

# Timor Sea Justice Forum

---

## **Submission to the Independent National Security Legislation Monitor's review into the operation of Part 3 Division 1 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.**

The Timor Sea Justice Forum (TSJF) is advocating in support of the rights of Bernard Collaery and Witness K. TSJF recognises that the review currently being undertaken by the Independent National Security Legislation Monitor is considering only the Act's application in the 'Alan Johns' matter.

Nevertheless, because TSJF is concerned that the principle of open justice is being undermined in the cases of Bernard Collaery and Witness K, we consider the findings of the Independent National Security Legislation Monitor's review into the Act's application in the 'Alan Johns' matter will be relevant in their cases.

The TSJF points out that the questions of open justice and national security were addressed in the Australian Law Reform Commission's interim report of August 2015 on Traditional Rights and Freedoms - Encroachments by Commonwealth Laws.

The interim report notes the common law principle of open justice, with the proviso for judicial discretion. It states that open justice is one of the fundamental attributes of a fair trial and that the necessity of the administration of justice taking place in open court is a 'fundamental rule of the common law'. The interim report quotes the High Court as saying that 'the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances'.

In relation to national security, the interim report notes that restrictions on open justice need to balance the right to a fair trial with the protection of national security. The report implies that the needs of the commonwealth should not be given extra weight, rather there must be judicial consideration whether the denial of open justice is in the public interest.

The TSJF is also conscious of the 3 April 2020 submission made by the Law Council of Australia to the then Independent National Security Legislation Monitor. We note the Council's view that the NSI Act should better balance the requirements of open justice with the protection of information that may genuinely prejudice national security.

The TSJF agrees with this view and endorses the recommendations made in the Law Council's submission. These include that there should be an added legislative step for the public interest in open justice to be considered by a court before in camera proceedings take place and that where courts conduct proceedings in camera, they should be required to provide reasons for doing so.

We believe the Australian Law Reform Commission and the Law Council of Australia's documents support the principle that open justice is essential to the proper administration of justice, with judicial discretion applying to considerations of the protection of national security.

We urge the Independent National Security Legislation Monitor to reach the same conclusion.

Sister Susan Connelly PhD  
for the *Timor Sea Justice Forum*