Mr Grant Donaldson
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Dear Mr Donaldson

**Submission into the Current Review into the operation of section 22 of the N*ational 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 contribute to this important review into the circumstances of the 'Alan Johns' matter.

Assessment of the operation, effectiveness and implications of national security and counter-terrorism laws is of primary importance for our society and the liberties of citizens, for the protection of free speech and an informed media unafraid to report matters of public interest.

There have been several matters of concern which provide a context relevant to this inquiry – the incarceration in secret of Alan Johns, and the prosecutions and use of National Security (NS) orders in the cases of David McBride, Bernard Collaery and Witness K. While I recognise that these other cases are not directly relevant to this inquiry, the secrecy being invoked in these other cases does provide a broader context for the inquiry and points to the need for further reviews.

It is reassuring that the INSLM is well aware of the requirements and importance of the open court principle and aware of the extraordinary nature of the orders made in the 'Alan Johns' matter.

I consider that such orders **should never be made** to keep the whole trial, the charges, the process and hearing of the charges and the sentencing of the accused, completely secret.

I do acknowledge that there may be rare circumstances where details of the identity of the accused and that some detail of the matters with which he/she is charged, may, on national security grounds, justifiably be kept secret. These instances however should be rare occasions. Further, given the dangers if the totality of the matters or the nature of the matters, are kept secret from the public and the media and our justice system, I do **not accept** that some matters, such as a general description of the nature of the charges, some of the court hearings, and the final sentence, should not be open or not be disclosed, even with the accused being in agreement with them being kept secret.

The accused should not be able to determine whether their identity and the substance of the charges and the sentence, should be kept secret. They are surely too subject to possible pressure to agree to secrecy, so that the onus of that decision should not be on them. Further the public interest also needs to be taken into account. Additionally, the Attorney-General and the defendant should not be able to agree between themselves to keep the whole

proceedings secret. This overrides the public interest. The legislation should provide that, notwithstanding any agreement between the parties, the judge must consider the public interest and open justice and whether all the proceedings can be in public. The judge must publish his/her reasons for determining that any part of the proceedings be in secret.

Public confidence in the judicial system is crucial to our democracy. If people don't believe that the laws of the land apply equally to everyone, or if they believe powers are being abused, our legal system loses force. Open justice is crucial to this public confidence and open courts are fundamental to the justice system.

The situation regarding terrorism and national security in our society today is not of such magnitude that it justifies the use of such orders. Many more people have been murdered in domestic-related killings than in terrorism actions in Australia. And while it is impossible for ordinary citizens to know how many terrorism plots have been thwarted by our security agencies, if indeed there have been numerous plots, this is testament to the effectiveness of the security agencies' work and the reduced threat to the population. I consider that the threat of terrorism in Australia has been overblown.

It is essential that the public is allowed to know how many people have been charged and detail of the cases and sentences, if any persons have been charged and sentenced under the NS Act and/or such NS orders.

In the rare situations where such orders could properly be made so as to protect national security information, I consider that a contradictor or friend of the court should be part of the proceeding at any stage when such NS orders are invoked. This would provide more confidence to the public that the powers were not being abused.

I also consider that it is essential to require the Attorney-General to make submissions to the trial judge that would facilitate publication of reasons (including sentencing remarks) that do not disclose national security information. This would also increase public confidence in the judicial system.

These conditions for court procedure or requirements on the Attorney-General should be contained in legislation. To do otherwise would make them too easy to bypass or change by executive order.

*The National Security Information (Criminal and Civil Proceedings) ACT 2004* per se should be reviewed on a regular, I suggest 5 yearly, basis. The need for orders, and the orders made under that legislation should be reviewed every two years. Either the INSLM or another independent legal body should undertake the reviews assisted by a small citizens jury properly designed and constituted for this purpose. Clearly, sufficient resources would need to be made available to conduct the reviews thoroughly.

The citing of national security concerns can so easily be used by the Attorney-General or others in authority to hide events from the public. I recall in the early 2000's when 'on-water matters' in relation to refugees were deemed matters not to be disclosed to the public, when it was hard to see what events in this situation would be so important that they could not be disclosed.

The giving of national security reasons for orders should be detailed and made mandatory so that the nature of the concerns, for example, identity or technology, can be identified in general terms to determine whether national security would indeed be at risk by disclosure. Detailed disclosure should be made to 2 or 3 judges to evaluate the veracity of the need for non-disclosure. As indicated before, I think there should only be very rare cases where partial non-disclosure would be justified as terrorism and national security threats in Australia are not high at the present time. Total non-disclosure, as in the case of 'Alan Johns,' should never occur.

The protections for individual's rights and for the public's right to know should be a high priority in these judgements. The danger of abuse of power by those in positions of power is always present and our judicial system should provide clear protections against such abuse of power. The nature of 'national security' concerns should be unpacked so that bogus national security claims can be exposed. Our judicial system must be transparent and citizens in general must have the opportunity to attend court hearings to ensure that transparency is practiced, except for cases of family court matters when personal security may be at risk.

In light of the disturbing circumstances of the 'Alan John's case, I also consider that the INSLM should conduct immediate reviews of the cases of David McBride, Bernard Collaery and Witness K to determine whether the NS orders made in those cases, and indeed, the charges they are facing, are justified. It seems to me very likely that the National Security powers in these prosecutions are being abused.

Thank you for the opportunity to contribute to this review.

Kathryn Kelly