Law Council
OF AUSTRALIA

Office of the President

17 August 2021

Mr Grant Donaldson SC
Independent National Security Legislation Monitor
3-5 National Circuit
BARTON ACT 2600

By email: INSLM@inslm.gov.au

Dear Mr Donaldson

Supplementary Submission: The operation of section 22 of the *National Security Information (Criminal and Civil Proceedings) ACT 2004* (Cth) as it applies in the 'Alan Johns' matter (a pseudonym)

Thank you for the opportunity to appear before the public hearing of this review on 9 June 2021.

As you will be aware, the Law Council's primary position is that subsection 22(2) of the *National Security Information (Criminal and Civil Proceedings) ACT 2004* (Cth) (**NSI Act**) should be amended to prohibit the making of orders which are capable of suppressing all information about a criminal matter, and that provision should require that orders allow the disclosure of at least the most fundamental information about a criminal proceeding.

However, if this position is not accepted, the Law Council considers there should be some added legislative step to elevate the public interest in open justice, and a requirement on the court to consider less restrictive alternatives, before *in camera* proceedings take place under section 22.

The Law Council acknowledges that a great number of orders made under subsection 22(2) will be uncontroversial; governing routine matters such as the practical arrangements for the physical storage and handling of documents containing national security information. It also recognises that there will be circumstances where the need to close a court will be uncontroversial because it is readily apparent – such as a witness giving oral evidence which discloses the true identity of an employee of an intelligence service. It is unlikely that the submissions of a contradictor would be necessary or of assistance to a court in either of these circumstances.

This supplementary submission is intended to provide the Law Council's views on those circumstances or 'trigger points' where a court, as part of that added legislative step, should be required to hear from a contradictor (in the form of a public interest advocate or similar) and consider their submissions canvassing less restrictive alternatives to those posed by the party's subsection 22(1) arrangements, before making orders under subsection 22(2).

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In addition to the *prima facie* disproportionate secrecy surrounding the Witness J matter, the subsequent disclosures[1] of information indicate that the balance between secrecy and open justice may not have been adequately achieved in the section 22 arrangements and orders in that matter.

Those subsequent disclosures are also significant in the context of a case involving the suppression of nearly all aspects of the proceedings while they were on foot. In particular, the fact that fundamental information about the prosecution was latently disclosed publicly might reasonably give rise to a desire to have a stronger and more demonstrable mechanism for providing 'real time' assurance to the public that any claims for the necessity of complete secrecy are subject to rigorous, independent scrutiny. This scrutiny should be part of a court's standard decision-making process when assessing an application for orders giving effect to subsection 22(1) arrangements.

The secrecy context of the Witness J prosecution

The Law Council acknowledges that claims that the extreme secrecy-related measures taken in the Witness J prosecution were necessary would have been premised on an evaluative exercise about the level of classification assigned to information, which is based on a qualitative assessment of the degree of harm to the national interest that the disclosure is assessed as being likely to cause, at that point in time. The Law Council does not in any way impugn the professionalism and diligence of persons within originating agencies who are responsible for assigning classifications to information and making predictions about anticipated harm, or those acting on the advice of such persons. However, where the most extraordinary steps are proposed to be taken in reliance on those assessments—such as the effective suppression from public knowledge of the existence of a prosecution and its outcomes—equally extraordinary steps should be taken to provide the strongest possible assurance that those assessments are subject to independent scrutiny and testing. In other words, there should be demonstrably independent scrutiny of their analytical integrity and currency.

In this regard, the Law Council notes that the former Inspector-General of Intelligence and Security (**IGIS**), the Hon Margaret Stone AO, made the following remarks in a submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the originating Bill inserting the official secrecy offences into Part 5.6 of the *Criminal Code Act 1995* (Cth), about oversight findings in relation to the assignment of classifications to information by intelligence agencies:

> *Assigning a security classification to information or a document is not a precise science. As Inspector-General, I frequently see documents that appear to be over-classified or documents that may have been correctly classified when created but would now warrant a lower classification because of the passage of time or authorised public disclosure of related information. A tendency to over-classify documents 'to be safe' is understandable. In practical terms, the main things that presently hinge on this are the procedures that need to be applied to store, transport, destroy and disseminate the document. However, the Bill now proposes to give direct and profound legal consequences to the security classification assigned to a document or information.*[2]

The value of an independent contradictor

[1] 'Summary of offending' published 8 June 2021; Attorney-General's response to Senator Patrick's question on notice no. 957 (19 December 2019)

[2] Inspector General of Intelligence and Security, *Submission to the PJCIS Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, (22 January 2018), 7.

In circumstances involving the extraordinary levels of secrecy which arose in the Witness J matter (and which could arise in further prosecutions of Commonwealth officials who work in highly classified environments for official secrecy offences), the value of a contradictor who is at arm's length from the executive government—that is, not a minister, member of a security agency, or a senior official of a department of state—is to ensure that the qualitative assessment given to the sensitivity of information by an originating agency withstands scrutiny, as well as to scrutinise the necessity and proportionality of the protective arrangements that are proposed to be the subject of the order.

Even if the court in the Witness J prosecution ultimately made the same or substantially similar subsection 22(2) orders, the additional value of an independent contradictor is that their involvement creates public assurance about the rigour of the process by which the decision was made, noting that the public cannot observe that process given the presence of the national security information that would require disclosure and examination. It also reflects the practical reality that the interests of the parties (including the defence) are not always co-extensive with the public interests in open justice (see below).

The second Independent National Security Legislation Monitor, the Hon Roger Gyles AO QC, noted the value of an independent contradictor in the following terms in a report on control orders in 2016:

> *My experience as defence counsel is that it is possible to play a useful role in testing the prosecution case where no positive defence can be put forward on behalf of an accused. My experience as counsel, Royal Commissioner and judge is that a contradictor plays a vital role in any decision making, particularly judicial or quasi-judicial decision making. A special advocate can make submissions, for example as to: the extent to which the information needs to be protected if at all; the most helpful way of redacting the information and providing summaries or particulars of it; and the admissibility of the information and the lack of, or limited, probative value the information might have to support the case for the orders.*[3]

Circumstances where a court should be required to engage a contradictor

The Law Council submits that clear legislative safeguards are necessary to ensure that, as far as possible, disclosure of the most fundamental information about a criminal proceeding can occur to uphold the public interest in open justice.

In circumstances where minimum levels of disclosure are not legislated, and where public scrutiny may not be present as a protective factor, a contradictor is necessary to ensure that proceedings are only closed, or information is only suppressed, where it is absolutely necessary to protect the interests of national security, and that the community is re-assured that courts are only making these orders following a rigorous and independent scrutiny of the evidence said to prove the necessity of the arrangements sought.

To that end, the Law Council recommends that a court should be required to hear submissions from a contradictor in certain, narrowly-defined, circumstances.

These circumstances could be restricted to those where a court is presented with a narrow category of arrangements which, if made the subject of orders under subsection 22(2), would have the consequence of either:

[3] The Hon R Gyles AO QC, Independent National Security Legislation Monitor, *Report on Control Order Safeguards, Special Advocates, and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, (29 January 2016), 6-7 at [4.1].

- mandating that proceedings be held *in camera* in broad circumstances (for example, where there are suppression orders over the evidence relating to the facts in issue), or
- suppressing even the most fundamental information about a criminal proceeding (see the Law Council's primary position[4]).

These circumstances should always encompass those where no other independent party is likely to test the necessity of this narrow category of arrangements, or if there would be a public perception that the necessity of the orders consequent on these arrangements was untested or was *prima facie* a disproportionate response to the security concerns in the matter.

The issue of disclosure of fundamental information about a criminal proceeding arises most acutely in the prosecution of official secrecy offences, such as those under Part 6, Division 1 of the *Intelligence Services Act 2001* (Cth). This arises partly because the information sought to be suppressed may include evidence necessary to prove the elements of an official secrecy offence, including the accused's employer and dates of employment, their secrecy obligations and evidence tending to prove that those obligations were breached.[5]

Furthermore, prosecutions for official secrecy offences have created all the scenarios known to the Law Council where the deployment of section 22 orders has led to results such as those in the Witness J matter. The comparator is Witness K's matter, where the Law Council submits that scrutiny arising from public knowledge and the notoriety of that matter contributed to section 22 orders which struck a more appropriate balance between the need to protect national security information, while allowing the sentencing hearing to remain comparatively open.

For these reasons, the Law Council notes that the category of arrangements attracting a requirement for a court to hear from a contradictor could be further narrowed to include only those sought in proceedings for the prosecution of official secrecy offences.

The Law Council's recommendation

If the Law Council's primary position is not accepted, it recommends that the INSLM should formulate a recommendation as follows:

- Section 22 should be amended to insert an added legislative step in the form of a statutory presumption that a court must hear submissions from a contradictor where it is presented with arrangements during a prosecution for an official secrecy offence which would have the consequence of either:
    - mandating that proceedings be held *in camera* in broad circumstances (for example, where there are suppression orders over the evidence relating to the facts in issue), or
    - suppressing even the most fundamental information about a criminal proceeding.
- In presenting those submissions, the contradictor should have the power to test the evidence said to prove the necessity of the arrangements sought, and should have a function to present less restrictive alternatives.
- The court should have the power to depart from the presumption if it considers that it is not necessary to hear from a contradictor, or that no less restrictive alternatives to those proposed under subsection 22(1) are appropriate in the circumstances.

[4] See the Law Council's primary recommendation: Law Council of Australia, *Submission to the Independent National Security Legislation Monitor Review into the operation of section 22 of the NSI Act as it applies in the 'Alan Johns' matter* (5 May 2021), [24].
[5] See e.g., *Intelligence Services Act 2001* (Cth), s 39.

However, it should be required to give written reasons for any departure from that presumption.

Please contact Dr Natasha Molt, Director of Policy on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au in the first instance if you require further information or clarification.

Yours sincerely

Dr Jacoba Brasch QC
President