



Australian Government

Independent National Security Legislation Monitor

NEW REVIEW

THE OPERATION OF THE NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004 (CTH) ARISING OUT OF THE MATTER OF ALAN JOHNS (A PSEUDONYM).

An own motion review

The *Independent National Security Legislation Monitor Act* confers an own motion power upon the INSLM to review at any time any of the defined ‘*counter-terrorism and national security legislation*’, which includes the *National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act)*. As INSLM, I independently review the operation, effectiveness and implications of national security and counter-terrorism laws; and consider whether such laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary. My ‘Royal Commission’ like powers as INSLM give me access *as of right* to all relevant material regardless of national security classification. I do not consider complaints.

I recently wrote to the Attorney-General saying:

I note with interest your response to Senator Patrick’s Question on Notice 957 concerning ‘Alan Johns’. In view of the public interest in the matter, and now that the Richardson Review has been completed, I have now decided of my own motion to consider the operation in that matter of the National Security Information (Criminal and Civil Proceedings) Act 2004 and I will make any necessary recommendations arising from that review in my final annual report (parts of which may need to be classified).

The publicly known facts

Based upon a response by the Attorney-General to Question on notice no. 957 from Senator Rex Patrick, the following matters only have been officially stated or confirmed. They are the public or unclassified facts I assume for the purpose of my unclassified report on this review. There is a great deal of public speculation about the nature of the charges and the evidence supporting them. I am not authorised to disclose anything further than has been made public by the government, and no inferences should be drawn from this notice as to the true facts beyond those set out in it. Interested persons may however be assured that I will obtain, and then examine in private, the charges, evidence, submissions and transcripts of these closed proceedings. All that can be made public will be included in my final unclassified Annual Report to the Attorney-General.

1. 'Alan Johns' communicated confidential information contrary to a lawful obligation not to do so. The information was of a kind that could endanger the lives or safety of others. This risk remains.
2. Following an AFP investigation, the CDPP decided a prosecution was appropriate (given the Prosecution Policy of the Commonwealth, it may be assumed that the CDPP therefore considered it was in the public interest to prosecute and there were reasonable prospects of conviction).
3. The relevant offences provide that the Attorney-General's consent is required before a prosecution can proceed. That consent was given.
4. The prosecution commenced in the ACT Magistrates Court and was ultimately heard in the ACT Supreme Court. The NSI Act was invoked to manage the protection of the national security information in the proceedings.
5. Once the NSI Act is invoked, the Attorney-General may be heard on issues relating to the disclosure and protection of national security information. The Attorney-General was represented by the Australian Government Solicitor in relation to the NSI Act.
6. The court made orders under section 22 of the NSI Act, with the consent of the relevant parties, that is, the Attorney-General and the accused, protecting the national security information. The orders provided for a mechanism for closure of the court in circumstances where highly sensitive national security information would have been disclosed, but did not prevent the defendant or his counsel from accessing the information.
7. Mr Johns was represented by counsel of his choice.
8. Mr Johns pleaded guilty to the offences. There was thus no jury trial which, given the CDPP presented an indictment, would have been by jury: *Constitution* s 80.
9. He was sentenced to a term of imprisonment for the offences. The term of imprisonment was two years and seven months, imposed across an aggregate of five charges. He was released from custody on recognisance to be of good behaviour for three years.
10. Consistent with the Supreme Court orders, Mr Johns may disclose the fact of his conviction and terms of his sentence and that the nature of his offending involved 'mishandling classified information'. He may not otherwise disclose sensitive information including information that reveals the nature of his offending or the provisions against which he was charged or convicted. The Attorney-General states that 'any further comment on this specific matter would be inappropriate in light of the court orders and the risks which led to those orders being made.'
11. The NSI Act balances the need to protect national security information with the principle of open justice and gives the court wide powers to make orders it considers appropriate about such matters. The nature of the national security information involved in this proceeding informed the Commonwealth's position to seek protective orders. The Attorney-General advises that 'the matter is unique in my experience, and I am not aware of any other similar cases.'

The scope of my inquiry and my request for submissions

The publicly known facts set out above reveal that there has been an apparently unique set of circumstances whereby a person was charged, arraigned, pleaded guilty, sentenced, and has served his sentence with minimal public knowledge of the details of the crime, as a result of consent orders which were not the subject of published judicial reasons. The limited facts

which are now known did not arise because the court orders so provided. Rather, the details of these closed proceedings were apparently revealed in passing in collateral civil proceedings, and as a result of questions in Parliament.

I have commenced this inquiry because of the importance of the principle of open justice including in matters which may relate to counter-terrorism or national security. Further:

1. I concur in the statement by the Attorney-General that ‘the matter is unique in my experience, and I am not aware of any other similar cases’. Wholly closed criminal proceedings do indeed appear to be unprecedented in Australia, save possibly during the World Wars.
2. To be clear, this matter was quite different from cases where there are in criminal proceedings:
 - a. Temporary non-publication orders to protect the administration of justice, for example by keeping the fact of a conviction, or the nature of evidence given, in open court confidential, so as not to prejudice the fair trial of the accused or a co-accused;
 - b. Permanent non-publication and related closed court orders to protect the identities of a person whose identity is protected by common law or statute;
 - c. Orders made by a court setting aside a subpoena or refusing access to a document on the grounds of public interest immunity privilege in which case such material is not received into evidence at all.
3. Criminal proceedings, in this case involving the judicial power of the Commonwealth, differ from civil proceedings or a private arbitration not least because of the public interest in the administration of criminal justice. This means that the circumstance that the Attorney-General and the accused agreed on secrecy orders is the beginning of the argument, not the end of it. Very many accused have an interest in their criminal proceedings and sentence *not* being known as it adversely affects their reputation and may affect their treatment by other prisoners.
4. The public interest in open justice is particularly strong in criminal proceedings.
5. I understand that the interests of justice even in criminal matters may require modification of the open justice principle: see, eg *Hogan v Hinch* [2011] HCA 4; *HT v The Queen* [2019] HCA 40. An example of powers in addition to the NSI Act is s 8 of the *Court Suppression And Non-Publication Orders Act 2010 (NSW)* which provides:

8 Grounds for making an order

(1) A court may make a suppression order or non-publication order on one or more of the following grounds:

- (a) the order is necessary to prevent prejudice to the proper administration of justice,
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
- (c) the order is necessary to protect the safety of any person,

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the Crimes Act 1900),

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

6. In order to ensure that the NSI Act permits suppression orders which are proportionate and only made to the extent necessary, I ask whether the NSI Act should require that, or at least require the court to consider whether:
 - a. a contradictor, such as media interests, or a special advocate (such as is now provided for in control order matters) should be heard,
 - b. at least some details of the charges and orders should always be publicly known,
 - c. reasons should always be given by the presiding judge for the exceptional step of departing from the strong presumption of open criminal justice.

I will consider whether amendments to the NSI Act or indeed any other federal statute or rule should be recommended to avoid a repetition of these apparently unique facts. I will report on this matter in my final Annual Report which I will deliver by the end of my term as INSLM on 30 June 2020.

Dr James Renwick CSC SC
3rd INSLM
March 2020