisations, including the Law Council made submissions to the ALRC, arguing that there were well established mechanisms for protecting sensitive information in the context of court proceedings, such as measures to protect the identity of informants, suppress the names of parties or witnesses, or restrict or limit publicity associated with the proceedings.[51] However, the Law Council also recognised that the practical application of public interest immunity law was difficult and complex, and that some further work on the systematization of the various circumstances involving public interest immunity would be valuable.

54. The ALRC discussion paper contained a range of detailed reform proposals, including a detailed statutory scheme that would govern the use of classified and security sensitive information in all stages of proceedings in all courts and tribunals in Australia.[52] The ALRC again invited submissions and comments on the views presented in its paper.

55. The Law Council made a detailed submission in response to the ALRC's Discussion Paper wherein it queried whether a major overhaul of existing mechanisms for the protection of security sensitive information was needed, but also expressed support for proposals to:

    - strengthen measures to protect whistle-blowers;
    - improve the handling of classified and security sensitive information by government agencies through procedures contained in the *Commonwealth Protective Security Manual*; and
    - amend the Crimes Act and the Criminal Code to provide for injunctive relief to restrain disclosure of classified or security information in contravention of the criminal law.

[51] For example *Crimes Act 1914* (Cth) s85B and *Criminal Code Act 1995* (Cth) s93.2 provide sufficient power to enable judges exercising federal jurisdiction to protect security sensitive information by closing proceedings in whole or in part or making restrictive orders. For further discussion see Law Council of Australia Submission to the Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information* (16 April 2004).
[52] See ALRC Discussion Paper 67 available at http://www.alrc.gov.au/dp-67.

56. The Law Council expressed general support for the ALRC's proposals relating to the introduction of specialised procedures for detailing with sensitive national security information in courts and tribunals.[53] For example, the Law Council supported those proposals that would:

    - require the accused to notify the other parties and the court of its possible reliance on sensitive security information in advance; and
    - provide for the editing and summarising of information as an alternative to full disclosure.

57. The Law Council also expressed the strong view that while situations would arise which demanded that access to sensitive national security information be prohibited or restricted in courts and tribunals, any such limitations should remain the responsibility of the courts. It further submitted that under such arrangements, the onus should always be upon those seeking to limit access and that any permitted limitations upon access should remain consistent with the principles of a fair trial.

58. The Law Council expressed opposition to the proposals that would:

    (a) allow the executive to prohibit access to information to parties or courts and tribunals through a process of certification; and/or

    (b) empower the court to order that lawyers obtain security clearances in cases involving security sensitive information.

59. On 23 June 2004 the ALRC issued its final report entitled Keeping Secrets: The Protection of Classified and Security Sensitive Information (ALRC Report 98) (Keeping Secrets report.[54]

60. As part of its report, the ALRC examined the operation of section 130 of the uniform Evidence Acts. The ALRC also found that the public interest immunity procedure worked effectively. The ALRC noted that one unresolved issue was whether the uniform Evidence Acts required a provision to enable a judge's ruling on the immunity claim to be obtained in advance of the trial (and to allow time for an appeal from that ruling).[55]

61. The ALRC recommended enhancing the regime for the protection of classified and security sensitive information through the enactment of specific procedures in a National Security Information Procedures Act rather than by amending section 130 of the *Evidence Act 1995* (Cth).

62. The ALRC's proposed National Security Information Procedures Act would govern the use of classified and security sensitive information in all stages of proceedings in all courts and tribunals in Australia (except where expressly displaced by other legislation).

---

[53] These proposals were outlined in Chapter 10 of the ALRC Discussion Paper, available at http://www.austlii.edu.au/au/other/alrc/publications/dp/67/10_Proposals_for_Reform___Courts.html#Heading367

[54] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), available at http://www.austlii.edu.au/au/other/alrc/publications/reports/98/6.html

[55] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), [8.192].

63. The ALRC explained that the key features of its proposed National Security Information Procedures Act were to:

- *identify and bring forward as early in the proceedings as practicable - preferably before the trial—the issues associated with the admission, use and protection of any classified and security sensitive information;*
- *provide the court with a wide range of possible methods of maximising the amount of evidence available for use in the proceedings - ensuring that fairness is afforded to all parties (including the Crown) and public access is not unduly restricted; and*
- *leave the Government with the ultimate option to withhold extraordinarily sensitive information where it considers that (following the court's final rulings on these issues) the risks associated with disclosure outweigh all other considerations (including gaining a criminal conviction at trial or successfully defending a civil action). However, the court or tribunal retains the final power to determine how the proceedings will go ahead in the light of the Government's decision about whether or not to produce the evidence.*[56]

64. The ALRC's recommended scheme would give the court the power to make orders relating to (but not limited to):

- *admitting the sensitive material after it has been edited or 'redacted' (that is, with the sensitive parts obscured);*
- *replacing the sensitive material with alternative, less sensitive forms of evidence;*
- *using closed-circuit TV, computer monitors, headphones and other technical means to hide the identity of sensitive witnesses or the content of sensitive evidence (in otherwise open proceedings);*
- *limiting the range of people given access to the sensitive material (for example, limiting access only to those with an appropriate security clearance);*
- *closing all or part of the proceedings to the public; and*
- *hearing part of the proceedings in the absence of one of the parties and its legal representatives—although not in criminal prosecutions or civil proceedings (except some judicial review matters), and only in other exceptional cases, subject to certain safeguards.* [57]

65. The Keeping Secrets report also contained a range of other recommendations including:

- the introduction of a comprehensive public interest disclosure scheme to clarify whistle-blowers' protections and the procedures for investigating public interest disclosures, especially those that related to classified or security sensitive information, or the defence and intelligence agencies;

[56] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), Executive Summary, see also Chapter 11 and Recommendations 11.1 - 11.46.
[57] Ibid.

- improvements to the structure, content and enforceability of the *Commonwealth Protective Security Manual*;

- improvements to the classification and handling of sensitive material by government agencies; and

- comprehensive review of all laws and regulations that gave rise to a duty not to disclose.

Introduction of NSI Act regime to Federal Criminal Proceedings

66. Before the ALRC published its final report, the Commonwealth Government introduced the *National Security Information (Criminal Proceedings) Bill 2004* (Cth) and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (Cth) into Parliament (the NSI Bills 2004).

67. Despite being introduced prior to the public release of the Keeping Secrets report, the NSI 2004 Bills contained features that reflected a number of the ALRC's recommendations relating to its proposed National Security Information Procedures Act. However, while both the ALRC and the Government recognised the need for the introduction of legislation that dealt specifically with the disclosure of sensitive material in federal criminal proceedings, there were significant points of departure between the ALRC's legislative proposal and the NSI 2004 Bills, for example:

    - the ALRC's scheme permitted courts to retain a discretion (in the light of whatever objections the Crown may raise) to grant lawyers without a security clearance participating in proceedings access to classified material, subject to such conditions and undertakings that the court considered necessary;

    - the ALRC scheme did not include a statutory direction that the Court hold closed hearings in certain circumstances;

    - although the NSI 2004 Bills required a record of the closed hearings to be kept, such a record would be available only to the court hearing an appeal on the decision made during that session (and not, for example, to the parties). This can be contrasted with the ALRC approach wherein the court was given the power to release a record of a closed court hearing if, on subsequent review, it appeared that this would cause no prejudice to national security;

    - under the NSI 2004 Bills, the hearing that the court would be required to hold to determine whether it would accept the Attorney-General's certificates would be, in some cases, held at the beginning of the trial. Under the ALRC's recommendations, emphasis was placed on the court convening a special directions hearing at the earliest possible time, and preferably before the trial began; and

    - under the NSI 2004 Bills, the court was directed to give the greatest weight to the possible prejudice to national security when determining whether it would accept the Attorney-General's certificates. The ALRC's scheme acknowledged that possible prejudice to national security ought to be given great weight, but

would formally leave the court with more discretion to ensure that the interests of justice were served in the case before it.[58]

68. On 16 June 2004, the Senate referred the provisions of the NSI 2004 Bills to the Senate Legal and Constitutional Legislation Committee (the Committee) for inquiry and report by 19 August 2004.

69. The Law Council made a written submission to the Committee,[59] wherein it drew attention to its detailed submission to the ALRC inquiry and expressed:

- disappointment that the NSI 2004 Bills were introduced in advance of the public release of the final ALRC report and with only limited time for public comment;
- grave concerns at the provisions of the NSI 2004 Bills that established a system of security clearances for lawyers, noting that these provisions would involve a very direct and serious prejudice to lawyers and clients and would be unlikely to be effective at protecting sensitive information if other key personnel involved in the process with no security clearance status could receive such information. The Law Council also queried whether such a system was necessary in light of existing mechanisms to protect sensitive information; and
- serious concerns regarding the process for issuing non-disclosure certificates and witness exclusion certificates by the Attorney-General and the potential exclusion of a defendant or legal representative from a closed hearing.

70. The Law Council appeared before the Committee to give evidence at the Inquiry into the NSI 2004 Bills.[60] The Law Council told the Committee that while it was generally supportive of proposals to create new procedures for dealing expeditiously with the use and management of security sensitive information, the restrictive impact of the NSI 2004 Bills on the fair trial rights of the accused went too far. [61] For example, it noted that the NSI 2004 Bills could result in:

> *decisions which are critical to the nature of the prosecution case, including possibly exculpatory elements, being determined in the absence of the accused or his or her representative by a judge who is processing in secret and …without the accused even knowing of the occasion.* [62]

71. The Law Council also pointed to alternatives that could offer protection against the disclosure of sensitive information or the calling of witnesses who might disclose such information, including the established privilege in relation to the identity of police informers. [63] These alternative models provided a more appropriate balance between

---

[58] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004) at [1.36].
[59] Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* (2 July 2004).
[60] The Senate Committee on Legal and Constitutional Affairs hearing into the NSI 2004 Bills took place on 5 July 2004 in Sydney. The Law Council was represented by Bret Walker SC and Philip Selth OAM. A copy of the transcript is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/national_security/report/index.htm
[61] Senate Committee on Legal and Constitutional Affairs Hansard, 5 July 2004, pages 14-15.
[62] Senate Committee on Legal and Constitutional Affairs Hansard, 5 July 2004, page.19.
[63] Senate Committee on Legal and Constitutional Affairs Hansard, 5 July 2004, page.19.

the need for accusatorial fairness so that the defendant could test evidence, and the public interest in protecting sensitive information or identities of witnesses in certain circumstances.[64]

72. The Committee acknowledged a number of the Law Council's concerns in its report.[65] It concluded that the NSI 2004 Bills attempted to "reconcile two important objectives that in some cases may conflict: promoting and upholding the right of a defendant to a fair trial and maintaining national security by protecting sensitive information during criminal proceedings."[66] The Committee made a number of recommendations intended to ensure that there were adequate safeguards in the proposed legislation that would protect this right. These included that the NSI 2004 Bills be amended to:

    (a) remove those provisions which required the court to hold closed hearings, so that the court retained its discretion to determine whether its proceedings were open or closed;[67] and

    (b) include a provision requiring the court to provide a written statement of reasons outlining the reasons for holding proceedings in-camera.[68]

73. If these recommendations were not adopted, the Committee recommended that as a commitment to the right of a defendant to a fair, public trial, the NSI 2004 Bills should be amended to include a provision requiring the Attorney-General to publish a statement of reasons for any decision to hold a closed hearing.[69]

74. It was also recommended that the NSI 2004 Bills be amended to provide that:

- defendants and their legal representatives could only be excluded from hearings in limited specified circumstances, and that courts would retain the power to stay proceedings if the defendant could not be assured of a fair trial;[70] and
- when making an order allowing information to be disclosed subject to the Attorney-General's non-disclosure certificate, the court should be satisfied that any amended document and/or substitution documentation to be adduced as evidence would provide the defendant with substantially the same ability to make his or her defence as would disclosure of the source document;[71] and
- when making an order to exclude a witness from the proceedings, the court should be satisfied that the exclusion of the witness would not impair the ability of the defendant to make his or her defence.[72]

---

[64] Senate Committee on Legal and Constitutional Affairs Hansard, 5 July 2004, page 19.
[65] A copy of the Senate Committee's Report, released on 19 August 2004, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/national_security/report/index.htm The Law Council's concerns are acknowledged by the Committee in Chapter 3.
[66] Senate Committee on Legal and Constitutional Affairs Report on the Provisions of the *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* (19 August 2004) at [3.146]
[67] Ibid., Recommendation 1.
[68] Ibid., Recommendation 2.
[69] Ibid., Recommendation 3.
[70] Ibid., Recommendation 6.
[71] Ibid., Recommendation 7.
[72] Ibid., Recommendation 8.

75. In relation to the provisions of the NSI 2004 Bills relating to security clearances for lawyers, the Committee recommended that "the court assume a more active role in determining whether a defendant's legal representative requires a security clearance before he or she can access information". [73] Specifically, the Committee recommended that the NSI 2004 Bills adopt the recommendation by the ALRC that "the court may order that specified material not be disclosed to a lawyer unless he or she holds a security clearance at a specified level". [74]

76. In 2004 the Bills were passed without amendments.

Extension of NSI Act to Certain Civil Proceedings

77. In 2005, amendments were introduced to the NSI Act to extend its operation to civil proceedings through the *National Security Information Amendment Bill 2005* (the NSI Bill 2005). The amendments broadly adopted the process for federal criminal proceedings under the Act with some departures to account for the nature of civil proceedings. Key differences in the civil regime include the following:

- the Attorney-General (or an appointed Minister) gives written notice to the parties and the court that the NSI Act applies to a civil proceeding, rather than the prosecutor;[75]
- the Attorney-General (or appointed Minister) must be given notice of a prehearing conference and may attend the conference, given that the Attorney-General may not necessarily be a party to the proceeding and may not otherwise be aware of it;[76]
- at any time during a civil proceeding, the Attorney-General (or appointed Minister) may agree with the parties to the proceeding to an arrangement about any disclosure and the court can give effect to such an order;[77]
- the security clearance provisions extend to the parties as well as their legal representatives and the assistants of the legal representatives.[78] Upon receiving written notice from the Secretary, a party or the party's representative may apply to the Secretary for a security clearance at the level the Secretary considers appropriate.[79] Failure to apply for a security clearance within the relevant time period allows the court, inter alia, to recommend that a party seek a security clearance or engage a legal representative, who has been given or is prepared to seek a security clearance;[80]
- the provisions apply to civil proceedings in any Australian court. A civil proceeding means all stages of the civil process, including discovery and interlocutory proceedings.[81]

[73] Ibid., Recommendation 9.
[74] Ibid., Recommendation 9.
[75] NSI Act ss6A,38A.
[76] NSI Act ss6A,38AA.
[77] NSI Act s38B.
[78] See for example NSI Act s38I(3), NSI Act Part 4 Division 2.
[79] NSI Act s39A (2).
[80] NSI Act s39A (5).
[81] NSI Act s15A.

78. Under the amended NSI Act, the court retains the power to determine that proceedings should be stayed in the event that a party would not be guaranteed a fair hearing, even after the court makes an order after the closed hearing. The 2005 amendments also included a number of new offences to prevent disclosure of national security information in civil proceedings.

79. On 16 March 2005 the NSI Bill 2005 was referred to the Committee for inquiry and the Law Council made a submission raising concerns relating to:

    (a) The need for and the purpose of the NSI Bill 2005, noting that Australian courts had a long history of being able to manage sensitive evidence in all kinds of situations and there was no reason to believe that security sensitive information could not be handled by the courts and by the legal representatives of parties consistently with the proper administration of justice.

    (b) The provisions that allowed the court to stay proceedings in civil as well as criminal proceedings. While the power to stay proceedings was strongly supported by the Law Council in criminal proceedings, it noted that in civil proceedings an unfortunate perception could be created: that a stay of proceedings compelled by difficulties relating to the admission of security sensitive information had enabled the government to evade a civil liability for which it might otherwise have been found responsible.

    (c) The application of the security clearance system to lawyers. In particular, the Law Council expressed the view that it should be a court, and not the Secretary which should determine whether a legal representative and the parties and the assistants of a legal representative should require security clearances. Failing this, the process undertaken by the Secretary should be as fair and transparent as possible.

    (d) The offences introduced by the NSI Bill 2005, including lack of clarity regarding the key concepts underlying some of these offences, such as 'disclosure that *may affect* national security'[82]

80. The Committee issued its report on 11 May 2005.[83] The Committee:

    (a) expressed the view that it was necessary to provide a consistent and appropriate scheme for protection of national security information in civil proceedings[84] but acknowledged the concerns about the Bill's impact on the safeguards in anti-terrorism legislation and made recommendations to address some of these concerns.[85]

    (b) acknowledged the concerns regarding the perceived conflict of interest arising from the Attorney-General's power to intervene in civil proceedings, noting that this differed from that in federal criminal proceedings, where an independent statutory office holder, the Director of Public Prosecutions would be involved in proceedings; [86]

[82] See NSI Act s46C.
[83] Senate Committee on Legal and Constitutional Affairs Report on the Provisions of the *National Security Information Amendment Bill 2005* (11 May 2005).
[84] Ibid. at [3.22]
[85] Ibid. at [3.23]
[86] Ibid. at [3.53]-[3.55].

(c) noted that the Committee had made a number of recommendations in relation to the NSI Bill 2004 that were intended to give courts greater discretion in the conduct of their proceedings, but not all of these were taken up in amendments;[87]

(d) noted the strong concerns regarding security clearances for lawyers and parties;[88]

(e) noted criticisms that the NSI Bill 2005 had the potential to result in increased delays and costs. [89]

81. The Committee also made 11 recommendations for amendments to be made to the NSI Bill 2005. These recommendations generally reflected those made following the Committee's inquiry into NSI 2004 Bills, and among other changes, would have amended the Bill to:

- ensure the court retained its discretion to determine whether its proceedings were open or closed; and
- require the court to provide a written statement of reasons outlining the reasons for holding proceedings in-camera.

82. Regulations were also passed in 2005 under the NSI Act which prescribed requirements for the handling and destruction of information under the NSI Act.[90] These regulations incorporated the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings* which further specified how and where national security information should be accessed, stored and otherwise handled and addressed a range of physical security matters.

2010 Amendments

83. In 2009, the Attorney-General's Department released a discussion paper on proposed legislative reforms to Australia's counter-terrorism and national security legislation followed by exposure draft legislation. This draft legislation included a number of reforms to the NSI Act. In particular, it was proposed that the NSI Act be amended to:

- Extend the notice provisions regarding the expected disclosure of national security information in civil or criminal proceedings to disclosure arising from the issue of subpoenas; and
- Insert a definition of 'national security information' as information that 'relates to national security' or 'the disclosure of which may affect national security'.[91]

84. This draft legislation was followed by the introduction of the *National Security Legislation Amendment Bill 2010* (Cth) (the NSL 2010 Bill) and the *Parliamentary Joint Committee on Law Enforcement Bill 2010* (Cth). In May 2010 both Bills were referred to the Senate Committee on Legal and Constitutional Affairs for inquiry.

85. The Law Council made submissions in response to the discussion paper, the draft legislation and the 2010 Bills.

[87] Ibid. at [3.70]-[3.74].
[88] Ibid. at [3.107]-[3.109].
[89] Ibid. at [3.148].
[90] *National Security Information (Criminal and Civil Proceedings) Regulations 2005* (Cth).
[91] S 7 NSI Act

86. In respect of the amendments to the NSI Act proposed in the NSL 2010 Bill, the Law Council opposed the proposal to extend the requirement to notify the Attorney-General if national security information would be disclosed in proceedings to circumstances where the prosecutor or defendant (or the defendant's legal representative) knows or believes that:

> *"on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal court proceeding".*

87. The Law Council also gave evidence before the Committee. It highlighted particular concerns with those amendments to the NSI Act that related to the drafting of subpoenas. It noted that under the amendments, it would be an offence carrying two years imprisonment for lawyer to draft a subpoena in a way which, on its face, may disclose national security information. It told the Committee:

> *That is a very scary prospect for somebody who drafts subpoenas. The information that is produced in response to a subpoena is already covered by the NSI Act. In cases so far, where there have been arguments about the application of the NSI Act, it has been about, by and large, information produced on subpoena. Now this provision will go a step further: it is actually the document that creates the offence. If you draft a schedule to a subpoena asking for particular documents to be produced to the court, and if it is thought that the list of documents itself might disclosure national security information, that is a criminal offence. But in circumstances where the only people who are ever going to see the document are the lawyers who issue it, the party who receives it and the registrar who issues or stamps the documents, we think this is unnecessary – and yet scary.*[92]

88. While the Committee made recommendations in relation to other aspects of the 2010 Bills, it did not make any recommendations in respect of the proposed amendments to the NSI Act.

Judicial Consideration of the NSI Act

89. The Law Council is aware of a number of civil[93] and criminal proceedings that have involved judicial consideration of the NSI Act.

90. Perhaps of most relevance to this inquiry are the terrorism cases that have considered provisions of the NSI Act. These include:

    (a) *R v Lodhi* [2006] NSWSC 571, *R v Lodhi* [2006] NSWSC 586, *Lodhi v Regina* [2006] NSWCCA 101; *Lodhi v R* [2007] NSWCCA 360 (the 'Lodhi proceedings")

    (b) *Thomas v Mowbray* [2007] HCA 33

    (c) *DPP v Thomas* [2006] VSC 18

    (d) *R v Benbrika & Ors* [2007] VSC 141

[92] Senate Committee on Legal and Constitutional Affairs, Inquiry in the NSL 2010 Bill, 21 May 2010 Committee Hansard pages 3-4. The Law Council was represented by Phillip Boulten SC.
[93] For example see *AVS Group of Companies Pty Limited and Ors v Commissioner of Police and Anor* [2010] NSWSC 109; *Clement v Comcare* [2011] FCA 629.

(e) *R v Khazaal* [2006] NSWSC 1353

(f) *R v Baladjam & Ors* [No 24] [2008] NSWSC 1447

91. The Law Council will focus on the judicial consideration of the NSI Act in the context of the *Lodhi* proceedings. These proceedings provide an insight into the various mechanisms in the NSI Act that are designed to protect against the unauthorised disclosure of national security information and how these provisions interact with the common law concept of public interest immunity. The *Lodhi* proceedings also include consideration of the constitutionality of the NSI Act and some discussion of the appointment of special defence counsel.

Lodhi

92. In 2005, Faheem Khalid Lodhi was suspected of obtaining a series of documents and other materials for the purposes of carrying out a terrorist attack in Australia. Mr Lodhi was charged with a number of offences under the Criminal Code.[94] Following a series of interlocutory proceedings and a trial, Mr Lodhi was ultimately acquitted of one count of making a document connected with preparing for a terrorist act, but found guilty of possessing a thing connected with preparing for a terrorist act; collecting documents connected with preparing for a terrorist act; doing an act in preparation for a terrorist act; and, giving false or misleading answers to the Australian Security Intelligence Organisation (ASIO). Mr Lodhi was sentenced to 20 years imprisonment with a 15 year non-parole term. He appealed his conviction and sentence. Both were upheld by the NSW Court of Appeal on 20 December 2007. The High Court refused special leave to appeal on 13 June 2008.[95]

The making of protective orders

93. The evidence relevant to Mr Lodhi's prosecution and defence included evidence that related to national security information, for example, information that was obtained following the issue of subpoenas to ASIO and the Australian Federal Police.

94. Some of the documentary evidence was not seen by either the accused or the prosecution and was subject to claims for public interest immunity made by the Attorney-General.[96]

95. The NSI Act also had an impact on certain evidence. On February 2006, a notice was given to the Attorney-General under section 24 of the NSI Act that the proceedings would involve the disclosure of national security information. Following the receipt of this advice, the Attorney-General issued a number of certificates under the NSI Act relating to certain folders of documentary evidence and in respect of certain witnesses.[97]

96. In March 2006, the court considered the claims for public interest immunity and the certificates issued by the Attorney-General under the NSI Act and indicated the range of likely orders to be made under section 31 of the NSI Act, which provides that the

[94] Mr Lodhi was charged with: possessing a thing (in this case a document about how to make bombs) connected with a terrorist act, knowing of such a connection (Criminal Code s 101.4(1)); collecting or making documents (collecting maps of the electricity supply system and making aerial photos of Australian Defence Force establishments) connected with terrorist acts, knowing of such a connection (*Criminal Code* s 101.5(1)); and doing an act (seeking information about the availability of materials that could be used to make bombs) in preparation or planning a terrorist act (Criminal Code s 101.6).
[95] *Lodhi v R* [2008] HCATrans 225
[96] For example see *R v Lodhi* [2006] NSWSC 586 [5].
[97] For example see *R v Lodhi* [2006] NSWSC 586 [8].

court may affirm non-disclosure, except in certain circumstances or allow disclosure, including in certain forms.[98] The Attorney-General, intervened in the proceedings and made submissions to the court during the closed hearing.[99] The court then moved into open court session immediately after the closed hearing had finished.[100] It did so to enable the Attorney-General to make submissions as to the imposition of protective orders relating to national security information in the event that the court was minded to order disclosure pursuant to the NSI Act.[101]

97. The protective orders in the open proceedings related to pre-trial hearings and the trial itself, and included:

    (a) that the court be closed while the ASIO witnesses give their evidence and that there be no publication of evidence taken during the closed court session.

    (b) that there be no disclosure or publication of details of the appearance of the witness; and

    (c) that each witness give evidence while using a pseudonym or cipher.

98. When considering making orders for non-disclosure of certain evidence, Whealy J explained that this:

> *requires the Court to conduct a balancing and weighing exercise in relation to a number of strongly competing considerations. These include the protection of national security; the right of the prosecutor to place before the jury evidence in support of its contention that the accused is guilty of the charges brought against him; the principles of open justice and, importantly, the accused's right to be tried fairly. The Court's ultimate task is to come to a discretionary decision in relation to the imposition of protective orders and, if so, the extent to which such orders should be made. The considerations I have identified, as might be expected, pull strongly in different directions.*[102]

99. Whealy J referred to sources of power for the making of the protective orders sought by the Commonwealth: section 85B of the Crimes Act and subsection 93(2) of the Criminal Code. Both of these provisions are outlined above, and authorise the court to make orders to restrict public access to hearings and/or to restrict or limit the publication of transcripts of certain proceedings.

100. When considering making protective orders, Whealy J emphasised that "[o]pen justice is one of the most fundamental aspects of the system of justice in Australia" and that "[t]he conduct of proceedings in public is an essential quality of an Australian court of justice." His Honour observed that:

> *Where a Court has an inherent or statutory jurisdiction to make a non-publication order, a test of necessity is ordinarily applied to the exercise of the power to make such an order. A court can only depart from the fundamental rule that the administration of justice must take place in open court where*

[98] NB this decision of Whealy J does not appear to be accessible through Austlii or other subscription services. In the case of *R v Lodhi* [2006] NSWSC 586 Whealy J outlined the range of orders likely to be made under section 31 of the NSI Act, however, some confusion later arose regarding whether the orders were actually made. See http://www.smh.com.au/news/National/Queries-about-Lodhi-trial-secrecy-orders/2007/08/16/1186857652848.html
[99] *Regina v Lodhi* [2006] NSWSC 596 at [4]
[100] Ibid.
[101] Ibid.
[102] *Regina v Lodhi* [2006] NSWSC 596 at [6]

observance of the rule would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. An order of the court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in the proceedings before it.

An order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice or the protection of the relevant public interest.

The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. [103]

101. To assist in the resolution of the matter his Honour received an affidavit sworn by the then Commonwealth Director-General of Security. Parts of that affidavit were confidential and His Honour provided for a section of his reasons to be included in a confidential schedule. The affidavit included the Director-General's analysis of the importance to the security of the Commonwealth of making protective orders in this case.[104]

102. Whealy J accepted the arguments of ASIO and the material in the affidavits of the Director-General that were provided in support of orders to prevent the disclosure of certain information and the identity of certain witnesses and observed that "disclosure of matters of that kind in the public domain would adversely affect ASIO's ability to effectively perform its statutory functions" and that "disclosure of the identities of present ASIO personnel has the capacity to seriously compromise both past and present activities."[105]

103. When making the protective orders, Whealy J relied upon the well established principle of public interest immunity but also referred to his consideration of section 31 of the NSI Act. His Honour ultimately ordered that:

1. The Court be closed at all times when information is disclosed, or evidence is heard, which discloses: (a) the fact of, or content of, ASIO's dealings with any of its sources; or (b) the fact of, or content of, ASIO's relationship with any foreign agency.

2. The Court be closed at all times when ASIO witnesses give evidence in the proceedings.

3. There be no disclosure or publication (except in closed Court) of any information which discloses: (a) the fact of, or content of, ASIO's dealings with any of its sources; (b) the fact of, or content of, ASIO's relationship with any foreign agency; or (c) details of the physical appearance of any ASIO witness or any other details which disclose the identity of, or are likely to lead to the identification of, any ASIO witness.

4. Officers or employees of ASIO be referred to, in and for the purposes of these proceedings, by pseudonym.

---

[103] *Regina v Lodhi* [2006] NSWSC 596 at [6], summarising *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (2004) 61 NSWLR 344; *Attorney-General (NSW) v Mayas Pty Limited* (1988) 14 NSWLR 342.
[104] *Lodhi v Regina* [2006] NSWCCA 101 [12].
[105] *Regina v Lodhi* [2006] NSWSC 596 [20]

5. Any ASIO witness referred to [in the Attorney General's non-disclosure certificate] be screened from all persons other than: (a) the Judge; (b) the Judge's Associate; (c) the jury; (d) the legal representatives for the Defendant; and (e)the legal representatives for the Prosecution.

6. The transcript of any proceedings which occurred in closed Court (other than any closed hearing under s 29 of the NSI Act) is to be provided forthwith in electronic format to the legal representatives for the Crown, the Accused and the Attorney-General;

7. The Attorney-General will inform the Court of any proposal to edit any part of the transcript;

8. If the Court considers it appropriate to do so the Court may grant leave to media interests to be heard in respect of the proposed edits to the transcript; and

9. The transcript will then be made publicly available in its edited form as soon as practicable after the edited transcript is received by the Court and in any event not later than 48 hours after the day to which the transcript relates or such further time as the Court may allow.

104. Mr Lodhi sought leave to appeal these orders in the NSW Court of Criminal Appeal.[106] Leave to appeal was refused.

Appointment of Special Defence Counsel

105. The *Lodhi* proceedings also included an application by counsel for the defendant relating to the use of special defence counsel.[107]

106. Counsel for the defendant argued that there were several matters which "demonstrated an exceptional situation for warranting the appointment of special counsel"[108] in this case. Central to these were:

(a) The fact that none of the defence lawyers possessed a security clearance as referred to in section 29(3) of the NSI Act. This could result in lawyers for the defendant, as well as the defendant, being excluded from the hearing when sensitive information was going to be disclosed, and that disclosure was likely to prejudice national security.[109]

(b) The fact that in the pre-trial hearing, the prosecution did not have access to many of the documents that would have or may have been examined, such as three folders of unredacted material. It was argued that, in those unusual circumstances, neither the prosecutor nor the defence would have the material or know what it was. As a consequence, the prosecutor would not have the capacity to fulfill his duty of disclosure to the defence because he did not have the material itself.[110]

(c) The fact that the trial itself could be said to relate to national security, and was therefore the type of trial which more readily raised issues of national security

[106] Lodhi v Regina [2006] NSWCCA 101.
[107] *R v Lodhi* [2006] NSWSC 586.
[108] *R v Lodhi* [2006] NSWSC 586 at [18].
[109] Ibid.
[110] *R v Lodhi* [2006] NSWSC 586 at [19].

whereas in other trials such issues arose only indirectly. Given the definition of "national security" under the NSI Act, a claim for non-disclosure could be expected to be a very broad ranging claim where careful consideration might be required in determining whether to disclose or not to disclose the information.[111]

107. Having considered these submissions, Whealy J held that the provisions on the NSI Act were not inconsistent with the appointment of special counsel, and that subsection 29(2)[112] was drafted sufficiently broadly to allow a person appointed as special counsel to take part in a section 31 hearing.[113] This was because a special counsel could be considered to be 'any legal representative of the defendant'.

108. Whealy J explained that although this type of special counsel would take instructions from defence counsel and solicitors, rather than from the defendant himself and would be under an obligation not to disclose any material of a secret nature to the defence lawyers or the accused, the role of special counsel would be to represent the interests of an accused person in relation to the issue of disclosure and need not go further. Whealy J noted that special counsel might have a role to play on appeal but again it would be a limited role and relate to a grievance arising from an unsuccessful disclosure submission. His Honour concluded that:

In all these circumstances, it could not be said other than that special counsel is representing the accused albeit on a limited and special basis. The very fact of appointment of special counsel carries with it the need to promote, in the interests of justice, the protection of a criminal defendant's right to a fair trial [references omitted].[114]

109. Whealy J also noted that subsection 19(1) of the NSI Act specifically reserved the power of the court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process, except so far as the NSI Act may expressly or impliedly provide.

110. His Honour concluded that the court had power to appoint special defence counsel in the context of hearings under section 31 of the NSI Act, and that it should do so if satisfied that no other course would adequately meet the overriding requirements of fairness to the defendant. However, Whealy J also accepted the submission by the prosecution that it was inappropriate at the particular stage of the proceedings in *Lodhi* to make an order appointing special counsel. As a result, no such counsel was appointed in that case.[115] Notwithstanding this, Whealy J made a number of recommendations which he left up to the parties to decide whether they would act on. These are extracted below:

"That the Attorney-General select a senior counsel who is considered appropriate to act as special counsel in the proceedings, if required so to act.

That the Attorney-General notify the defence of the identity of the special counsel so selected.

---

[111] *R v Lodhi* [2006] NSWSC 586 [20].
[112] Section 29(2) of the NSI Act outlines who is permitted to be present at a closed hearing. The only people that are permitted to attend such a hearing are: the magistrate, judge or judges comprising the court; and court officials; and the prosecutor; and the defendant; and any legal representative of the defendant; and the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General; and any witnesses allowed by the court.
[113] *R v Lodhi* [2006] NSWSC 586 at [28].
[114] *R v Lodhi* [2006] NSWSC 586 at [29].
[115] *R v Lodhi* [2006] NSWSC 586 at [44].

That, if thought appropriate, arrangements be made between the lawyers for the defence and the nominated special counsel so that an appropriate briefing in relation to issues likely to arise at the trial, especially those attaching to the defence case, be placed before special counsel.

That the person nominated as special counsel be asked to make himself or herself available towards the end of the week commencing Monday 6 March 2006 so that he/she may be invited to inspect a possibly limited amount of material, if it is the decision of the Court at that stage that special counsel be invited to assist the trial judge in relation to ensuring fairness for the defendant."[116]

Constitutional Challenge

111. The *Lodhi* proceedings also included a challenge to the constitutionality of Part 3 of the NSI Act.[117] Media agencies intervened in the proceedings, arguing that the procedures set out in Part 3 of the NSI Act were unconstitutional because they breached the implied constitutional freedom of political communication. It was also argued that features of the NSI Act required State and Territory Supreme Courts to exercise Commonwealth judicial power in a manner inconsistent with their judicial character as courts under Chapter III of the Constitution. Whealy J upheld the constitutional validity of Part 3 of the NSI Act.

112. In the course of his reasons, Whealy J outlined a number of the 'novel', 'startling' and 'intrusive' features of the NSI Act, including the fact that legal counsel were rendered liable to criminal prosecution under the legislation by failing to give notice to the Attorney-General of knowledge or belief that they would disclose in a federal criminal proceeding information that related to or affected national security.

113. Whealy J observed that despite the fact that Part 3 of the NSI Act contained features that had the potential to result in the exclusion of the defendant from certain hearings, these features did not misalign:

"…the statutory procedures to such an extent as to make the procedure materially different from the situation that arises traditionally where a public interest immunity claim is made. Admittedly, there is a closed court for this hearing but it is important to note that the hearing is not concerned essentially with the admission or exclusion of evidence. It is concerned only with disclosure and the identification of material that may be later adduced in the trial. Questions as to the admissibility of the evidence and the manner of giving the evidence remain for the determination of the trial judge in the ordinary way. These procedures would normally be carried out in open court and bring about a situation where the only evidence properly placed before the jury is evidence that is properly admissible and not otherwise subject to exclusion."[118]

114. Whealy J also considered arguments relating to the operation of section 31 of the NSI Act, which outlines the range of factors the court must consider when deciding which orders to make following the holding of a closed hearing to determine the outcome of the issue of a non-disclosure certificate or a witness exclusion certificate

[116] *R v Lodhi* [2006] NSWSC 586, at [46].
[117] *Lodhi v R* [2006] NSWSC 571 (7 February 2006); *Lodhi v R* [2007] NSWCCA 360 (20 December 2007) (on appeal to the Court of Criminal Appeal); *Lodhi v The Queen & Anor* [2008] HCATrans 225 (13 June 2008) (application for special leave to appeal to the High Court rejected)
[118] *Lodhi v R* [2006] NSWSC 571 at [96].

by the Attorney-General.[119] Subsection 31(8) requires the court to give greatest weight to national security considerations when considering whether an order to prevent disclosure or the calling of a witness would have a substantial adverse effect on the defendant's right to a fair hearing or whether the disclosure of the information or the presence of the witness would constitute a risk to national security. Whealy J found that :

> *…., it is not in my opinion a situation where the subject legislation compromises in any real sense the fundamental characteristics of a criminal trial nor the fundamental characteristics of the Supreme Court in hearing a criminal trial. Part 3 of the legislation does not take away the character of the Court or the fact that the Court is exercising the judicial power of the Commonwealth. While it is true that certain discretions are replaced (mandatory adjournments) and that legislative guidance is given in the conduct of the s 31 hearing, the traditional procedures of a criminal trial are altered only for a very limited purpose, namely the issue of the disclosure of information to enable a determination as to what evidence is to be adduced in the trial or as to the witnesses to be called in the trial.*[120]

115. His Honour concluded that none of the features of Part 3 of the NSI Act, "either collectively or individually, represent an incursion into the Commonwealth judicial power so as to bring about invalidity".[121]

116. On 5 and 6 November 2007, the NSW Court of Criminal Appeal considered an appeal by Mr Lodhi against his conviction and sentence, which included arguments relating to the constitutionality of Part 3 of the NSI Act, and in particular to the constitutional validity of subsection 31(8). The Court of Criminal Appeal rejected Mr Lodhi's appeal and held that subsection 31(8) was constitutionality valid. Chief Justice Spigelman, observed that:

> "*The modification of judicial procedures by legislation should not be characterised as a legislative usurpation of judicial power, unless it affects the integrity of the judicial process. As noted above, in certain contexts the common law tilts a balancing process without effect on the integrity of the process. Legislation can also do so, without necessarily having such an effect."*[122]

117. While the *Lodhi* proceedings must be considered in the context of the many other criminal proceedings that have given rise to judicial consideration of the NSI Act, they serve to illustrate the impact that the provisions of the NSI Act can have on the length and complexity of criminal proceedings. They also illustrate the range of options available to the court outside of the NSI Act to protect against the disclosure of national security information, and suggest options that could be incorporated into the NSI Act regime, such as the use of special defence counsel. The constitutional challenge raised in *Lodhi,* although unsuccessful, highlights the problematic features of section 31 of the NSI Act and the limitations this provision places on the exercise of judicial discretion when determining whether to make orders under that provision. These issues are discussed in further detail below.

[119] *Lodhi v R* [2006] NSWSC 571 [97]-[113] See also NSI Act ss27-28.
[120] *Lodhi v R* [2007] NSWCCA 360 at [113].
[121] *Lodhi v R* [2007] NSWCCA 360 at [93].
[122] *Lodhi v R* [2007] NSWCCA 360 at [72].

Monitor's Questions

118. In this section of the submission the Law Council will seek to respond to some of the Monitor's specific questions relating to the operation and impact of the NSI Act,[123] including:

- Whether the operation of the NSI Act has excessively impeded terrorism trials?
- Whether the resort to agreements under the NSI Act has been a healthy development?
- Whether Attorney‑General's certificates are appropriate in place of judicial determination of national security matters?
- What, if any, resort would be appropriate to security clearance for defence counsel and to special defence counsel?

The operation of the NSI Act and agreements under the Act

119. As part of his 2011-12 Annual Report, the Monitor observed that there was a:

> *… widely held view among practitioners that the potential difficulties for the fair and efficient running of a criminal trial posed by a full‑blooded application of the NSI Act are obvious, but have so far been avoided. Indeed, a view encountered from different quarters is to the effect that the awful prospect of the NSI Act operating to its full extent in a contested way has had the effect of producing in nearly every such case agreements [made under section 22 of the NSI Act] in place of contested adjudications.*[124]

120. The Monitor noted that this experience was reflected in the extra-judicial comments of the Hon Anthony Whealy QC, the trial judge in *Lodhi,* who observed that "a considerable degree of co‑operation between experienced counsel for the prosecution and the defence" "prevented … delays from intruding unfairly on the trial process".[125]

121. A similar view was presented by the Law Council at a parliamentary inquiry into the NSI 2010 Bill. It noted that in practice:

> *… nearly all of [the NSI Act's provisions are] dealt with by a serious of ancillary rulings by the trial judge and undertakings by lawyers on both sides of the record – none of which needs the NSI Act to occur. One particular concern that we as the Law Council have and that we addressed in our submission is the requirement that at some stage in the process only security cleared defence lawyers should be allowed to participate in the trial. That is anathema to the rule of law in Australia. Thankfully, so far that has not been an issue.*
>
> *As I understand it, every defence lawyer who has appeared in every terrorist case in Australia since 2005 has not had a security clearance, and every issue*

[123] See Monitor's 2011-12 Report pages 52-54.
[124] Monitor's 2011-12 Report page 53
[125] See the Hon Justice Whealy QC "Difficulty in obtaining a fair trial in terrorism cases" (2007) 81 *ALJ* 743 at 748‑749

under the NSI Act has been dealt with without the need for them to have one. All of them have provided comprehensive undertakings not to disclose information, and that system seems to be working.[126]

…

If the lawyers involved in these cases did not cooperate to the extent that they do, there is potential for these cases just to collapse in a heap because of the procedural burdens placed on the lawyers appearing. [127]

122. More recent feedback received from the Law Council's National Criminal Law Liaison Committee also suggests that the agreements reached between the parties under section 22 of the NSI Act have had a positive impact on the nature of arguments that need to be advanced before the court and the type of material required to be considered by the Attorney-General. The use of agreements as an alternative to 'triggering' the notification provisions of the NSI Act appears to be a development generally welcomed by the legal profession, particularly those involved in representing clients charged with criminal offences, and a feature of the NSI Act that appears to be more frequently invoked than other provisions.

123. However, as the Monitor noted in his 2011-12 report, the infrequent use of the more intrusive features of the NSI Act did not point to a growing acceptance or support within the legal profession of the need for or value of these provisions.

124. To the contrary, experience within the National Criminal Law Liaison Committee suggests that the existence of these provisions continues to cast a shadow over the expedient and fair conduct of proceedings, particularly terrorism related criminal proceedings. If triggered, these intrusive provisions threaten to undermine the defendant's right to a fair trial and the independence of the legal profession.

125. For example, the Law Council remains concerned that:

(a) The security clearance requirements for legal practitioners in Parts 4 and 4A continue to be intrusive; disruptive to proceedings; unnecessary in light of other obligations on legal practitioners and other mechanisms for protecting security information; and contrary to the right of a defendant to an independent lawyer of his or her choice;

(b) The notification provisions in Part 3 of the NSI Act create a complicated, time consuming set of obligations on each of the parties and the Attorney-General;

(c) The Attorney-General is required to personally consider each notification and determine whether a non-disclosure or witness exclusion certificate should be issued. This can be particularly onerous for the Attorney-General in the case of multiple trials occurring in different jurisdictions and/or involving multiple accused;

(d) During the pre-trial period and at each subsequent stage of the proceedings, the defence is required to reflect carefully on each aspect of its case and that of the prosecution to determine whether national security information may arise and if so to consider the implications of a notification being made and the issue of a certificate;

[126] Senate Committee Legal and Constitutional Affairs, Inquiry in to the provisions of the NSL 2010 Bill (21 May 2010) Committee Hansard page 7. The Law Council was represented by Phillip Boulten SC.
[127] Ibid.

(e) These requirements may lead to delay and disturbance to the trial process while the Attorney-General contemplates whether to issue a certificate. Where a certificate is issued, a closed hearing will be held. As Whealy J has explained writing extra-judicially on the NSI Act regime, these closed hearings may take place days, or perhaps weeks, after the initial adjournment. If the court decides to make orders after the closed hearing, there are three possible appeals. The first is an appeal relating to the records to be kept. The second is an appeal relating to the reasons for the decision. The third is an appeal against the merits of the decision. In each of these cases there is the capacity for delay and the trial cannot proceed until the appellate court has resolved the issues arising under the various appeals;[128] and

(f) The need for the system of non-disclosure and witness exclusion certificates, in conjunction with the onerous notification requirements, remains unsubstantiated particularly when regard is had to the pre-existing mechanisms for protecting national security information. In particular, the arguments available to the Government under public interest immunity principles remain more than sufficient to protect against unauthorized disclosure of national security information.

126. These views lead the Law Council to support the proposition outlined by the Monitor in his 2011-12 Annual Report that:

> *… there is some perversity in approving the operation of a complicated law by observing that the unpalatable prospect of its application has produced prudent negotiation and agreement. Agreement among adversaries in litigation is not an unalloyed good thing. Rights and obligations may both be compromised by most such agreements. If the rights pertain to fundamental aspects of fair trial, it is in principle a bad thing for them not to be enjoyed to their full prescribed measure.*[129]

Use of Attorney–General's certificates in place of judicial determination of national security matters

127. As noted above, 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.

128. 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.

[128] The Hon Justice Whealy QC 'Terrorism and the Right to a Fair Trial Can the Law Stop Terrorism? A Comparative Analysis' (Paper Delivered in 2010) pages 22-23 available at http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/whealy0410.pdf
[129] Monitor's 2011-12 Report page 53

129. The Law Council is concerned that the issue of certificates by the Attorney-General, and the consequences that flow from such certificates 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. Moreover, the Law Council maintains the view it outlined in its submission to the ALRC and the parliamentary inquiries into the NSI 2004 Bill that the case for these provisions was not made out.

130. 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.[130]

131. As the Law Council has previously submitted, by instituting a system whereby the Attorney-General must be notified by either party when national security information may be disclosed, which in turn triggers a set of procedures that can result in evidence not being disclosed to the defendant, the NSI Act not only impacts upon the defendant's ability to adduce critical evidence from his or her own witnesses, but also impacts upon the defendant's ability to test the prosecution's case. As the Law Council told the Committee in 2004:

> *[A] decision not to call a witness [on the basis of a witness exclusion certificate issued by the Attorney-General] not only spares the accused that witness's testimony against the accused but also spares the court the prospect that weaknesses in that witness's evidence not only will affect the credibility of that witness's testimony but may also affect the whole credibility of the case. It is for those reasons that the judge will, in the absence of the defence, be engaged in an exercise which makes, as I say, a prosecution case – assembles a prosecution dossier - and the judge cannot possibly appoint himself or herself as defence counsel in that. They do not know what the defence case is…*[131]

132. The Law Council has raised particular concerns with this scheme relating to the breadth of the notification provisions; the issue of non-disclosure or witness exclusion certificates by the Attorney-General and the related court order process. These concerns are outlined in further detail below.

<u>Concerns regarding the breadth of the notification provisions</u>

133. The Law Council holds concerns regarding the breadth of the notice provisions under Parts 3 and 3A of the NSI Act which require the parties in civil and criminal proceedings to notify the Commonwealth Attorney-General and/or the court if they know or believe that any information that either relates to or may affect national security may be disclosed in the proceedings. These requirements demand that if, before or during a hearing, either the prosecutor or the defendant knows or believes

[130] For example see Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* (2 July 2004); Law Council of Australia Submission to the Australian Law Reform Commission, *Inquiry into Protecting Classified and Security Sensitive Information* (12 September 2003); Law Council of Australia Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document* (29 August 2008)

[131] Senate Committee on Legal and Constitutional Affairs, Inquiry into the provisions of the *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* Hansard, 5 July 2004, page19 . The Law Council was represented by Bret Walker SC.

that information which relates to or may affect national security will be disclosed, he or she is required to notify the Attorney-General and take a number of other procedural steps as soon as possible. Failure to comply with the requirements exposes the practitioner concerned to imprisonment for up to two years.[132]

134. Having received such notice, the Attorney-General must then determine whether the information falls within a much narrower category of information, that is, information which if disclosed would be likely to prejudice national security. If the information falls within this narrower category the Attorney-General may issue a non-disclosure certificate or a witness exclusion certificate.

135. The rationale behind these provisions of the NSI Act is to ensure that the Attorney-General is put on notice of any possible disclosure of information which may be *prejudicial to* national security, by ensuring that he or she has notice of any disclosure at all that relates to or may affect, however remotely, national security.

136. The problem with this approach is that national security is very broadly defined in section 8 of the NSI Act as follows:

> *In this Act, national security means Australia's defence, security, international relations or law enforcement interests.*

137. Security is defined in section 9 of the *NSI Act* as follows:

> *In this Act, security has the same meaning as in the Australian Security Intelligence Organisation Act 1979.*

138. Security is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) as follows:

> *(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:*
>
> *(i) espionage;*
>
> *(ii) sabotage;*
>
> *(iii) politically motivated violence;*
>
> *(iv) promotion of communal violence;*
>
> *(v) attacks on Australia's defence system; or*
>
> *(vi) acts of foreign interference;*
>
> *whether directed from, or committed within, Australia or not; and*
>
> *(aa) the protection of Australia's territorial and border integrity from serious threats; and*
>
> *the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).*

[132] The Hon Justice Whealy QC 'Terrorism and the Right to a Fair Trial Can the Law Stop Terrorism? A Comparative Analysis' pages 22-23

139. ‘International relations’ is defined in section 10 of the NSI Act as follows:

In this Act, international relations means political, military and economic relations with foreign governments and international organisations.

140. 'Law enforcement interests’ is defined in section 12 of the NSI Act as follows:

In this Act, law enforcement interests includes interests in the following:

(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;

(b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;

(c) the protection and safety of informants and of persons associated with informants;

(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation’s government and government agencies.

141. Read together, these provisions would mean that lawyers representing a defendant in a terrorism prosecution may well be required and would be wise to put the Attorney-General on notice that their entire case may relate to or affect national security.

142. Given that a failure to comply with the notice provisions is an offence which carries a maximum penalty of two years, such a cautious approach is advisable. However, if, in view of the broad definition of national security, parties were to adopt this approach, the regime set out in the NSI Act would be unworkable. It would not be possible for the Attorney-General to personally consider, as is required under sections 26 and 38F, the volume of material referred to him or her for determination. As a result, the workability of the regime is contingent on lawyers exercising their own discretion even though it may expose them to prosecution. For that reason, the Law Council submits that the notice provisions should be redrafted so that they only relate to a narrower and more directly relevant class of information.

143. Similar concerns arose in the context of the 2010 amendments to section 24(1) of the NSI Act[133] which extended the notification requirements to apply when the prosecutor or defendant (or the defendant’s legal representative) knows or believes that “*on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal court proceeding.”*

144. This extension further increases the notification burden on lawyers engaged in federal criminal proceedings and gives rise to additional practical difficulties such as requiring lawyers to determine in advance whether national security information will be captured by a particular subpoena.

[133] Section 38D which sets out the notice requirements in civil proceedings was amended in the same way. The Law Council’s objections to the amendment of section 24 apply equally to section 38D.

Concerns relating to section 31 orders

145. The Law Council is concerned that subsection 31(8) of the NSI Act unduly restricts the court's discretion to determine what orders to make in relation to matters covered by relevant certificates.

146. 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).*

147. The Law Council submits that the NSI Act tilts the balance too far in favour of the interests of protecting national security at the expense of the rights of the accused. While this has been found not to be in breach of Chapter III of the *Constitution*,[134] the Law Council maintains that it is not a proportionate response to addressing the risk that information prejudicial to national security may be released.

148. The disproportionate features of the balancing exercise prescribed by subsection 31(8) can be illustrated by a comparison with the balancing exercise required under section 130 of the uniform Evidence Acts, which codifies the public interest immunity principle. As noted above, subsection 31(8) requires the court to give greatest weight to a risk of prejudice to national security arising from a certain disclosure when determining what order to make under that section. In comparison, under subsection 130(1) the balancing exercise is more equally weighted - "[i]If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence."

[134] In *Lodhi v R* [2007] NSWCCA 360 the constitutionality of Part 3 of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (the NSI Act) was challenged on the grounds that by requiring the Court to give "greatest" weight to the risk of prejudice to national security (pursuant to section 31(8)) the Parliament had usurped the judicial function by directing the judge hearing the case how the case must effectively be decided. The Court of Appeal held that subsection 31(8) was constitutionally valid. The Court found that while the word 'greatest' meant that greater weight must be given to the risk of prejudice to national security than to any other of the circumstances weighed, the subsection did not usurp judicial power because it did not require that the balance must always come down in favour of the risk of prejudice to national security. *Lodhi v R* [2007] NSWCCA 360 at [41]-[49], per Spigelman CJ with whom Barr and Price JJ agreed.

149. In both cases, the opinion of the Attorney-General or the Minister as to the public interest in preserving the confidentiality of the information is given considerable weight, whether expressed through a certificate in the case of the NSI Act or in an affidavit supporting a section 130 claim. However, in the case of the NSI Act provision, the court's discretion is constrained (albeit to a constitutionally permissible degree) in way that favours the public interest in preserving secrecy over the public interest in open justice. The Law Council queries the need for such an approach, in light of the approach taken in section 130 of the uniform Evidence Acts which has proven to be an effective tool for Governments to protect national security information and other sensitive information.

150. For these reasons, the Law Council has recommended that subsection 31(8) of the NSI Act be repealed. Similar concerns apply to subsection 38L(8) in relation to civil proceedings and the Law Council recommends that this subsection should also be repealed.

Security clearances for defence counsel and special advocates

151. As part of his consideration of the provisions of the NSI Act, the Monitor has sought views on what, if any, resort would be appropriate to security clearances for defence counsel and to special defence counsel.

152. For the reasons outlined below, the Law Council strongly opposes those features of the NSI Act that provide for a system of security clearances for lawyers.

153. The Law Council considers that defence counsel should have access to national security information without being required to obtain security clearances. If defence counsel are not allowed access to national security information, a special defence counsel or special advocate model could be considered subject to a range of critical safeguards. The Law Council has examined the use of special advocates in comparative jurisdictions to identify such safeguards.

Law Council's Opposition to Security Clearances for Lawyers

154. As noted above, section 39 of the NSI Act currently provides that, during a federal criminal proceeding, a legal representative of a defendant may receive written notice from the Secretary that an issue is likely to arise in the proceedings relating to the disclosure of information that is likely to prejudice national security.[135] A person who receives such a notice must apply to the Secretary for a security clearance.[136] They must do so within 14 days of receiving a notice. If they do not apply for such a clearance, or if they are unsuccessful in obtaining such a clearance, then it is possible that they will not be able to view all the relevant evidence in the case and thus they will not be able to continue to effectively represent their client.[137] In the circumstances the court may recommend that the defendant retain a different legal representative.[138]

155. During the ALRC Inquiry and at the time of the introduction of the 2004 NSI Bills the Law Council expressed the view that it was not persuaded that a case had been made for a major overhaul of existing mechanisms for the protection of security sensitive information. It noted that a range of pre-existing mechanisms already

[135] NSI Act s39(1).
[136] NSI Act s39(2)
[137] If the person does not obtain the security clearance, anyone who discloses relevant information to the person will, except in limited circumstances, commit an offence. s39(3).
[138] NSI Act s39(5)(b)(ii).

provided protection against the unnecessary disclosure of sensitive information. These mechanisms - such as rules of evidence and procedures allowing for restrictive orders; common law and statutory rules relating to public interest immunity; and lawyers' professional obligations - are outlined in detail earlier in this submission. The Law Council noted that prior to the introduction of the NSI Act, no evidence was provided to indicate that, in the experience of courts or disciplinary tribunals, lawyers breached requirements of confidentiality imposed either by agreement or by the courts.

156. The Law Council is also of the firm view that the security clearance scheme threatens the independence of the legal profession by potentially 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, national security information. The Law Council has warned that in the absence of a plausible justification for the security clearance system, the perception arises that the primary purpose of the system is to provide the executive arm of government with the ability to select the legal representatives permitted to appear in matters involving such information.

157. The system of security clearances for lawyers in the NSI Act also has a highly intrusive impact on the professional and private lives of the legal representatives who act in matters that may involve national security information, and there have been numerous instances both before and after the enactment of the NSI Act where legal practitioners have refused to undergo a security clearance process for these reasons. As Whealy J has observed writing extra judicially on the NSI Act regime:

> *The Act imposes highly unusual obligations on lawyers engaged in Federal proceedings. In particular, lawyers must obtain security clearance to have access to information concerning national security.*
>
> *… The processes for obtaining these clearances are intrusive and, in some instances, upsetting. Not only must the individuals be scrutinised but so also their spouses and partners. Details of their financial and personal lives are examined.* [139]

158. This in turn potentially restricts 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 national security information. Such a risk may be particularly acute in jurisdictions where access to senior counsel with experience in federal criminal matters involving national security information may already be very limited.

159. In addition to the provisions relating to the Secretary requiring a lawyer to apply for a security clearance, the 2008 Commonwealth Legal Aid Guidelines provided that payment for lawyers acting on grants of aid in such maters could only be made if the work was done within 14 days of the notification by the Secretary of the requirement to obtain a clearance or where the lawyer was awaiting the determination of the application or had obtained the clearance. While this requirement has not been included in the 2010 guidelines, the Law Council understands that if a lawyer was required to obtain a security clearance and was not able to do so, the relevant legal aid commission would need to consider whether the lawyer could effectively represent the client if he or she could not be given access to all of the evidence. If the

[139] The Hon Justice Whealy QC 'Terrorism and the Right to a Fair Trial Can the Law Stop Terrorism? A Comparative Analysis' pages 22-23.

commission was not so satisfied, it would have to consider whether to transfer the grant of aid to another lawyer, possibly not of the client's choice.

160. Taken together, these features of Part 4 of the NSI Act detract significantly from the guarantee in article 14(3) of the *International Covenant on Civil and Political Rights* that all persons have access to a legal representative of their choosing. This guarantee is reflected in the Law Council's *Policy Statement on Rule of Law Principles* which includes the principle that everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights.[140]

161. The Law Council acknowledges that to date terrorism prosecutions have, as a result of the use of undertakings, proceeded without the need for defendants' legal representatives to seek security clearances. Nonetheless, until the security clearance provisions are repealed or amended, it remains strongly concerned that defence counsel continue to operate under the shadow of these provisions, uncertain of when and if they might be invoked.

162. In light of these views the Law Council recommends the repeal of the security clearance process contained in sections 39 and 39A of the NSI Act.

163. If these recommendations are not adopted, the Law Council recommends that sections 39 and 39A be amended so as to give the court a greater role in both determining whether a notice should be issued and in reviewing a decision to refuse a legal representative a security clearance. A similar recommendation was made by the Committee during its inquiries into the NSI 2004 Bills and the NSI 2005 Bill where it recommended that "the court assume a more active role in determining whether a defendant's legal representative requires a security clearance before he or she can access information". [141]

164. The Law Council notes that under the existing regime, if a clearance is denied to a legal practitioner, he or she may seek a review of the decision by the AAT.[142] The Law Council supports continued access to the AAT if the system of security clearances for lawyers is retained in the NSI Act. However access to the AAT does not address the full range of the Law Council's concerns relating to the executive controlled system of security clearances for lawyers under the NSI Act. The Law Council recommends that if the security clearance system is retained, it must be supplemented by the following measures designed to provide greater judicial oversight of the process:

(a) the Secretary should be obliged to apply to a court for leave to give a notice to a legal representative under section 39 or 39A of the Act;

(b) the application should be supported by an affidavit setting out the basis for the Secretary's contention that before or during a proceeding an issue is likely to

[140] In March 2011, the Law Council's Directors approved a *Policy Statement on Rule of Law Principles*. This document seeks to articulate some of those key principles. It is intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice. A copy of the Principles is available at http://www1.lawcouncil.asn.au/lawcouncil/index.php/divisions/criminal-law-and-human-rights/general-rule-of-law-issues.

[141] Recommendation 9.

[142] Attorney General's Department *Practitioner's Guide to the National Security Information (Criminal and Civil Proceedings) 2004 Act* (June 2008) page 29 available at http://www.ag.gov.au/Publications/Pages/PractitionersGuidetotheNationalSecurityInformationCriminalandCivilProceedingsACT2004.aspx

arise relating to a disclosure of information in the proceeding that is likely to prejudice national security;

(c) the application by the Secretary should be made *ex parte* and *in camera.* This would allow the court to assess properly the nature of the information which was said to prejudice national security, without that information otherwise being disclosed;

(d) the court should give leave to the Secretary to issue the notice if the Secretary established a *prima facie* case that an issue was likely to arise relating to a disclosure of information in the proceeding that was likely to prejudice national security.

(e) a legal representative who receives an adverse decision with respect to his or her application for a security clearance should have a right of appeal against that adverse decision;

(f) the right of appeal should be expressly set out in the Act and should be distinct from the appeal rights available under the *Administrative Decisions (Judicial Review) Act 1977;*

(g) in the appeal the Attorney-General should have the burden of establishing on the balance of probabilities that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security;

(h) the appeal should be held *in camera*;

(i) the appeal should be conducted, if possible, so as to ensure that, during the hearing, the information concerned is not disclosed;

(j) if it is not possible to conduct the appeal without the information concerned being disclosed, then the court should have the power to make appropriate orders for the conduct of the appeal in order to protect that information;

(k) in the event that the Attorney-General failed to establish that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security, the appeal should be allowed and the legal representative should be entitled to have the information concerned disclosed to him or her in the course of acting for the defendant/client.

Special Advocates or Special Defence Counsel

165. Special advocates or special defence counsel[143] are lawyers with high security clearance given access to secret evidence that cannot be disclosed to those for whom the advocates act. These special advocates act in closed material proceedings (CMPs). In such proceedings the individual who is subject to state action and his or her legal representatives are excluded, but the special advocate acts on the subject's behalf.

166. While the NSI Act does not specifically provide for the use of 'special defence counsel', in *Lodhi*[144] 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

[143] The terms "special advocate" and "special defence counsel" are used interchangeably throughout this section.
[144] *R v Lodhi* [2006] NSWSC 586

to allow a person appointed as special counsel to take part in certain hearings under the NSI Act (as previously discussed).

167. More broadly, the use of special defence counsel or special advocates has emerged as an issue of debate and consideration in a number of different contexts relating to the use and disclosure of national security information in Australia.

168. For example, a private members Bill[145] was introduced in late 2012 by Australian Greens Senator Sarah Hanson-Young (the Greens Bill), seeking to ensure that adverse security assessments (ASAs) issued by ASIO in relation to people in immigration detention would be subject to a greater level of transparency and scrutiny. The Greens Bill includes proposed amendments to the *Administrative Appeals Tribunal Act 1975* (Cth) to provide for the appointment of a special advocate who would be able to access and challenge the reasons for, and evidence supporting, an ASA where the Attorney-General has certified that there are national security reasons which preclude the release of that information to the review applicant.

169. More recently, the Council of Australian Government's (COAG's) *Review of Counter-Terrorism Legislation report*, which was compiled by a committee chaired by the Hon Anthony Whealy QC (the Whealy Report),[146] recommended that consideration be given to introducing a nationwide system of special advocates to participate in control order proceedings.[147] Control orders are made under the Criminal Code and impose restrictions and requirements on a person where this would substantially assist in preventing a terrorist act or where it is established that the person has provided training to or received training from a terrorist organisation.

170. The Whealy Report suggested that such a system of special advocates would allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in CMPs in relation to a control order. It recommended that Government-funded special advocates would have full disclosure of information used where national security information is being relied upon or is relevant. As a model for its recommendations, the report referred to the UK model of special advocates used for Terrorism Prevention and Investigation Measures (TPIMs) proceedings.[148] In 2012 TPIMs replaced control orders in the UK. TPIMs impose fewer restrictions on persons than the previous control order regime in the UK and their issue is subject to more stringent evidentiary requirements.[149]

171. In this section of the submission, the Law Council will express its preliminary views on some of the possible models for the use of special defence counsel or special advocates in the context of the NSI Act.

---

[145] *Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012* (Cth). The Law Council's comments on this bill are set out in its *Submission to the Senate Committee on Legal and Constitutional Affairs regarding the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012*, 19 December 2012

[146] Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* report, Issued 15 May 2013, available at: http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF

[147] Ibid., Recommendation 30 (see also Recommendation 31), pages 48-52; 59-60

[148] See Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* report, issued 15 May 2013, discussion at page 50

[149] See Law Council of Australia Submission to the Monitor's Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention Orders, 10 September 2012 at http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2645%20-%20Inquiry%20into%20questioning%20and%20detention%20warrants,%20control%20orders%20and%20preventative%20detention%20orders.pdf

Appointment of Special Advocate Does Not Remedy Unfairness of Closed Court

172. Although the Law Council has not previously commented in detail on the role of special defence counsel or a special advocate in the context of the NSI Act, it has considered the potential advantages and disadvantages of the appointment of a special advocate in other legislative contexts.[150]

173. In doing so, the Law Council has expressed the firm view that as a matter of principle, the appointment of an additional legal representative with authority to consider sensitive information and assist the court in its determinations regarding disclosure of that information does not necessarily mitigate the unfairness experienced by the defendant or a party to the proceedings who is excluded from accessing that same information. In other words, the unfairness inherent in closed court processes cannot necessarily be remedied by the appointment of a special defence counsel or special advocate.

174. More specifically, the Law Council raised its concerns about the proposed procedure under the Greens Bill which provides that a special advocate will only be able to communicate with the person seeking review of an ASA prior to accessing classified material. It noted that the Special Advocate's ability to identify factual inaccuracies in the evidence relied upon, or to deny or explain an activity or statement attributed to the applicant or to adduce evidence which contests a particular version or interpretation of events would be heavily restricted. While concluding that it was desirable that a person affected by an ASA should have some opportunity to challenge material adverse to his or her interests, it raised strong concerns that the role of the Special Advocate would merely provide a veneer of credibility to an inherently unfair process.[151]

175. Despite these concerns, the Law Council has examined the experience of the UK and other comparable jurisdictions to compile a preliminary list of the advantages and disadvantages of the use of such counsel in matters involving national security information. The Law Council has undertaken this examination because of the ongoing interest in the concept as noted above.

Comparative Experiences of Special Advocates

176. The Law Council is aware of a range of different models involving special advocates in other jurisdictions, including in the UK, New Zealand and Canada.

177. The UK system of using special advocates as part of CMPs has attracted particular consideration in Australia (for example, in *Lodhi* and the Whealy Report). CMPs involving special advocates were first formally adopted in the UK in relation to immigration proceedings involving classified material. However, they are also utilized in the counter-terrorism context, including for TPIMs and proceedings relating to the

[150] Law Council of Australia, Submission to the Senate Committee on Legal and Constitutional Affairs regarding the *Migration and Security (Legislation Amendment) Bill 2012*, 19 December 2012, pages 13-16, available at: http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2680%20-%20Migration%20and%20Security%20Legislation%20Amendment%20%28Review%20of%20Security%20Assessments%29%20Bill%202012.pdf See also Law Council of Australia, *Submission to COAG Counter-Terrorism Review Committee* regarding the *COAG Counter-Terrorism Legislation* Review, 27 September 2012, available at: http://www1.lawcouncil.asn.au/lawcouncil/index.php/10-divisions/143-independent-national-security-legislation-monitor

[151] Ibid.

proscription of terrorist organisations, and financial restrictions or asset-freezing sanctions in relation to terrorism and certain other activities.[152]

178. Outside immigration and counter-terrorism proceedings, special advocates are also used in the UK in certain planning cases, parole hearings and employment tribunal cases dealing with national security information.[153] They are not used in criminal trials. However, on 25 April 2013 the *Justice and Security Act 2013* (the Justice and Security Act) was granted Royal Assent with the effect that CMPs (in which security advocates may be used) may be adopted, upon judicial discretion, in relevant civil proceedings more broadly. Under the Justice and Security Act, courts may declare that CMPs may be used provided that two conditions are satisfied:

(a) a party to the proceedings would be required to disclose "sensitive material";[154] and

(b) disclosure is in the interests of the fair and effective administration of justice.

179. The UK Independent Reviewer of Terrorism Legislation, Mr David Anderson QC, has described the CMP/special advocate model operating within the TPIM context in the UK as follows:

(a) the Government makes only such disclosure to the person subject to the TPIM (the TPIM subject) about the reasons for the order as is not contrary to the public interest;

(b) the Government makes full disclosure to a special advocate chosen by the TPIM subject from a panel of security cleared barristers appointed by the Attorney-General and entrusted with representing the interests of the TPIM subject in litigation;

(c) the court then considers whether closed material may be withheld from the TPIM subject, having heard submissions from counsel for the Secretary of State and the Special Advocate. If the court decides that information must be disclosed for the subject to have a fair hearing, the Secretary of State must decide whether to disclose the information or to withdraw the material from the case, with the effect that she may no longer rely on it in the proceedings;

(d) the review or appeal is then conducted partly "*in closed court*" with the Special Advocate present, but with the subject and his or her own legal representatives absent;

(e) the Special Advocate may apply to the court for further disclosure to the TPIM subject, and may (in theory) call evidence. However, the efficacy of the special advocate is limited by the fact that once proceedings are closed, he or she may not communicate with or take instructions from the subject, save on strict

[152] As discussed in Dr Cian Murphy, "Counter Terrorism and the Culture of Legality: The Case of Special Advocates," (2013) 24 *Kings Law Journal*,19–37 at pages 23-29

[153] Dr John Ip has noted that the expansion of special advocates in the UK has occurred both by statute and judicially driven-expansion in his article, "The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill " [2009] *New Zealand Law Review* 207 at 214.

[154] Defined in section 6(11) of the Justice and Security Act as "material the disclosure of which would be damaging to the interests of national security".

conditions which are aimed at ensuring that no additional disclosure is inadvertently made.[155]

180. Mr Anderson describes the CMP as similar to those procedures operating in other national security contexts in the UK, and to the regime now introduced in the Justice and Security Act for civil litigation. However, he notes that it contains one additional safeguard: that the subject must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.[156] The gist of any secret material relied upon, referred to as 'the open national security case', is served on the TPIM subject in accordance with directions given by the High Court after it has granted permission for a TPIM to be imposed.

181. While most Australian commentary has focused on the UK model, the Law Council is aware that special advocates are also used in other countries.

182. For example, in Canada, special advocates have been a feature of the legislative immigration framework since 2008, when amendments were made to the Immigration and Refugee Protection Act 2001 (IRPA).[157] The Law Council understands that the special advocate protects the interests of a person subject to proceedings under the IRPA held in the absence of that person or their lawyer. Under this system, a special advocate may:

(a) challenge the relevance, reliance and sufficiency of the information that is provided by the Minister and is not disclosed to the named person and their lawyer, and the weight to be given to it;

(b) make submissions with respect to the classified material as well as participate in, and cross-examine any witness who testifies in the closed proceedings;

(c) also exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the named person.[158]

183. While the Law Council has not directly compared the provisions of the IRPA to those governing the UK framework, it notes that in 2010, the UK Joint Committee on Human Rights (the UK Committee) commented that a key difference between the UK and Canadian systems existed as follows:

…the special advocate regime adopted in Canada … has not reproduced one of the principal limitations inherent in the UK system, the prohibition on

---

[155] David Anderson QC, UK Independent Reviewer of Anti-Terrorism Legislation, *Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011,* March 2013, page 24, available at: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/first-report-tpims.pdf Writing generally about special advocates in the UK, Dr Cian Murphy notes that they "may only communicate with the person whose interests they represent with the permission of the court, which must in turn notify the Secretary of State, who then has the opportunity to object to the communication. The individual may write to the special advocate but the latter is not permitted to reply except to acknowledge receipt": Dr Cian Murphy, "Counter Terrorism and the Culture of Legality: The Case of Special Advocates," (2013) 24 *Kings Law Journal* 19 at page 31

[156] Ibid., page 25. Mr Anderson QC notes that this safeguard is the consequence of the judgment of the House of Lords in *SSHD v AF* (No. 3) [2009] UKHL 28, [2010] 2 AC 269 (AF (No 3)), following the European Court of Human Rights in *A v UK* (2009) 49 EHRR 625

[157] This follows an earlier model involving special advocates which was used in Canada in Security Intelligence Review Committee proceedings: as discussed by Dr John Ip in "The Rise and Spread of the Special Advocate" [2008] *Public Law* 717 at pages 719-720

[158] Canadian Department of Justice, Special Advocates Program Overview, http://www.justice.gc.ca/eng/fund-fina/jsp-sjp/sa-es.html, accessed 21 June 2013

communication with the controlled person other than with the permission of the court following an application made on notice to the Secretary of State.

… the relevant [Canadian] statutory provision provides that, after receiving the closed material, the special advocate may communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate, but there is no requirement to notify the Government about the proposed communication. Indeed, any communication between the special advocate and the person whose interests they represent is deemed to be subject to legal professional privilege if it is the sort of communication that would attract such privilege between lawyer and client. [159]

184. This report quoted a UK special advocate's evidence to the Committee that:

… in Canada after the Canadians examined the British system … they have adopted a system which permits discussion between open representatives and special advocates on open matters, and have deployed a regime whereby the ex parte procedure may be used if there is a desire to communicate from the special advocates to the open advocates on anything that may impinge on closed material.[160]

185. The report further noted that UK special advocates have indicated that their understanding, gained from visiting Canadian special advocates is that in Canada extensive use is made of a procedure whereby special advocates apply to a judge for permission to ask questions of the person they represent, without being required to give notice to the Government.[161]

186. The UK Committee's 2010 report called for a relaxation on communications allowing greater consultation between the special advocate and the person concerned in the anti-terrorism context.[162]

187. In New Zealand, the *Immigration Act 2009* (NZ) (the NZ Immigration Act) provides for the special advocate procedure to be adopted where there are immigration proceedings involving classified information. The Special Advocate's role is to represent the person concerned including by making oral and written submissions and cross-examining any witnesses at closed court hearings.[163]

188. Under the NZ Immigration Act, following disclosure of the classified information, the special advocate may not communicate with the affected individual or his or her representative, except through a written communication first submitted to the relevant tribunal or court for approval. The tribunal or court may either: forward on the material in its current form; amend the material to the extent necessary to prevent prejudice to

[159] UK 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) at paragraphs 74 to 76, available at: http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf
[160] Ibid. at [75]
[161] UK 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) at [76]
[162] Ibid. at [67-69], and [13] of Conclusion; see also Joint Committee on Human Rights *Counter Terrorism Policy and Human Rights: 28 days, Intercept and Post-Charge Questioning* (2006-2007 HL 157, HC 394 at [203-205]
[163] Section 263, NZ Immigration Act. Note that Dr John Ip raised concerns that there did not appear to be the same emphasis under the NZ legislation as within the UK on special advocates arguing for greater disclosure of the classified material in his article, "The Rise and Spread of the Special Advocate" [2008] *Public Law* 717 at page 730.

certain interests,[164] or decline to forward the communication. The tribunal or court may consult the chief executive of the relevant agency before making such a decision.[165] It has been suggested that this restriction is less stringent than the UK equivalent provisions, which mandate that the Home Secretary be notified.[166]

189. Regardless of whether a special advocate has been appointed or made available, the tribunal or court may appoint counsel assisting the court for the purposes of any proceedings before it which involves classified information. Counsel assisting the court may be a special advocate or a person holding a security clearance.[167]

190. The Law Council notes that a special advocate procedure is also included in the *Telecommunications (Interception Capability and Security) Bill 2013* (the NZ Telecommunications Bill), which is currently before the New Zealand Parliament.[168] The Law Council understands that the NZ Telecommunications Bill:

(a) proposes to impose on telecommunications network operators obligations to assist the government "on network security matters where they may raise a risk to New Zealand's national security or economic wellbeing;"[169]

(b) includes provisions requiring a court, in any proceedings relating to the administration and enforcement of the Bill, to determine whether to receive or hear classified security information in the absence of the defendant or the defendant's lawyers;[170] and

(c) provides for a special advocate procedure.

191. Under the NZ Telecommunications Bill, the court may, if satisfied that it is desirable to ensure that a fair hearing will occur, appoint a barrister or solicitor as a special advocate to represent the defendant's interests on the terms directed by the court.[171] Neither the NZ Telecommunications Bill, nor its Explanatory Note, provides further detail regarding the proposed role of the special advocate, or the procedures which would apply, for example, in relation to post-disclosure communication between the special advocate and the defendant.

192. The Law Council suggests that caution needs to be exercised in assuming that the models for using special advocates noted above can or should translate directly to the Australian context. For example, the absence of a Charter of Rights or a federal Human Rights Act in Australia should be taken into account in considering the use of special advocates in Australia in comparison to the UK, New Zealand and Canada which have such provisions.

---

[164] Defined under 7(3) of the NZ Immigration Act as (a) prejudice to New Zealand's security, defence or international relations interests; (b) prejudice to the entrusting of information to the New Zealand Government on a basis of confidence by the government of another country, (c) an agency of another country or an international organisation; to prejudice the maintenance of the law including the prevention, investigation and detection of offences and the right to a fair trial; or (d) to endanger the safety of any person.

[165] Section 265, NZ Immigration Act

[166] According to Dr John Ip, the equivalent UK Special Immigration Appeals Commission provision requires the Home Secretary be notified: see Dr John Ip "The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill" [2009] *New Zealand Law Review* 207 at page 228

[167] Section 269, NZ Immigration Act

[168] As at 12 July 2013, the NZ Telecommunications Bill had been referred to the NZ Parliament's Law and Order Committee for an inquiry and report by 20 September 2013.

[169] General Explanatory Note to the NZ Telecommunications Bill, page 108-1

[170] Clause 96(1)(a)

[171] Clause 97(3)(c)

193. In addition, there are some particular aspects of international experience to date which may mean that it is not readily applicable in the NSI Act context:

(a) The UK special advocate model has only applied to date in certain civil contexts including immigration and TPIM proceedings. It does not apply to criminal proceedings. Academics Professor Daphne Barak-Erez and Associate Professor Matthew C Maxman have commented that this appears to reflect a general acceptance that the severity, and standard of proof required, in criminal proceedings demands that defendants be able to respond to the evidence led by the prosecution;[172] and

(b) The Canadian and New Zealand special advocate models currently apply only in relation to immigration proceedings.[173]

194. In contrast, the provisions of the NSI Act apply to both federal criminal proceedings and civil proceedings.[174]

195. There are also definitional differences, with the relevant material under the UK Justice and Security Act expressed as that which "would be damaging to the interests of national security".[175] In contrast, the NSI Act seeks to protect material which if disclosed "would be likely to prejudice Australia's defence, security, international relations or law enforcement interests".[176]

196. There are also more practical considerations to be taken into account when making comparisons between Australia and different jurisdictions. For example, compared to the UK, Australia has a smaller pool of lawyers with sufficient expertise in national security matters and a broader geographical reach. This raises questions about how a limited panel of special advocates would operate effectively.

Issues for Consideration regarding the use of Special Advocates under the NSI Act

Potential Benefits

197. To date, some of the perspectives of the Australian legal profession indicate their recognition of the potential practical benefits of a special advocate approach.

198. As discussed above, in the *Lodhi* proceedings, special defence counsel was considered a viable option by the defendant's counsel to guard against the unfairness that would potentially flow from the defendant being excluded from closed hearings that would determine whether critical evidence was to be disclosed or whether witnesses would be called.

199. Whealy J held that making an order for a special advocate would have been premature at that stage of proceedings. However, he also held that the NSI Act was sufficiently wide to enable a special counsel to be appointed and ordered that preparatory steps be taken in the event that such an order was made later in the proceedings.

---

[172] Professor Daphne Barak-Erez and Associate Professor Matthew C Waxman, "Secret Evidence and the Due Process of Terrorist Detentions"48 *Columbia Journal of Transnational Law* (2009-2010) 3 at page 7

[173] Although the NZ Telecommunications Bill refers to "any proceedings relating to the administration and enforcement of the Bill": clause 96(1)(a)

[174] While it recognises that the Australian case of *Lodhi*, which considered the possible use of special advocates, involved criminal proceedings, the Law Council is not aware of international instances in which special advocates have been used in such proceedings.

[175] ss 6(4)(a) and 6(11), UK Justice and Security Act

[176] ss 8 and 17, NSI Act

200. Since his retirement, the Hon Anthony Whealy QC has published arguments supporting further consideration of utilizing special counsel in Australia, given that the NSI Act may operate to exclude affected individuals or their lawyers to attend proceedings or access critical information.[177] He has remarked that the use of special counsel "means that submissions, helpful to the defendant and of assistance to the trial judge, will be forthcoming to counter the arguments advanced on behalf of the Commonwealth",[178] remarking that:

> *Although the utility of the appointment of special counsel has been doubted, I consider it could be a useful weapon in the armoury of a trial judge in a situation where there is a clash between a national security claim and a suggestion that the defence will be substantially prejudiced or interfered with in the conduct of the case.*[179]

201. In making these remarks, however, he has emphasised Lord Bingham's cautionary words in the UK case of *R v H*:

> *None of these problems should deter the Court from appointing special counsel where the interests of justice are shown to require it. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.*[180]

202. It has been acknowledged that the special counsel or advocate approach may hold some advantages over a system of security clearances for lawyers, as observed by Mr Hylton Quail, a member of the Law Council's National Criminal Law Committee, when addressing the COAG Review of Counter-Terrorism Legislation Committee:

> *In my view there is a role for Special Counsel in this circumstance. In the matter of Roche we had difficulties during the course of the trial in relation to public interest immunity claims by the Commonwealth over not just one or two documents in the prosecution brief but over – in fact most of the prosecution brief, because to disclose the materials would – as is often the case in public interest matters – disclose things in the nature of procedures and processes.*
>
> *And at the time, it being then 2001/2002, I have to confess that there was no consideration at all given to the potential involvement of Special Counsel. The way that we dealt with it in that trial was that it was suggested that I should go and get a security clearance. I thought that was a good idea, although in hindsight I have to confess that I don't think it was such a good idea because it was an extremely intrusive – personally – and arduous process to go through. And it's one that you have to continue to go through if you intend to retain the clearance. As it turned out in Roche, it worked out; by some miracle I got the clearance and most of the public interest immunity matters then fell away and – as happened in Lodhi and is different to the process in*

---

[177] The Hon Justice Whealy QC "Difficulty in Obtaining a Fair Trial in Terrorism Cases", (2007) 81 *ALJ* 743; the Hon Justice Whealy QC, "Terrorism and the Right to a Fair Trial: Can the Law Stop Terrorism? A Comparative Analysis", April 2010, Paper presented to the British Institute of International and Comparative Law, available at: http://www.professionalstandardscouncil.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/whealy0410.pdf/$file/whealy0410.pdf

[178] Ibid. (2007). at pages 750-751

[179] Ibid. (2007) at page 750

[180] Ibid. (2007) at page 751, quoting Lord Bingham in *R v H; R v C* [2004] 2 *AC 134* at [22]

the UK – the trial judge was able to rule on the remaining documents by himself, which didn't occasion us any difficulty.

Legal Aid – it was a legally assisted matter – facilitated in the obtaining of the security clearance in the Roche matter, which means they paid for it, because it's also a very expensive process. It arises very rarely; as I say it's the only trial that we have had. I don't anticipate that it would arise frequently in the future at all.

But it would, I think, be a good idea if there were to be a process whereby a senior counsel in the state could be appointed as special counsel, in order for the purposes of facilitating criminal proceedings and the contesting of these type of national security – public interest immunity claims. And that would maintain – particularly in the small state of Western Australia – the ability of accused people to have counsel of choice in relation to their trial, but for there still to be a person holding a security clearance who could act as special counsel, because the reality is in a small state like Western Australia, one: it would be a very expensive and very difficult for every defence counsel who wanted to be involved in these matters to obtain the security clearance, whereas it might not be so difficult to have one or two people as special counsel who have that ability and for the overriding principle to be respected – that is that counsel in such – or accused in such matters would have counsel of choice in relation to their primary defence counsel.[181]

203. The Law Council also notes that the UK Independent Reviewer of Terrorism Legislation, Mr David Anderson QC, has concluded in the UK TPIM/ control order context that despite the constraints of CMPs, the UK courts have managed to provide "a substantial degree of fairness to the controlled person", although he has noted that "no procedure can be wholly fair in which a participant is enabled neither to hear nor (therefore) to rebut the detailed evidence against him".[182] Mr Anderson has emphasised that this conclusion is contingent upon the existence of the minimum disclosure requirement established under UK and European Court of Human Rights (ECHR) case law: that the controlee must be given at least the "gist" of the case against him so that he can give instructions to his counsel of choice. He has further recommended that this "gisting" requirement be enshrined in legislation.

204. In summary, the special advocates system may assist in improving the fairness of proceedings, where the alternative is that decisions are made in closed court proceedings, on the basis of classified material which has not been disclosed to the affected individual or his or her legal representative, and in respect of which neither the individual or representative may attend or make submissions. There are also possible practical advantages in respect of avoiding cost and delay compared with the alternatives of obtaining security clearances.

[181] Mr Hylton Quail representing the Law Council's National Criminal Law Committee before the COAG hearing into its Review of Counter-Terrorism Legislation, Presiding: the Hon Anthony Whealy QC (Chair), Mr Richard Bingham (SA Ombudsman), Perth, Wednesday, 7 November 2012, *Transcript of Proceedings*, pages 13-14

[182] Mr David Anderson QC, Independent Reviewer of Terrorism Legislation, *Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005*, March 2012, page 6

Disadvantages

205. However, such advantages need to be weighed against the strong concerns which have been expressed about the extent to which a special advocates model impinges on basic common law standards of fairness, open justice and natural justice.

206. Most strikingly, these concerns have been voiced by the UK Special Advocates themselves. For example, in their joint response to the 2011 UK Green Paper on Justice and Security, which preceded the Justice and Security Act, the Special Advocates stated that:

- *"Closed material proceedings (CMPs) represent a departure from the foundational principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own. They also undermine the principle that public justice should be dispensed in public…*[183]

- *Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do not "work effectively", nor do they deliver real procedural fairness...Neither the provision of Special Advocates, however conscientious, nor (where applicable) the modifications to current CMPs required by the House of Lords decision in AF (No. 3), are capable of making CMPs "fair" by any recognisable common law standards."*[184]

207. As a key concern, Special Advocates emphasised their inability to take direct instructions in relation to the case against an individual (other than through the court and relevant government body), following the disclosure of classified material. This, they argued, left them with little realistic opportunity of responding effectively to the case. They were unlikely to seek permission to reveal any communication to the opposing party and the court due to the disadvantage and unfairness to their client's case in doing so.

208. Special Advocates argued that CMPs "systematically exclude the public, press and Parliamentary scrutiny of parts of our justice system". Their further concerns can be summarised as:

(a) The inability effectively to challenge non-disclosure;

(b) The lack of any practical ability to call evidence;

(c) The lack of any formal rules of evidence, so allowing second or third hearsay to be admitted, or even more remote evidence; so that it was often unchallengeable;

(d) A systemic problem with prejudicially late disclosure by the Government, as well as "iterative disclosure" of "gist" material;

(e) Government practices of serving redacted closed documents, and resisting requests for the production of documents on the basis of a unilateral view of relevance; and

[183] *Justice and Security Green Paper: Response to Consultation from Special Advocates*, 16 December 2011, published by the UK Cabinet Office, available at: http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf, page 1
[184] Ibid., page 6

(f) The lack of a searchable database of closed judgments.[185]

209. While some of these issues could be addressed, the Special Advocates argued that others were more integral to the CMP and special advocate system and could not be remedied.[186]

210. The concerns of the Special Advocates were echoed by the UK Committee in relation to the UK Justice and Security Green Paper. It concluded that the Government had failed to make the case for extending CMPs to all civil proceedings. In reaching this conclusion, the UK Committee explicitly agreed with the view of the Special Advocates that CMPs were inherently unfair. While it accepted that the legal framework applying to national security-sensitive material could be made clearer, the UK Committee questioned whether replacing the then-existing public immunity law governing disclosure of sensitive material was justified. [187] Even when it welcomed significant amendments to the later Justice and Security Bill to address the most controversial proposals, the UK Committee reiterated its concerns about the necessity for CMP in civil proceedings.[188]

211. Further to the concerns raised within the UK, the Law Council also notes that the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (the Special Rapporteur), commented on special advocates briefly in 2008.[189] The Special Rapporteur referred to UK and ECHR case law which emphasised that:

(a) the compatibility of special advocates with the right to a fair trial is a matter to be addressed in the particular circumstances of each case, and there may be cases where it would not be fair and justifiable to rely on special advocates;[190] and

(b) while the assistance which special advocates can give has been acknowledged, their use must never undermine the ability of an accused or respondent to effectively challenge or rebut the case against him or her.[191]

212. The Special Rapporteur concluded that there are real dangers accompanying the appointment of special advocates (such as the inability to communicate with the client following the disclosure of classified information) which frustrate and undermine the ability of a person to instruct counsel for the purpose of answering the case.[192]

213. The Law Council notes that a variety of academics have also published their views on the special advocate model as adopted in the UK, Canada and New Zealand. It

---

[185] Ibid., pages 7-8. According to Dr Cian Murphy, the UK Home Office is currently exploring the possibility of developing closed head notes with searchable keywords. However, he notes that the problem of the absence of any academic discourse on such judgments remains: Dr Cian Murphy, "Counter Terrorism and the Culture of Legality: The Case of Special Advocates," (2013) 24 *Kings Law Journal* 19 at page 31.

[186] Ibid., pages 8 and 13

[187] UK Committee *Twenty-Fourth Report: The Justice and Security Green Paper*, published 5 April 2012, available at: http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/286/28603.htm, see Conclusions and Recommendations, paragraphs 7-22

[188] Human Rights Joint Committee - *Fourth Report Legislative Scrutiny: Justice and Security Bill*, published 13 November 2012, available at http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/59/5902.htm; see Conclusions and Recommendations [7]

[189] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Report to the United Nations General Assembly, A/63/223, 6 August 2008, at page 19

[190] Ibid., quoting Lord Carswell in *R (Roberts) v. Parole Board* [2005] UKHL 45 at [144].

[191] Ibid. quoting Lord Bingham in *Secretary of State for the Home Dept v MB and AF* [2004] 2 All ER 863 at [34]

[192] Ibid. referring to Lord Bingham in *AF* (at [34]); and Lord Woolf in *Roberts* (at [83(vii)])

notes in particular the views expressed by Dr Cian C Murphy of King's College London.[193] These include the following concerns:

(a) The key issue is that at precisely the point at which the accused's participation is most important, both to ensure the legitimacy of the process and the effectiveness of counter-terrorism law, he is excluded from the process. At that point, no matter how skilled or conscientious the special advocate is, he has become part of a system to which the accused is subject rather than one in which the accused participates.

(b) One reason for this is that special advocates cannot be held accountable to those whose interests they seek to represent. This is a fundamental change to the role of a lawyer that has implications not just for the legitimacy and effectiveness of the system but also for questions of professional ethics.

(c) While special advocates tend to be highly qualified and diligent professionals, they have been said to occupy… a space somewhere between an amicus curiae and an ordinary legal representative". This is of concern, given the severity of the interference with the right of liberty of those subject to the proceedings;

(d) Regardless of their skill, special advocates face significant disadvantages in their effort to ensure that rule of law principles are upheld, including:

    (i) the lack of communication post disclosure (as already discussed);

    (ii) the burden on special advocates in preparing the case without instructing solicitors. Dr Murphy also notes that this has been addressed in part in the UK through a Special Advocates Support Office.

    (iii) the prohibition on special advocates calling current or former members of security agencies as witnesses, and practical restrictions in calling any expert witness such as the requirement for security vetting of the witness.194

214. Dr Murphy also states that the use of special advocates in a range of different kinds of proceedings gives rise to particular concerns as their ability to ensure that the rule of law is upheld is so limited. He states that "the difficult choice faced by those who operate the legal system is whether or not to cooperate with a system that is ultimately contrary to the rule of law". He also likens the CMP process, including special advocates, to:

> *… a legal grey hole… in which the state seeks to use legal or quasi-legal rules, processes and institutions to disguise the erosion of the rule of law and the culture of legality in the exercise of state power.*[195]

[193] Dr Cian Murphy, "Counter Terrorism and the Culture of Legality: The Case of Special Advocates," (2013) 24 *Kings Law Journal* 19
[194] Ibid. at pages 30-32
[195] Ibid. at pages 32-33

Law Council position on the Use of Special Advocates

215. The Law Council is aware that there is a continuing academic discourse regarding the advantages and disadvantages of special advocates with some academics and commentators favouring the use of special advocates.[196]

216. Given this continuing discourse and the concerns outlined above, the Law Council suggests that the consideration of a special advocates model under the NSI Act should be approached cautiously. Furthermore, this option should not detract from the momentum to effect meaningful reform of those provisions of the NSI Act that the Law Council and others have consistently identified as raising fair trial concerns. The Law Council continues its strong support for this broader reform.

217. If however, the preferred option of major reform to the NSI Act is not pursued and the problematic features of Part 3 of the NSI Act are to remain, the Law Council does see some practical advantages in further considering the use of special advocates, provided that fundamental safeguards are met. These safeguards include:

(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 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.[197]

(b) Special advocates must be appointed under a process that is subject to the full 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;[198]

(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.[199] 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 fulfill their role to the maximum extent possible, noting the difficulties that have been expressed by UK special advocates which are discussed above. For example:

[196] For example, Dr John Ip notes a history of support for the special advocate procedure in the Canadian legal community in his article "The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill " [2009] *New Zealand Law Review* 207 at page 216

[197] 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, issued 15 May 2013

[198] *R (Roberts) v Parole Board*, per Lord Carswell at [144], as discussed in Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Report to the United Nations General Assembly, A/63/223, 6 August 2008, page 19

[199] As per Whealy J in *R v Lodhi* [2006] NSWSC 586 at [45]

(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 from the Government purse;

(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;[200] 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.

218. 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.

219. 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 jobs 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".[201]

220. As discussed above, a less restrictive approach is reportedly taken under the Canada IRPA, 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.

221. If a special advocates model is to be adopted, the Law Council considers that it should be trialled on a limited basis only, within narrow parameters (for example, in relation to a single area of the law) and a finite timeframe. A comprehensive independent review should then take place before it is adopted on a permanent basis.

[200] See, for example, section 268 NZ Immigration Act

[201] Dr John Ip, "The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill " [2009] *New Zealand Law Review* 207, at page 219

Conclusion

222. For the reasons outlined above, the Law Council considers that the approach adopted in the NSI Act needs considerable reform before it can be considered to be an "appropriate approach to the dilemma of national security secrecy and the open administration of criminal justice".[202]

223. While many of the concerning provisions of the NSI Act have not been frequently invoked, those affected continue to operate under their shadow. If these provisions are triggered, they will affect the fairness of the trial process and undermine the independence of legal profession.

224. To address these concerns, the Law Council recommends that:

(a) the security clearance process contained in section 39 of the NSI Act should be repealed. If this recommendation is not adopted, the Law Council recommends that section 39 of the NSI be amended so as to give the court a greater role in both determining whether a notice should be issued and in reviewing a decision to refuse a legal representative a security clearance.

(b) sub-sections 31(8) and 38L(8) of the NSI Act be repealed; and

(c) the notice provisions in the NSI Act be amended so that they only require notice to be given to the Attorney-General about the potential disclosure of a much narrower and more directly relevant class of information and do not apply to the issue of a subpoena.

225. Without such reform, the Law Council concurs with the view outlined in the Monitor's 2011-12 report that the existence of the NSI Act continues to threaten the right to a fair trial and does so without bestowing any "benefit or advantage over and beyond the common law technique of claims for public interest immunity, decided by the court and not by executive certificate."[203]

226. If defence counsel are not allowed access to national security information, a special defence counsel or special advocate model could be considered subject to a range of critical safeguards. These safeguards include appointing special advocates under a process that is subject to the full discretion of the court and as a last resort, where the trial judge is satisfied that no other alternative will adequately meet the interests of fairness to the affected individual**.** Special advocates should also be provided with access to the affected individual, his or her counsel, and the case against him or her as well as access to the information subject to the closed hearing determination.

227. The Law Council recognises the need for mechanisms to be available to the courts to protect the confidentiality of national security information in the course of federal proceedings. It recognises that this may have an impact on the conduct of certain proceedings and potentially on the ability of parties to access and disclose certain information. However the approach adopted in the NSI Act - which imposes broad and impractical notice provisions, establishes a system of security clearances for lawyers, and fetters the court's discretion to maintain, modify or remove restrictions on disclosure of information - amounts to an unacceptable compromise of fair trial

[202] Monitor's 2011-12 Report page 54
[203] Monitor 2011-12 Report page 54.

principles in favour of the protection of information that may be relevant to national security.

Attachment A: Profile of 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 Large Law Firm Group, 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 Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. 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, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.