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TRANSCRIPT OF PROCEEDINGS
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OFFICE OF THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

CANBERRA, AUSTRALIAN CAPITAL TERRITORY

MR G DONALDSON SC, INSLM
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PUBLIC HEARING

REVIEW INTO THE *OPERATION OF PART 3, DIVISION 1 OF THE NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004* (CTH) (*NSI ACT*)

WEDNESDAY 09 JUNE 2021

EXHIBIT LIST

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Acknowledgement of Country and Opening Statement by Mr Donaldson SC

MR DONALDSON: All right, everybody, I think we'll make a start. As we begin the hearing I acknowledge the Ngunnawal people, the traditional custodians of the land on which we meet today, and I express my respects to their Elders past and present.

My name is Grant Donaldson and I am the Independent National Security Legislation Monitor, or INSLM. This is a public hearing conducted under s21 of the INSLM Act of part of my review into the operation of Part 3, Division 1 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. Part 3, Division 1 includes s.22. This hearing is being transcribed and is also being live streamed. Sitting next to me is my Principal Adviser, Mark Mooney.

The background of this review is the 'Alan Johns matter', which can be understood as follows. On 8 November 2019, Justice Burns of the ACT Supreme Court delivered judgment in the matter of *Alan Johns (a pseudonym) v Director General of the ACT Justice and Community Safety Directorate*. That action concerned complaints by Alan Johns about the conditions of his incarceration in an ACT prison.

The judgment referred to evidence given by a representative of the prison authority about orders made in another matter involving Alan Johns. That evidence was to the effect that although the witness was not aware of the specific orders made in the other matter, she understood that disclosure of information relating to Alan Johns, including the offences of which he had been convicted, was prohibited.

This judgment gave rise to media and other interest and resulted in a statement about the Alan Johns matter by the Attorney-General that was conveyed in the Senate on 19 December 2019. Without going through everything that was stated in the Attorney-General's statement, the following can be taken from it, and I quote, 'Alan Johns is a pseudonym. Alan Johns was charged with offences under Commonwealth law arising from disclosure of confidential information contrary to a lawful obligation not to do so.

'The court made orders under s.22 of the *NSI Act* protecting national security information. The orders provided for a mechanism for closing of the court where highly sensitive national security information would have been disclosed. Alan Johns pleaded guilty to the offences and was sentenced to a term of imprisonment.

'Pursuant to s.22 of the *NSI Act*, the court made orders that Alan Johns could disclose the fact of his conviction and the terms of sentence, and that the nature of his offending involved mishandling classified information. He could not otherwise disclose sensitive information, including information that reveals the nature of his offending, or the provisions against which was charged for (indistinct).'

The Attorney went on to say, 'the sensitive national security information that would, but for the orders, have been disclosed, was of a kind that could endanger the lives and safety of others.' The Attorney-General also stated that, 'any further comment on this specific matter would be inappropriate in light of the court orders and the risks which led to these orders being made.'

Until the commencement of this review, the Attorney-General's answer was the only public disclosure by the Commonwealth Government of anything concerning the Alan Johns matter. Alan Johns was charged, arraigned, convicted on his plea of guilty, sentenced, and served his sentence without public awareness of any of this.

The process of the Alan Johns matter can be characterised as a secret criminal prosecution of a Commonwealth officer for very serious matters that resulted in a significant sentence of imprisonment, where the orders requiring this and the reasons for these orders were also secret, and by secret I mean, 'unknowable to the public.'

In the Alan Johns prosecution there were several appearances in the ACT Magistrates Court, and three sets of orders were made. When the matter was transferred to the ACT Supreme Court, there were further interlocutory hearings, further interlocutory orders were made, a lengthy sentencing hearing was held and some weeks after this hearing, a sentence was handed down with fulsome sentencing remarks by the presiding judge. The orders that were made that affected all of this, both prior to and at Alan Johns' sentencing, had not been published prior to them being put on the INSLM website as part of this review. There is no reason why these orders, in the form that they appear on the INSLM website, could not have been made publicly available before this, although it is unusual for court orders as opposed to judgments to be published.

Reasons explaining why the relevant orders were made have never been published. Neither the sentencing remarks nor a summary of them have ever been published. This review commenced on 2 March 2021. It followed an earlier review that was commenced by my predecessor but was not able to be concluded. In the course of this review, I have liaised

with relevant Commonwealth officials, and I expressed some scepticism that all that could sensibly be said publicly about the Alan Johns' prosecution is that stated in the Attorney-General's statement to the Senate in December 2019.

After discussions, it was accepted that more could be stated publicly and further details were published on the INSLM website, regrettably only yesterday. I had hoped that this could have been done earlier but it could not. But as from yesterday, the following matters are now publicly known. I won't read out the entirety of the statement; it is, as I said, on the website and can be accessed by anybody, and that statement is broadly to the following effect.

Alan Johns is a former Commonwealth official who held a high-level security clearance. As a clearance holder he was subject to strict reporting obligations and had a responsibility to maintain certain standards of behaviour. Alan Johns' clearance was subject to a revalidation, owing to concerns that were raised about his conduct including his behaviour and failure to meet certain reporting obligations.

The revalidation process, which included several opportunities for Alan Johns to respond to concerns ultimately resulted in a recommendation that his clearance be revoked. Following this process, the relevant agency head made a decision to revoke Alan Johns' security clearance, which lead to the termination of his employment. Shortly following his termination, Alan Johns made a series of complaints to the agency via unsecure means, that he had - or to the effect that he had - been unfairly treated.

In these unsecure communications, Alan Johns communicated classified information. In doing so, he breached secrecy obligations, which he was obliged to follow and which he understood as part of his former employment and as a former security clearance holder. Alan Johns' actions put at risk this classified information, which was of a kind that could endanger the lives or safety of others.

Alan Johns was arrested and charged with multiple offences relating to these breaches of secrecy provisions. He pleaded guilty to several offences in the ACT Magistrates Court and Chief Justice Walker remanded Alan Johns into custody in mid-2018. Alan Johns was represented at all times by counsel of his choice. Alan Johns was committed to the ACT Supreme Court for sentence, which took place in early 2019. He was sentenced to a term of imprisonment for two years and seven months. He spent 15 months in prison then was released from jail in mid-2019, some 16 months before the expiry of his sentence.

He was released on recognisance to be of good behaviour for three years and certain conditions were attached to his release. As with the publication of the orders made in the Magistrates Court and the Supreme Court, it is a pity that these further details could not have been made public earlier. This short summary of events discloses some very unusual things, which in totality resulted in the unprecedented secrecy in this matter. In this review I am centrally concerned with the following matters whether orders such as those made in the Alan Johns matter, which are now publicly available but required closed hearings, can ever be justified.

If so, is it desirable or necessary that the Court be assisted by a contradictor at any stage of the proceedings, because currently in s.22 matters there is never a contradictor. Section 22 operates upon the consent of all of the parties. I'm also interested in whether it is desirable or necessary that the Attorney-General be required to make submissions to the Court when these orders are sought that would ensure that relevant matters and relevant legal principles are brought specifically to the Court's attention, and submissions specifically directed to publication of orders and reasons, including sentencing remarks that would not disclose national security information.

Is it desirable or necessary that a means of ensuring that orders made under s.22 requiring closed court hearings be published in some way? Is it desirable or necessary that a process be developed for ensuring that reasons for the making of closed hearing orders under s.22 be published even if some details may have to be redacted. If orders made and reasons given are, over time, no longer required to protect national security information, should there be a requirement to periodically review such orders and reasons and how might these reviews be conducted?

I have some pretty well-developed views on certain of these matters, and in doing so I have been assisted enormously by the written submissions that I have received, but I am eager to hear more and to test certain matters, and so the hearings today will be of enormous assistance in that and will, I'm sure, be crucial to my final report, which I hope will be published in the not-too-distant future. With that, I welcome the representatives of the Law Council of Australia, who have kindly agreed to make themselves available today.

SESSION 1: Law Council of Australia

DR BRASCH: Now I am joined with Phillip Boulten, who is before you and Natasha Molt, our director of policy. Thank you for this opportunity

and thank you for providing me with the opportunity to appear by this technology, I was caught up in some Melbourne difficulties. We welcome, the Law Council welcomes the opportunity to appear at this hearing before you as part of your review; these are pressing questions you have just identified and asked.

Open justice is, of course, one of the primary attributes of a fair trial. It's a fundamental rule of the common law, that the administration of justice take place in open court and secrecy, or suppression, is only ever appropriate where the rare exceptions are other considered appropriately and applied. At common law, these exceptions are premised on being necessary to secure the proper administration of justice, or as permitted by statutory provision such as what we are discussing today. That, of course, sits counter to Article 14.1 of the ICCPR, which protects the human right to a public trial and a public judgment for criminal proceedings, albeit with limited exceptions.

While the Law Council welcomes the release yesterday, and I acknowledge how you in your acknowledgement, Mr Donaldson, of its late - late release, we still don't know very much about the Alan Johns case; very little still has been available to the public. We do not know what offences he pleaded guilty to, why he was given a term of imprisonment, exactly why the proceedings were conducted entirely in-camera, and why even the ACT Attorney-General was not aware he was imprisoned in a correctional facility the ACT Attorney-General oversaw. This information may never be revealed.

The Law Council recognises, however, there may be appropriate cases where suppression of information about criminal offending and closure of courts to the public are necessary to protect national security information. However, the Law Council considers that based on what information we do have available, the extent of secrecy surrounding the Alan Johns case appeared to be disproportionate to the requirements to protect national security. Certainly, the previous Commonwealth Attorney-General said the case was unprecedented.

The available information, however, suggested the *NSI Act* requires some reform to recalibrate the balance between the requirements on one hand, and open justice and protecting the community against disclosure of information that may genuinely prejudice national security. At present, as you have outlined in your statement, and as we're aware, the *NSI Act* offers a person a binary choice between agreeing to an arrangement, a consent order, where there is, as you have noted, no natural contradictor; or enduring a lengthy contested hearing with the aim of securing more

appropriate orders under s.31 of the Act. Take Bernard Collaery as an example in the ACT Supreme Court and Court of Appeal.

But even then, the odds are weighed in favour of suppression of information because the Court is required to place preferential weight (under s.31(8) of the *NSI Act)*, to national security concerns. The difficulty and uneven outcome of this process inherently encourages accused persons to take the option of agreeing to the s.22 orders, and one would wonder if that has disproportionate outcomes. Our primary recommendation is directed at amending s.22 of the *NSI Act* to ensure that even where a person feels they have little option but to consent to such arrangements, those provisions carry sufficient safeguards to ensure that we don't see another Alan Johns again. While the matter may have been unprecedented, without the change in the law there is no guarantee that we will not see another secret trial or secret prisoner in Australia. Thank you, Mr Donaldson.

MR DONALDSON: Thank you very much. Did either of you want to add anything to those opening remarks? All right, thank you. Could I just make it clear that some of the matters that were raised in that opening statement, for which I'm very grateful, related to broader issues beyond just s.22. And I have previously announced that this review relates only to, in effect, the s.22 mechanism, where these orders are made by consent. There are other issues, and perhaps broader issues, that involve the other provisions of the *NSI Act* that we are now seeing implemented in, as you've mentioned, the Collaery matter. I've announced that I'm not going to be reviewing those provisions of the Act until sometime later, if at all, although I think that everybody can proceed on the basis that there is likely to be a review of those other provisions at some stage in the future.

DR BRASCH: And we accept that completely, Mr Donaldson, I didn't mean to suggest you be broadening that. I simply use that as a counter point example.

MR DONALDSON: No, I understood it in that way.

DR BRASCH: Thank you.

MR DONALDSON: So, then I suppose the question becomes, if it can be conceived that there might be circumstances in which, let us say, a trial in relation to secrecy matters should be held at least in large part in a closed court, or there be closed hearings, what are the safeguards that should be put in place to ensure either that the public knows that that is happening, or that only orders that are necessary for the protection of that security information are in place? I have read your report with great – or

your submission– with great interest. But do you have any further developed views on what these safeguards might be?

MR BOULTEN: I might deal with that up front.

MR DONALDSON: Yes, thanks.

MR BOULTEN: As you would have known reading our submission, the Law Council suggest that there should be an amendment to s.22 so that there is a core set of principles, or sets of information, that must be revealed, and that the legislation should require that there should be public information – publicly available information about a criminal case. We are suggesting that the section should require public disclosure of the charge that is laid. We would be suggesting that the actual terms of the charge, if possible, should be made public. That the number of charges should be made public. And that there should be some broad description of the offense, or offenses that are to be tried.

There'd be other particulars that should be published, such as when the offences are said to have occurred. We also suggest that there should be publicly available information about whether the Attorney-General was required to consent to the initiation of the proceedings, and whether that consent was obtained. And then following the trial, there should be publicly available information about the penalties that were imposed, the length of imprisonment if a prison sentence was imposed, and whether or not the defendant is subject to other legal obligations after the sentence has expired.

The information that you read out this morning, that you just were able to winkle out of the government yesterday, covers nearly all of those things. Not quite all of them. One thing that is still missing in the Johns case is what crime he committed. We've got some general idea now of what it was, but we don't know exactly what crime. We know there are multiple charges. But we don't know how many. We don't know when he did it. We know it's a male, and we presume that he had some involvement with a security agency, but there could be more publicly available information about this particular case. We see the idea of there being a statutory requirement for this to be necessary given the reluctance of security agencies in particular to reveal anything at all about anything to do with their operations, including, and especially when someone breaches the security laws.

MR DONALDSON: So, you would envisage that there would be certain matters in respect of which that trial judge in fact did not have discretion as to what could be revealed?

MR BOULTEN: Indeed. There should be mandatory disclosure. There might be some area of discretion. For instance, determine how to describe the offending conduct. But the section under which the offence was charged should be disclosed, and the penalty disclosed. And some of the particulars of the charge should be disclosed.

DR MOLT: Another area where discretion might come into play would be, for example, in any obligations that are imposed on the defendant after they've served their sentence. So, for example, with regards to disclosure of information or travel restrictions, or things like that.

MR DONALDSON: Well, I would have thought they, in the description that Phillip just gave, they would be part of the conditions that were imposed really at sentence, so they would, on that analysis, come to be publicly - - -

MR BOULTEN: Not necessarily. There are other post sentencing regimes that might impact – particularly if someone is charged with, say a terrorist offense, then there is a whole statutory regime of dealing with people after their sentence is expired.

MR DONALDSON: Yes. So, one of the interesting features of this – of the Alan Johns matter, not unique, but interesting, is that this was of course a prosecution in relation to what are referred to as secrecy offences. And the *NSI Act* as you know, because you've been involved in a number of them, the *NSI Act* has until fairly recently largely been invoked in terrorist offences. And the circumstances I think are quite different, really.

MR BOULTEN: Absolutely. In fact, the whole rationale for the *NSI Act* was to deal with breaches of security laws, and its application in terrorist offenses was a sort of novel, almost unexpected development. In retrospect now, people actually see the *NSI Act* as an Act which is designed to deal with terrorism offences because that was where it was forged, but actually it's the other way round really.

MR DONALDSON: Yes. I think that's exactly right. That is, historically that is the basis for the *NSI Act* to have come about - found its way into the statute books.

MR BOULTEN: Yes.

MR DONALDSON: And that of course gives rise to an inevitable problem with the prosecution of secrecy offences, that there is a tension

between disclosure of in fact the material that is required to be kept secret in the court process and how that might best be - might best be managed.

MR BOULTEN: Yes, so the way we look at this is that the security agencies and the executive government don't just willy-nilly bring criminal proceedings. There is a very comprehensive consideration about the risks to security involved in instituting criminal proceedings and it's a - it's a - almost a compact between all the players in the criminal system, criminal justice system, that - that one of the fundamentals of the justice system is public scrutiny.

A pillar of the criminal justice system is maintaining society's confidence in the ability of the courts to be able to deal justice fairly, so that when a security agency is faced with the task of a renegade who has caused problems and potentially broken the law, they have a number of options open to them. They can deal with the matter by way of discipline. They can take action internally, perhaps sack the person, or if they regard the matter as requiring criminal sanction, then they must know that there are going to be risks that something about the proceedings will be public and must be public.

MR DONALDSON: Well I think that actually gives rise to what is in some respects the most interesting question involved in these matters, and that seems to me to be this; that let's, on your example, talk about somebody who's a member of one of the security agencies. So one of their principal obligations is to maintain the secrecy of certain information. I am happy to be persuaded otherwise, but I can accept as a matter of principle that there are some matters that Government is entitled to keep secret.

Now if I accept that, if one of those officers whose central obligation is to maintain the secrecy of those matters cannot be prosecuted because of the risk of public disclosure of the very information, that is - well for a start I think it's fundamentally inconsistent with the rule of law. Those whose obligation is primary in relation to those matters should never be beyond the scope of the criminal law for its breach, I wouldn't have thought.
MR BOULTEN: So that's why there is an *NSI Act*.

MR DONALDSON: Yes.

MR BOULTEN: And that's why an agency can have some confidence that the inbuilt mechanisms of s.27 and s.31 are likely to protect the ultimate secret, in normal circumstances I hasten to add.

MR DONALDSON: Sorry, you mean by that that there might be other circumstances in which those mechanisms would not protect that information?

MR BOULTEN: There might be, and because you're not dealing with the Collaery case, and I'm not going to comment on it, then there might be. But put that to one side. The circumstances of any typical 'security breach' criminal proceedings can take place without the secret being disclosed, but ought to take place in circumstances where people know that someone is on trial for breaching that type of law.

MR DONALDSON: Well I think again that raises a critical point which comes out of your suggestions as to what the core material must be, and that issue is when is - when are these matters disclosed. Because it may be that - and it may be even in the Alan Johns matter, if a summary of the sentencing remarks were made available, that may give some further detail to the public of what lay behind these matters. As you probably know, the orders in this matter provided for that – provided for preparation of a summary of the reasons, but they've not been published.

MR BOULTEN: Yes, I don't think the sentencing remarks are sufficient to maintain public confidence in the court because it does mean that the whole process of laying a charge, the fact of a trial, the nature of the allegations remain secret throughout the course of the proceedings so that the trial was in fact secret. It's like it could be happening right now in the court down the street and none of us have any idea at all that it's happening, and that in its own way has a serious - can have and is likely to have a serious - undermining of the public's understanding of how the justice system operates and ought to operate.

But given that this hearing, your inquiry, is focused on s.22, given that there are these tensions, the fact that they can be sorted out informally between the parties is the most repugnant part of the whole process because it's because of the lack of oversight by anybody, apart from the parties, that the - - -

MR DONALDSON: Well the court.

MR BOULTEN: The court has a limited role to play in - - -

MR DONALDSON: I disagree.

MR BOULTEN: Okay. So it really depends on what we make of subsection 22(2) that a court may make such order as it considers appropriate to give effect to the arrangement. And what does it mean to

give effect to the arrangement? So the arrangement is the focus. It would seem to be that something that contradicts the arrangement or which goes something outside the arrangement is not envisaged by subsection (2).

MR DONALDSON: But there are decisions. There's a decision of Justice - well in fact more than one decision of Justice Bongiorno in the Benbrika matters and in fact there's a decision of Justice Mossop in one of the Collaery matters, where orders were sought under s.22, where the judges refused to make the orders that were brought to them. I don't think s.22 operates on the basis that a judge has to give effect to the arrangement. A judge can refuse to give effect to the arrangement and refuse to make orders and have done.

MR BOULTEN: It depends what the arrangement is.

MR DONALDSON: Yes.

MR BOULTEN: If a judge disagrees with the idea that the court staff has to be vetted - - -

MR DONALDSON: Yes.

MR BOULTEN: Or if the judge disagrees that the safe has to have a particular combination, or that the documents need to be shredded in a different shredder, that's understandable. But it doesn't seem, with respect, that the judge can say, 'All right, if the arrangement is nothing can be told to anybody about anything, I'm going to change all of that', not the way that this section is framed at the moment, and - - -

MR DONALDSON: Hence, you say the need for a change to the section.

MR BOULTEN: There needs to be some legislative amendment and we are of the view that the fundamental principles that involved the disclosure of those primary facts, the essential facts or ingredients of the offences, should at least be publicly available. Going back to Justice Bongiorno's way of dealing with matters, again, the parties reached almost unanimous agreement about every aspect of that arrangement.

There were some aspects of the manner in which the trial was to be conducted that his Honour disagreed with. That was ventilated, and yet it was ultimately agreed upon between the parties, and such as there were differences between the parties and the Bench; they were at the margins of the extent of the orders that were agreed upon under the s.22 agreement.

MR DONALDSON: And I think the other point that comes out of that is s.22 arrangements often deal with a large number of relatively uncontroversial issues, such as the storage of confidential information and the like, in a secure way in the courthouse. Well, frankly one would expect that those matters could be resolved without too much difficulty, in many instances.

But the focus of this inquiry and really, the focus of - or what happened in the Alan Johns matter, was actually the closed court.

MR BOULTEN: That's exactly right.

MR DONALDSON: Closed court orders.

MR BOULTEN: The parties typically embrace s.22 for obvious reasons, but mostly because the administrative arrangements in dealing with a secret, are common sense.

MR DONALDSON: Yes.

MR BOULTEN: And everybody just wants to get to the real issues.

MR DONALDSON: Yes.

MR BOULTEN: So, it's only when fundamental issues of open justice come into the equation that there is a real issue.

MR DONALDSON: Yes, I think that's right. And so, can I ask this. The safeguards that you outlined earlier; are you suggesting that there would be any discretion in relation to the timing of certain of those disclosures? Because, can I just say, in this matter the orders that were made were ultimately able to be published and there's no particular reason why, in my opinion, they could not have been published much earlier than they were.

But there may be circumstances which I can envisage and which you would've come across in your practice, for instance, where the publication of sentencing remarks is withheld for a period of time, for one reason or another. So there is sometimes a timing issue in these matters, or it may be the publication of reasons for the orders being made might be delayed for a period of time. Can you foresee those circumstances?

MR BOULTEN: Okay, sir, yes. It's possible that - for national security purposes it's in the interests of the court and national security itself that there be a timing mechanism.

MR DONALDSON: Yes.

MR BOULTEN: And of course that is a discretionary matter for a judge. I can see that. Postponing the delivery of the publicly available sentencing remarks might be one mechanism to do that. You talked about my extensive experience. Actually, I haven't got much experience in these cases.

MR DONALDSON: No. Well, I was referring more - - -

MR BOULTEN: But probably more than anybody else, but - - -

MR DONALDSON: Well, I was referring more to - sorry.

MR BOULTEN: These are very rare cases, I can tell you, and I'm not aware of any case where the sentencing remarks have been delayed. Yet. Apart from this one. But it might be a useful mechanism and we don't see a problem with it.

MR DONALDSON: Well I'm aware, for instance, of trials - I'm from Western Australia.

MR BOULTEN: Yes.

MR DONALDSON: I'm aware of at least one incident of a trial being held effectively in secret for a period of time, and that happened in a circumstance of there was an incident involving two very well-known public figures associated with organised crime. There was a fight in a nightclub. They were both charged with serious offences, and their trials had to be separately held. So, one of them was tried first.

The circumstances of that trial were not made public at all, because if it was widely reported, that would've had an effect upon the jury in the second matter.

MR BOULTEN: Okay, so that's - - -

MR DONALDSON: And so there are circumstances of which I am aware, where there has been, if you like, suppression of the complete circumstances of a matter really, for a period of time.

MR BOULTEN: Sure.

MR DONALDSON: And for a purpose. In that instance, is to ensure the second jury is not contaminated.

MR BOULTEN: Okay, so suppression of and non-publication of evidence is becoming a very common feature.

MR DONALDSON: Yes.

MR BOULTEN: And, you know, I can talk a lot about that. But that's quite a different thing than having the entire proceedings in-camera and supressed. Totally suppressed, unless and until a result is allowed to be published sometime after the event. That's what - - -

MR DONALDSON: Well, that is what happened in this matter.

MR BOULTEN: That's what happened here.

MR DONALDSON: Yes.

MR BOULTEN: And that's very unusual. Very unusual.

DR MOLT: If I can just add to that, and another common feature that we've seen in legislative frameworks around suppression orders is that there's often a requirement for the court to expressly consider the principles of open justice, and the administration of justice.

MR DONALDSON: Yes.

DR MOLT: And, of course, we don't have such a principle here in that section (indistinct).

MR DONALDSON: Well, it is a matter I'm considering, as I said. I would've thought that it is desirable, and I'm not entirely sure yet of the best means of doing this. But it is essential that when the Attorney-General is making submissions to any court in relation to any s.22 order that involves either suppression or a closed hearing, that the court be addressed fulsomely on what the relevant legal principles are.

MR BOULTEN: I think the Law Council would support that, and there are - if not uniform provisions, there are common provisions in State Suppression Order Acts, and the Federal Court has one, too.

MR DONALDSON: Yes.

MR BOULTEN: Where there are statutory criteria that guides the decision about what to suppress, and how.

MR DONALDSON: But I'm not sure - - -

DR BRASCH: Can I weight in too - sorry.

MR DONALDSON: Yes, sorry. No, off you go.

DR BRASCH: A lot of what the two of you in particular have been talking about; you know, the agreement that's put before the judge. A lot of standing back and listening to the two of you highlights the need for a public interest monitor, or - and that is Queensland language - the lack of contradictor.

The administrative staff, you know, what's the shredder, what's the code. Put that aside. The actual - if the parties, all parties have put in an agreement, a proposal to the judge who may make it or may not make it under Division 2; there is nobody arguing the opposite, and that was foreshadowed - or arguing the opposite or arguing alternatives.

So, the judge - what the judge can consider on these substance of matters is limited, really, to what the parties present to - are all going in the one consent direction, and you foreshadowed that. I acknowledge that. The need for a contradictor. I think I said (indistinct) before Queensland language. But the PIA equivalent.

MR DONALDSON: Well, I think that that's a matter that I'm giving considerable thought to. Plainly there wouldn't be a need for a contradictor every time orders are sought under s.22, by consent. Because, as we've said, there are many orders that are fairly routine.

But it may be that it would be desirable to have a public interest contradictor in circumstances where closed hearing orders are sought. It might be that that would be desirable where closed hearing orders of certain types - by that I mean it may be that it's not every time that an order is sought for the closing of the court for a particular purpose that it's required.

I can envisage where with some matters it would be fairly obvious that a court was - should properly be closed. Although I'd be assisted by you telling me otherwise, if you thought it was otherwise.

MR BOULTEN: No. In fact, the vast majority of court closures in common garden variety cases are perfectly explicable. They're dealt with informally, albeit under legislative guidance.

MR DONALDSON: Or under the inherent jurisdiction of the court.

MR BOULTEN: Or under the inherent jurisdiction, even of District and County Court trials where the courts are exercising functions, albeit they're statutory courts.

MR DONALDSON: Yes.

MR BOULTEN: But in a national security environment still, nobody expects that the court will be open to the general public when a witness comes forward to give evidence who is a member of a security agency, for instance and it is just unspeakable that it would be. So probably the vast majority of the court closure in NSI cases, - - -

MR DONALDSON: Even with closed court orders?

MR BOULTEN: Yes, they're not going to be controversial. And so long as the judge has some extra ability, past 22.2, we say, to keep an eye on when it's happening and to step in when it is inappropriate, then maybe there is no need for a public interest contradictor.

MR DONALDSON: Well, I think that raises two very interesting points. One is if you accept everything that you've just said, , it sounded very sensible to me, that what it would then – what would then be necessary to do is to have a definition of the circumstances in which a public interest monitor must appear in relation to a closed court hearing because if there are some where it's not required, there would have to be a definition, and that might be difficult.

The second issue though that arises out of it is what you said at the very end. And it comes – it reminds me of I think submissions that you made in *Lodhi* before Justice Whealy, and that is the extent to which the court can actually – the judge can – actually under their own power require a contradictor to appear. Now, and I know that that was Justice Whealy's view in *Lodhi*, in a slightly different statutory context, but do you think that that would be a sufficient protection?

MR BOULTEN: Maybe, but I think it would need to be legislated.

MR DONALDSON: Yes.

MR BOULTEN: Even though I was on this single perhaps occasion, capable of persuading the learned trial judge that a contradictor could be appointed apart from the defence team. The decision, I must say, hasn't been tested in any way at all.

MR DONALDSON: No.

MR BOULTEN: And there would be people who would suggest that that's not appropriate.

MR DONALDSON: I think that's right; that is, that if it's accepted that the judge has power or should have power to require a contradictor, they should be statutory.

MR BOULTEN: Yes.

MR DONALDSON: As opposed to – because as you say, in *Lodhi*, the decision was by his Honour that his Honour proceeded on the basis that he could do so. He had inherent power to do so but didn't need to in that case.

MR BOULTEN: That's correct.

MR DONALDSON: So it was never actually tested.

MR BOULTEN: It didn't happen. It wasn't required and - - -

MR DONALDSON: And so if it's a good idea, it should be in the legislation is your view?

MR BOULTEN: Yes.

MR DONALDSON: All right.

DR MOLT: And if I could just add to that the benefit of placing it in legislation is that is very clear to the Australian community that this is a mechanism that is available. It is clear on the face of the legislation that that can be utilised rather than relying on inherent powers of the court which might not be as transparent to members of the Australian community.

MR DONALDSON: Yes. And the other feature of what we've just been discussing is because it would be – a contradictor would only really arise in relation to closed court hearings, there's not going to be – the system's not going to be unworkable that it's required every time s.22 orders are

sought, and so it might be expected that the Attorney-General would proceed on the basis that if very extensive closed hearings orders are sought, it's at least possible, if not likely, that the court might require a contradictor. And that's probably not a bad discipline in itself if that's in the legislation.

MR BOULTEN: I agree.

MR DONALDSON: I understand that.

MR BOULTEN: I agree.

MR DONALDSON: All right, thank you. Now, the other matter that I don't think you've directly referred to but which is something that I must confess troubles me about s.22 as disclosed in the Alan Johns matter is that there has been no publication of reasons for the making of any of these orders. I must say I'm a bit old fashioned and I think reasons cures most things actually.

MR BOULTEN: Yes.

MR DONALDSON: And there are many instances in which s.22 is invoked, even instances that require suppression and closed court orders where reasons are given and I think Justice Bongiorno did that during the *Benbrika* matter in relation to the court being closed for a certain purpose. There's a very, if I might say with respect, very thorough judgment of Justice Refshauge in a matter of *Scerba*, I think it is, in the ACT Supreme Court where very thorough reasons were given as to why orders closing the court were to be made.

And those reasons can be tailored quite readily to not disclose information that need not be disclosed. It should not be beyond the court with the Attorney-General's input and I will come to that in a moment, to come up with reasons explaining why these orders have been made. Do you disagree with that?

MR BOULTEN: No, not at all. And it happens after a contested 31 hearing.

MR DONALDSON: Yes.

MR BOULTEN: And so why not with a 22 order.

MR DONALDSON: Yes. Well, there's provision, I think it's s.32 in the Act in relation to the provision you've described, that actually has a

process set out as to how reasons are dealt with, which is pretty standard. You know, a full set of, or a set of a full reasons, is provided to the Attorney-General and parties. They make submissions to the court as to, ideally redactions, because if it can be done by a simple redaction that's the best way of dealing with it.

MR BOULTEN: Sure.

MR DONALDSON: If not, then by preparing a summary of material. But if it can be done pursuant to s.32, it would seem to me that there's no reason why something similar couldn't be done in relation to s.22 orders.

MR BOULTEN: Agreed.

MR DONALDSON: Because as I said in my opening remarks, the reasons for the making of those orders is meant to be made public.

DR MOLT: I agree entirely.

MR DONALDSON: Which shouldn't happen. And it seems to me that in this matter, even if this matter is – Alan Johns – and can I make it very clear to everyone, this is not a royal commission into the Alan Johns matter, it's just that it's an illustration of how extraordinary things can happen.

MR BOULTEN: Yes.

MR DONALDSON: But in the Alan Johns matter, if the orders were published either as they were made or shortly after, at least – the very least that the community would have known is that there was a matter before the court that was the subject to these extraordinary orders, and that is important information in itself, I think.

MR BOULTEN: That's was what shocked everybody, that there had been a complete set of proceedings take place.

MR DONALDSON: Yes.

MR BOULTEN: Without significant players in the system, let alone the public knowing about it.

MR DONALDSON: Yes. I think that's right and so if we look back at the circumstances of Alan Johns, if the orders that were made giving rise to a closed court, had been published as they were made or about the time they were made, if the reasons for those orders were published even if

some of the information was suppressed in relation to those, if all of that had happened people would have known a lot. Plainly not everything and maybe not everything that in an ideal world they would know, but the public would have known a lot.

MR BOULTEN: Having said all of that, there's probably a whole lot more that could have been made public. So just as a judgment or reasons might have been properly edited by those keeping an eye out for NSI issues, so too could the transcript of the proceedings have been vetted in that way.

MR DONALDSON: Yes.

MR BOULTEN: And a version of the transcript made public as well.

MR DONALDSON: Well, that raises a slightly different issue because transcripts are not generally published, by that I mean there's not a system like AustLll where court websites don't publish transcripts other than the High Court. Are you suggesting that in matters involving the *NSI Act*, there should be some means of the publication of transcripts of hearings?

MR BOULTEN: Yes. Yes, it can be such a case. In fact, my memory of *Lodhi* is that that's what happened there. That for those parts of the proceedings where the press and the public were excluded, there was a transcript that was vetted and considered by the parties and the court, and that then released for publication.

MR DONALDSON: I see. By that – I understand, but that is the press, for instance, would know that there was a transcript that was available and could ask the parties or the court for the transcript.

MR BOULTEN: No, ask the court. Yes.

MR DONALDSON: I understand that. All right. That's very helpful. And then the other thing that I think arose out of something that was just said a moment ago, was if there is going to be a contradictor available in the process, perhaps the other place in which a contradictor could play a very valuable role actually is in preparation of reasons. I say that for this reason, court publishes an open set of reasons, provides them to the parties, with the parties to come back to the court with suggestions of redactions or material that can't properly be disclosed.

MR BOULTEN: Yes.

MR DONALDSON: Now, in s.22 matters, the accused is perfectly entitled to want as little information made public as he or she chooses, and nobody can criticise, in this matter Alan Johns, for going along with these orders, for instance. So, there is not a contradictor. And so, do you foresee that that might also be a place where - - -

MR BOULTEN: Could be.

MR DONALDSON: And again, if you look at s.32 of the Act, which has the mechanism in place, it wouldn't be particularly difficult to infuse a contradictor into that process at the obvious spot.

MR BOULTEN: No. Agreed.

MR DONALDSON: All right. I understand, yes. Now, I think you've answered – I didn't have sets of questions to ask you as it were, but I've just been very interested in your input into everything that we've discussed. Just bear with me for one second. Another matter that I mentioned in my opening remarks was whether it's desirable for there to be some mechanism for the periodic review of these matters. Which doesn't normally happen, actually. So, in commercial matters, for instance, when there is suppression of information that is commercially sensitive. I'm not aware, and I've been involved in many such matters, but I don't think anybody's every given thought to going back to the court at a time in the future when the need for that suppression has ceased. And I don't think that it happens in s.22 or in NSI matters either.

MR BOULTEN: No, it certainly doesn't.

MR DONALDSON: Do you think that there may be some utility in that?

MR BOULTEN: Yes, I do. I think there's a requirement for a report to parliament about the number of proceedings in the subject of NSI.

MR DONALDSON: It's in the annual report, yes.

MR BOULTEN: But there should be a special focus on suppression and closed court hearings. There is a particular public interest in the closure of a court for national security purposes that doesn't apply to the typical closed court environment.

MR DONALDSON: I agree.

MR BOULTEN: And there is a lot to be said for a periodic review, probably by a judge, of the reasons why the court was closed. Some of

the closures are common garden variety closures, and even so they're not many. It's not a huge body of data that needs revision. But I agree with you.

MR DONALDSON: Well, the circumstances that has occurred to me is there may well be a very good reason to have particular closed court hearings or suppression of a particular matter. For instance, that there is an undercover police officer currently in place in an organisation.

MR BOULTEN: Yes, operational reason.

MR DONALDSON: And that's the reason why materials are pressed. Now it may be that if that officer comes out at a particular point in time there may be absolutely no reason for the material that had been suppressed to not be made public.

MR BOULTEN: Of if the secret comes out.

MR DONALDSON: Or if the secret comes out.

MR BOULTEN: And everybody knows the secret, and there's no controversy that the secret is true.

DR BRASCH: And in certain circumstances you can have the contradictor involved in that as well. Now not for the garden variety stuff, but the more significant and substantial stuff.

MR DONALDSON: Yes, and the difficulty with what you've said is really coming up with a definition of what's garden variety and what's not. And I'm not saying that it's not a good idea, but it may give rise to some difficulties in that. But I think your views on the periodic review of these matters is very helpful.

MR BOULTEN: So, the *NSI Act* has only been invoked irregularly. It's not a very common feature. And even then, closed court is not always part of the NSI.

MR DONALDSON: No. But it would only be in relation to – I wouldn't be thinking of periodic review of orders about what sort of safe is put in the judge's chambers.

MR BOULTEN: No, of course not.

MR DONALDSON: We are really in this matter talking about closed court hearing orders, and perhaps wide-ranging suppression orders. But

even suppression orders – some suppression orders are routine. Somebody's name slips out during the course of a hearing, and the judge immediately suppresses it. Well, I don't think anybody would suggest that public interest advocates are required for that.

MR BOULTEN: No.

MR DONALDSON: All right. That's been of very great assistance to me, thank you. I'm again very grateful to the Law Council for its written submission, and to the three of you for coming along today - - -

MR BOULTEN: Pleasure.

MR DONALDSON: - - - and assisting me. Thank you very, very much.

DR BRASCH: Thank you. Thank you for the opportunity, Mr Donaldson, thank you very much.

MR DONALDSON: That's very good of you, thank you. Now, we might just have a break for 5 minutes. ,.

SHORT ADJOURMENT

SESSION 1: Human Rights Law Centre

MR DONALDSON: Thank you. We'll resume these hearings now. The second body that we are going to hear from is the Human Rights Law Centre and from Kieran Pender, who's with the Human Rights Law Centre. I should say, Kieran, before we start, I was very grateful for the written submission that was made by the Centre which was very thought provoking. So, if you've got some opening observations that you want to make, please make them and then we'll have a discussion similar to that I was greatly assisted by with the Law Council. Thank you.

MR PENDER: Fantastic. Thanks Mr Donaldson SC and Mr Mooney. Firstly I also want to acknowledge the traditional owners of the land on which we meet, the Ngunnawal people and that sovereignty was never ceded. The Human Rights Law Centre is very grateful for the opportunity to be participating today and we wanted to commend the Independent National Security Legislation Monitor for undertaking what we see as an incredibly important review.

Our position is relatively straightforward. We believe there is no place for secret trials in Australia and to the extent the *NSI Act* permits wholly secret trials as we saw in the Alan Johns' case, it requires urgent reform. Open justice is a fundamental democratic principle with heightened importance in the criminal justice context and we submit that there must be a minimum standard of openness or a transparency floor, so to speak, below which our courts cannot go when making orders pursuant to s.22. Orders of the kind made in the Alan Johns case should never be made again.

In our view, and consistent with our learned friends at the Law Council, we believe that safeguards should be introduced into the *NSI Act* to ensure that the public interest in open justice is adequately protected. In our written submissions we've made a number of recommendations to that end. I just wanted to briefly highlight three. We agree that a contradictor, we phrased it the open justice advocate, is required to ensure that the public interest in open justice is put to the court in the course of the adversarial process. And I think that's really important and I know our friend, Rebecca, later on today and I think her submission really underscored the need to embed this in the ordinary process of the courts to the extent possible.

Secondly, I think courts, in making s.22 orders as has been earlier discussed, must be required to give public reasons justifying the need for the departure from that starting point of open justice. And, thirdly, I think the *NSI Act* should be amended to require the establishment of a secret judgments library where all unpublished judgments in s.22 related cases are retained and, as has just been discussed, I think a mechanism for periodic review and release once national security concerns have elapsed would be eminently desirable.

Now, I want to say that I don't think these recommendations are entirely novel; they draw either on existing safeguards in other legislative schemes here in Australia or in some cases approaches adopted in other jurisdictions such as the United Kingdom. To the extent they contain any novelty is simply a necessary, considered response to an over broad legislative scheme lacking sufficient safeguards.

So I'm looking forward to your questions and the discussion but I just wanted to conclude my opening remarks with two central points. Alan Johns should not have been charged, sentenced and imprisoned in complete secrecy. In public commentary on this case, once this came to light, various people have highlighted the unprecedented nature. The then Attorney-General described it as unique. Your predecessor told the Senate, 'As far as we know there has never been another case, at least in

peace time in Australia, where all of it has been conducted in secret'. Now, this case may be unprecedented but unless the *NSI Act* is urgently reformed there's nothing to stop it happening again. For all we know it could be happening right now in a court.

MR DONALDSON: I was just going to say, we don't know if it's unprecedented.

MR PENDER: Well, exactly. And, secondly, I think the balance can be adequately struck between national security concerns and open justice in a way that accommodates both and doesn't reduce open justice to nothing. And I think the British case of *Guardian News & Media v Incedal* is instructive where the UK Court of Appeal accepted there were really compelling national security reasons for considerable secrecy but nonetheless retained a minimum level of open justice, and we think that is a strong guiding light for an approach involving the amendment of the *NSI Act*.

MR DONALDSON: Thank you for that,. I think one thing you highlighted is there are many judgments, in fact there are many High Court authorities, *Pompano* is one where various of the judges refer to the importance of the open court principle, but of course it's not an absolute and there are pretty well understood circumstances in which the principle is modified. Protection of police informers is one. There are commercial matters. There is another - and national security matters is a sort of well recognised category of circumstances in which the open court principle can sometimes be abrogated or not complied with in its full rigour.

So that I think is pretty well understood and accepted in your submission quite properly. Would I be correct in - when I have regard to your submissions, they really are directed at court closure orders, because I don't think it's controversial that there are many orders that are made under s.22 that actually are quite uncontroversial?

MR PENDER: Yes, that's correct.

MR DONALDSON: It's really in relation to whether matters are dealt with in open court or not. And if that's the case and following on from your opening statement that you – (I know that you saw with people from the Law Council), are trying to identify the circumstances, identify what I think you refer to as minimum standards of openness, that in effect are beyond the discretion of the court really. So, we heard today from the Law Council as to some of the matters that they recommend; do you have any - do you have any ideas of your own on that? And I say that for this reason, that this gives rise to very difficult definitional matters.. That's not

beyond the wit of a good parliamentary drafter to come up with it, but from a principled point of view, could you perhaps tell me what are these minimum standards of openness that must be met?

MR PENDER: Sure. I would broadly echo what the Law Council has said and would agree with their articulation at paragraph 24 of their submission as to, sort of, key dimensions.

I think in a prior discussion what I would underscore as an important factor is the timing of a degree of openness and I accept that in some cases, some material may need to be kept, for example, until sentencing remarks or an order is made, et cetera, but I think from the beginning a degree of openness is necessary, and I think it's necessary, you know, (a); to retain public confidence in the system but also because I think there are, you know, ongoing potential controversies around the operation of some of these provisions and the - the parties directly involved in a proceeding are not the only ones with an interest in the proceeding.

You've previously observed that it wasn't unreasonable for Mr Johns to accede to the secrecy that was sought and as we have set out in our submission, there are very many good reasons why someone may want secrecy around their prosecution and, I mean, I would point to, for example, the - - -

MR DONALDSON: Well, I would imagine most criminal accused would actually want to it if they could get it.

MR PENDER: Exactly, and the practitioners' guide from the Attorney-General's Department, for example, makes the, I think somewhat Orwellian point, that negotiation and cooperation is relevant to sentencing, and so you have a perverse scheme arranged where all of the factors are pointing towards secrecy and, you know, open - the *NSI Act* - - -

MR DONALDSON: Well, can I just say before I forget, because I - that point was made in your submission, as to the practitioners' guide. I have every confidence that that practitioners' guide will be issued in a different form fairly soon.

MR PENDER: I'm pleased to hear that.

MR DONALDSON: Because I think the point you make is a very good one.

MR PENDER: The *NSI Act* is 113 pages long and the phrase 'open justice' doesn't appear once. So, you know, all of this arrangement is

pushing towards a scheme of secrecy without the sufficient safeguards to protect the interests of others, and we all have an interest in a degree of minimum transparency, you know, for example - and I'm not, sort of, providing legal advice, but, you know, I think you could suggest that constitutional concerns arise by what has happened in the Alan Johns case, you know, we have several journalists in the room, they might have standing, for example, to, you know, raise issues about a fully secret trial and compliance with constitutional norms; how could they do that if, for example, even if we had minimum standards, they weren't implemented until the end?

So, that's a long and roundabout way of saying I broadly echo the Law Council but I think the timing question is very important and we would say that from the beginning there needs to be at least - and, again, I think in *Incedal*, a number of the - even the regime, which I know has been criticised but they allowed journalists to attend, in a way that - and they executed confidentiality agreements; there are all these different ways that that cat can be skinned but I think the core point is there has to be some openness. We do not accept there are ever circumstances that would justify these arrangements repeating themselves.

MR DONALDSON: One thing you would have seen from the orders is that - that are on the INSLM website is that the orders included that the Court be closed when Alan Johns was present in the Court. Of course, an accused person is entitled to be - present in the Court for any purpose, and so that's a - that's rather an unusual feature of the orders in themselves; I'm not saying it's a good order or a bad order, it's simply a feature of the orders that gave rise to, in effect, every hearing being closed pursuant to the orders, because Alan Johns presence in the - in the court room gave rise to, or invoked, the closure of the Court.

And it may be that there are circumstances, it occurs to me, in which the physical presence of an accused person in a court room could of itself give rise to a need for maybe closing the court or suppression of certain information, now - and I thought of this example, a former undercover police officer is charged with selling information and intrinsic to the crime is the fact that he was an undercover police officer operating in a certain area, say.

Now, if he is charged and appears in the courtroom, and he can be visually identified, that of itself could give risk to others with whom that undercover or former undercover police officer operated. So, there are complexities in these sorts of orders, even in relation to the physical identity of defendants at times.

MR PENDER: And I don't dispute that, but I would suggest that (a); in that scenario there are potentially practical workarounds that enable the identity of individuals to be protected while there's still a degree of open court presence or even audio transmission, for example, that doesn't permit people to visually identify - - -

MR DONALDSON: Yes, so technological means.

MR PENDER: - - - (b); and I think, you know, when you go to the various factors the Law Council set out, I think the broader point we would make is there are many different levers of transparency, some of them might be core, you know, such as a broad description of what the crime is as alleged, you know, what's the provision, et cetera, and some of them might be, sort of, you know, broader that might be, sort of, set off against each other.

So, I guess my point is, - if the starting point is, we can accommodate secrecy and transparency in a way that - protects national security concerns while protecting open justice. There are different routes we can go through to achieve that, but the point is we have to go on that road, and I think what is apparent from what is publicly known about Alan Johns is that that wasn't readily contemplated, and it doesn't seem, and as you said, there was a requirement - it was suggested that reasons would be given but we still haven't seen,

MR DONALDSON: Yes, the sentencing remarks.

MR PENDER: Sorry, sentencing remarks, and just on that note, you know, there was prior discussion about s.32 and the scheme that provides for reasons being reviewed and I would echo that a scheme such as that seems eminently appropriate, but I would note that that doesn't appear, at least on the bland reading of the provision, to require that those reasons are then made public.

Now, of course, in recent cases such as the Collaery case, they have, but unless I'm misreading something, purely on s.32, you know, the people that those reasons go - and again, so then constitutional concerns and - I mean, you mentioned *Pompano* - - -

MR DONALDSON: Well, that's what s.32 is directed to. That's the sort of process that is commonly followed to come up with a set of publishable reasons.

MR PENDER: Exactly. So, my point is just that it doesn't then follow, there isn't a s.5 saying, 'subsequently they will be published.' And so, my main comment is, if you're going to transplant that into a s.22 regime,

I think the core point is that there needs to be a public reason dimension, because that is such a core factor of the Court.

MR DONALDSON: One of the things that emerged from the Law Council's submission, or the discussions we had this morning is coming up with a core set of minimum standards, as it were, and when -, I think as we said, something along the lines of a broad description of the conduct, again that gives rise to a definitional issue that would have to be addressed.

So, there are - it arises most clearly out of your written submissions, there are some difficult definitions that would have to be - or definitional issues that would have to be addressed in all of these matters.

MR PENDER: And I don't envy the draftsman who might have to - draftsman or woman - who might have to prepare amendments to the NSI Act, but I think if you put in place additional layers of accountability, so if we have a - an open justice advocate or public interest monitor, what have you, if we have statutory criteria, those things together go towards stronger safeguards that ensure even if there is some definitional slippage, inevitably some - you know, one matter might fall on one side, one might fall on the other, the added of layers of, sort of, safeguard, and periodic review being another all go together towards added layers of protection for open justice.

MR DONALDSON: Yes. So, the exercise of power under s.22 by the judge - so, 21 deals with the - 22(1) with the agreement; 22(2) with the decision of a judge, that also requires the judge to have regard to the objects of the act, so this is s.3 of the *NSI Act*, and so s.3(2) requires that 'An exercise in powers or performing functions under the Act [so that would be making an order under 22] a court must have regard to the object of the Act' and the object of the Act is set out in subsection (1) which – it is a bit of an interesting provision in itself, but on its face it says, 'The object of this Act is to prevent disclosure of information in federal criminal proceedings and civil proceedings where disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice'.

Now, I'm pretty sure that if that object which the court is required to have regard to, is brought to the attention of judges when exercising their power under s.22(2), that's a fair indication of what judges should be thinking about, because the issue with prescribing minimum standards beyond which the court can order, that is the court has no discretion, these matters must be disclosed, they do give rise to acute definitional issues as I said, and it rather suggests a lack of confidence in the court to be exercising the

power under 22(2) having regard to the object which is pretty clearly set out in the Act.

And whether trying to define those circumstances might be – rather than defining the circumstances, a better way of doing it is just to ensure that the court is provided with what it needs to make the decision which is really a public interest advocate. Would you accept that?

MR PENDER: I see some merit in that view certainly. I think we are concerned that the Alan Johns situation has occurred, and that has occurred notwithstanding the object of the Act that you've just taken me to.

MR DONALDSON: Yes.

MR PENDER: And so that has happened and we would say without further additional safeguards it could be happening. It could be happening right now, it could happen again.

MR DONALDSON: Yes.

MR PENDER: But I do accept that having a monitor is one way of contributing to greater safeguards for open justice. We would say minimum standards or, taking the court more explicitly to requiring consideration to, for example, the public interest and open justice.

MR DONALDSON: And that could be achieved by requiring the Attorney-General to make submissions and it seems to me that if anybody's ever talking about closing a court, there should be a hearing about that, with submissions made.

MR PENDER: And I think having a third party monitor is an important additional safeguard.

MR DONALDSON: Yes. But those sorts of things shouldn't happen on the papers.

MR PENDER: No.

MR DONALDSON: So if that is done with the monitor, specific regard had to the objects of the Act, that may give rise to all the protection or maybe all the protection that's required, do you think?

MR PENDER: Yes, I accept there's merit in the view that that would go a significant additional way and we would certainly welcome that.

MR DONALDSON: Yes.

MR PENDER: I think it remains our view that having minimum – a number of – and even if they're just very core minimum safeguards of openness and transparency, and in that we would agree with the Law Council, but I guess if the core point is we can get to the layer of additional safeguarding various routes, then I accept that this is one alternative and partially, at least certainly desirable route.

MR DONALDSON: All right. Thank you Kieran, that's very helpful. I was also greatly assisted by your written submission which you've noted today, as well as to the maintenance of the unredacted reasons for various things being done, and I think your recommendation was really based on the English system where there is a – the maintenance of a library, as it were, of reasons. Do you envisage, and I think the English model is that they are maintained by the court which gives rise to a security issue of itself, whether the courts actually have facilities that are sufficiently secure to house some of this material.

But it may be that if there is to be a recommendation that these unredacted judgments must be maintained, that they could be maintained by the Attorney-General with some reporting mechanism as to that in an annual report, or in the annual report for instance.

MR PENDER: Certainly. And I think the need for a repository is important for two reasons; one is it enables, you know, learnings to flow from – as more cases occur and there's more consideration of the appropriate balancing and we've suggested, for example, that the open justice advocate or public interest monitor would be among the people who might be able to access other judges, should be able to access this if they're hearing a like case, and so that some of the safeguards will emerge, some of the additional judicial reasoning that will emerge, even in the secret version of a judgment, you know, is not lost.

MR DONALDSON: Yes.

MR PENDER: So I think that's an important reason, and then I think the other - - -

MR DONALDSON: And can I also add – sorry to interrupt, but could I also add it seems to me that many of these matters are an important historical resource.

MR PENDER: Exactly. And so then the second point is that I think periodic review, and I must admit, we have looked and given some

thought to how that might work and I'm not sure there's, sort of, clear – I mean other than the *Archives Act* and Cabinet, sort of that approach which is one that could be considered.

I accept that there's, you know, perhaps not a clear existing precedent for a periodic review in a case of this particular nature, but I think it's very important because, you know, the open justice interest isn't just at the time, it will continue and matters that are in the Alan Johns case at the moment go to national security and safety concerns, in 50 years may not.

And I think as we currently understand the scheme to exist, there is no mechanism for in 50 years' time accessing the documents that have arisen in this case, and that is - - -

MR DONALDSON: Or in 12 months' time.

MR PENDER: - - - Lost to historians, that is a loss, and I just think having a record keeping requirement just adds a layer of traditional court process. Having the judgments being kept and made available, whether today or in 50 years' time, you know, grounds this in traditional accessible judicial practice.

MR DONALDSON: Yes, I think that's a very helpful insight. Okay. Now, we're running a bit ahead of schedule, and I was hoping to actually have a slightly longer break after we finish with you Kieran. Were there other matters that you wanted specifically to address or that you thought that I should be paying particular regard to, other than those that you've stressed this morning?

MR PENDER: I think a point that arises in a number of the submissions that has been made is that this wasn't anticipated – the way the *NSI Act* was anticipated to operate. You know, the Act sets out a quite comprehensive complex scheme for determining these issues, and although it requires greater weight to be given to the Attorney-General's view, you know, it is a still a traditional adversarial mechanism as we are seeing in going in the Collaery case right now, and yet we have a situation that's arisen where s.22 has become the default and I think that's very understandable in light of the various interests of all of the parties.

But I think that's problematic because it wasn't anticipated as I think your predecessor in 2011 or 2012 said, 'Agreement amongst adversaries in litigation is not an unalloyed good thing', and so I think consideration of whether this mechanism of agreement is really appropriate in potentially compromising open justice is important, is my first point.

And then the second point is, some of the safeguards that we're suggesting, I think if they were introduced in s.22 would also properly be introduced in other parts of the Act to avoid a mechanism where transparency and accountability safeguards can be avoided by taking different routes, and I appreciate the scope of this inquiry is limited but I would, sort of commend, sort of a broader consideration in due course, particularly ensuring that how s.22 is amended, safeguards around that.

For example, if you were to set up a secret judgments' library properly in s.22 agreements - - -

MR DONALDSON: It might not be called that.

MR PENDER: I accept it is not the most attractive name, we have just taken that from the UK approach.

MR DONALDSON: Yes.

MR PENDER: But you know, properly materials would go in that via s.22 should it also come in from other parts of the Act, so again I accept that the scope of your inquiry is properly narrow given ongoing proceedings.

MR DONALDSON: Yes.

MR PENDER: But I just think consideration laterally in the Act is important.

MR DONALDSON: Well, one matter that is proving difficult, I must say, for me, is how to deal with the issues that are really specific to s.22, as opposed to issues that have a much broader consequence in other parts of the Act. I think that there are some things that we could so about s.22. But could I just make one observation arising out of what you just said. I have proceeded on the basis that it is – it really is erroneous to view what a judge does under s.22 to as really rubber stamping what the parties have agreed. That should never be the case.

And Justice Bongiorno, again I think it was in one of the *Benbrika* decisions, made it very clear that orders made under s.22 are orders by the court. They are within the control of the court. The court can call them back at any time. The court wishes to deal with any issue that is unforeseen or undesirable. And again, it may be sensible for the Attorney-General to be ensuring that judges are aware of that when orders are sought under s.22.

MR PENDER: I agree. And I'm very much not unsympathetic to the view that a judge has an active role to play. You know, the court may make such orders as it considers appropriate. I think that the issue is, and the way that the Alan Johns matter has arisen, and subsequently become known, is that public confidence in the totality of that role is lacking. And so, if there were additional safeguards, or if it was clearer that this is an active role, and the judge is required to give consideration to open justice, for example, I think that would buttress public confidence in this scheme, which is a departure from a fundamental common law principle.

MR DONALDSON: And it seems to me the greatest confidence that the public can have in courts is reading reasons.

MR PENDER: Yes.

MR DONALDSON: That is, it seems to me, the defining feature of the confidence that the community has in the courts, because the community knows that courts give reasons for their decisions, and they can read those reasons and be persuaded by them or not. And the difficulty here is we don't have reasons.

MR PENDER: As the High Court has recognised on many occasions that reasons are core, and we don't have reasons.

MR DONALDSON: Okay. Well, Kieran, thank you very much for appearing today. And again, I'm very grateful the Human Rights Law Centre has put the effort in to not only have you here today, but the very helpful submission– so, thank you very much. All right. So, what I'm proposing to do now is to break for about 20, 25 minutes. 20, 25 minutes. There are facilities outside for people to have a coffee, and everybody who's here is most welcome to do that. So, thank you again Kieran.

MR PENDER: Thanks.

MR DONALDSON: So, we'll just - - -

MR MOONEY: Yes, we resume at quarter past 11. Yes.

SHORT ADJOURNMENT

SESSION 2: Australian Security Intelligence Organisation

MR DONALDSON: Thank you. Welcome back. We are next going to hear from the Director-General of Security, Mike Burgess, and the security agencies have provided a joint submission. I'm very grateful for the assistance that I've been given in relation to that, and also very grateful that you've come along today to address these matters orally and also to deal with any questions that I might have. So, over to you.

MR BURGESS: Thank you. I have a brief opening statement. So it's great to be here today and thanks for the opportunity to appear. As Director-General of Security I want to explain why transparency is important to ASIO and why it is necessary for us to keep some information secret.. At the outset I want to make two points. First, I'm not a lawyer and I'll leave it to the Attorney-General's Department and other witnesses to speak to the finer details of the *NSI Act*. Second, I will not comment directly on the Alan Johns matter itself.

Transparency is important to me. It's important to ASIO and it's important to national security. This is a point I've consistently made as the Director-General of Security. To deliver our mission as a security service in a democratic society ASIO must have the trust and confidence of the public, our Parliament and our Government. Being as transparent as we can about what we do and why is an essential part of that process. It's something I'm personally committed to. And this extends to criminal proceedings which are the focus of today's inquiry.

ASIO is not a law enforcement agency. Our primary role is to collect intelligence to detect and disrupt threats to our safety and security, but in some cases prosecutions are the end result of years of work by ASIO to identify and investigate spies and terrorists and working with police to bring them to justice. In these cases there is real value in these trials being conducted as openly and transparently as possible. Public prosecutions send the strongest possible message to others who may be thinking about engaging in violent extremism, espionage or foreign interference which we stand to each detect and disrupt.

There are, however, some areas where secrecy is essential to ASIO's work and to the work of our partner intelligence agencies. Protecting information that would reveal our sources, capabilities and methods is an enduring need for ASIO. As I have previously said in my annual threat assessment, ASIO is in a race to innovate between spies and spy catchers and between those intent on inflicting violence on our citizens and those who seek to prevent it.

To secure Australia, protect its people, we need to be able to do things our adversaries think are impossible. Once they know what is possible for us they will change tack and they will find new ways to do the impossible and we will find new ways to do the impossible. This is not a quick or easy process. Many of our technical capabilities take months or years to develop, meaning that our adversaries gain a real advantage if they discover our capabilities. And that's why we don't talk openly about our capabilities and methods and why it's crucial to ensure that they are not revealed in legal proceedings. But it's not just about technology and capabilities, it's also about our people. Our intelligence officers and human sources operate in challenging environments to protect Australia and Australians from threats to their security. We ask our people and our sources to take risks on behalf of the country and we need to give them the confidence that we can protect them. This is a security issue as well as a safety issue.

The need to protect sensitive information is not new. It was something that Justice Hope considered nearly 50 years ago in his first Royal Commission, which the Director-General of National Intelligence quotes in his submission. It is something we're talking about today and I expect future directors-general will be just as focused on this 50 years from now. It does, however, come into sharper focus in the current espionage threat environment. Multiple hostile foreign powers and their proxies continue to target Commonwealth, State and Territory Governments, academia and business for access to classified or privileged information. These efforts are persistent and the threat to Australia cannot be understated.

Although the recent actions of ASIO and our partners have reduced the threat of espionage and foreign interference, it remains at an unacceptably high level. The global nature of espionage and foreign interference means that ASIO relies on information provided to us by our partners, and when our partners provide us this information they are trusting us with information that could reveal their own sources, capabilities and methods and they require that we protect that information. If they lose confidence in our ability to protect their information, those important sources of intelligence will dry up very quickly which will significantly harm our ability to protect Australia.

Foreign intelligence services are seeking to obtain classified or privileged information to gain an advantage at Australia's expense. They do this in multiple ways. Most obviously they seek access to classified or privileged information directly, either where it is released publicly or where it is not properly secured. They also look for seemingly innocuous information that they can piece together to unravel or reveal more sensitive

information, including about our sources, our methods and capabilities. And they look for individuals whom they can exploit, either by recruiting them as sources or because they display poor security practices. All of these are factors that potentially exist in criminal proceedings involving national security information and which the *NSI Act* can assist to protect.

While I am limited what I can say publicly, I can say foreign intelligence services would absolutely have an interest in information provided during criminal procedures that assists them in identifying our people, sources, methods and capabilities. Also our potential vulnerabilities in our systems and indication of a focus of our activities.

Before I conclude I'd like to make three quick points. First, for the reason I've explained, it is important that options continue to be available to protect highly sensitive information in criminal proceedings. Second, those options need to be flexible enough to work in the exceptional cases. My point is simply that in some cases where we investigate spies and violent extremists, exceptional circumstances do come up, and when they happen it's important that the law gives the courts the flexibility to make orders that consider - that they consider to be necessary and appropriate based on all facts and circumstances. Third, in cases where information is kept secret, the legal framework must give the public and the Parliament absolute assurance that ASIO acts ethically and within the law, which we of course do. As I said at the outset, I'm committed to ASIO being more open and transparent in ways we ensure we remain capable of always protecting Australia and Australians from threats to their security and I welcome the scrutiny the courts do apply to claims under the *NSI Act* and I wish for that to continue.

Finally, I'd like to reflect on the reasons why the *NSI Act* was introduced in the first place. At its core, the purpose of the Act is to guard against the risk that serious criminal activity will go unpunished if it becomes a choice between making sensitive information public, such as our sources, methods and capabilities, on the one hand and not proceeding with the prosecution on the other. In my view, we must continue to give the courts the ability to balance those competing interests, including public interest, in open justice in complex and exceptional cases. Happy to take questions.

MR DONALDSON: Thank you very much, Director-General, for those opening remarks. Could I perhaps approach matters that I'm hoping you can help me with in this way. There seemed to me to have been two broad categories of case, if we can call it that way, in which the *NSI Act* has been invoked. The first and perhaps best known and widely used has really been in the prosecution of terrorism offences. And in those cases I don't

think there's been any need for closed court - extensive closed court hearings to be made for the whole of a trial. And when closed court orders have been made in those matters they have been - it's often been when a source or an informer or an intelligence officer is giving evidence. I don't think you were here this morning but people from the Law Council of Australia accepted that there are obvious reasons why that should continue to happen, and I don't think anybody would ever - would contend otherwise that suppression or closed court hearings in certain of those circumstances would necessarily be ordered.

But there's another class of case where issues I think are more problematic, and they are where there's prosecution for secrecy offences. And the complication of prosecutions for secrecy offences is, in a sense, the whole reason for the prosecution is that something has not been kept secret that should have been, and it would be completely contrary to public policy, if one accepts the secrecy of the information, that it became disclosed during the course of a criminal trial. But that can give rise to perhaps the necessity for more or for greater closure of courts or suppression orders, and that I think is a different circumstance to a terrorist trial. Sorry to be so long-winded in this but I'll get to the questions in a moment.

And one thing that has occurred to me is that all governments must have a degree of comfort that in relation to prosecution of secrecy offences they can occur in circumstance where the matters that are sought to be kept secret are not ventilated, one. And two, it would be completely contrary I would have thought or I think to the rule of law that there would be some in government who thought that they were beyond the scope of being prosecuted for breaching secrecy obligations, and so those two combined make it essential that there are facilities in place where these trials can be held in a secure way.

Do you have any concerns that if a mechanism doesn't exist for secrecy-type matters to be dealt with in a, let's just call it a secure manner, that that would have an effect upon the capacity of ASIO to do its job, the capacity of ASIO to recruit; those sorts of matters?

MR BURGESS: Absolutely. I'd be concerned if we did not have a way to protect information that needs to be protected. So on that I totally agree.

MR DONALDSON: And prosecute those who should be prosecuted?

MR BURGESS: Absolutely. As I said, prosecutions do send a strong message both on the side of terrorists or spies, or people who may have

chosen to disclose something, by the very disclosure would actually be breaking the law because, as I've said in my opening remarks, there are good reasons why these things need to be kept secret and there has to be provisions for that to be occurred, otherwise there will be grave damage to this nation's security if that wasn't possible.

Of course, the other thing is, as I've said also, prior to the *NSI Act* there's the balance of, 'Well, we can't run the risk so we won't prosecute'. If the law enforcement angle of the laws weren't applied to protecting classified information, that would weaken the system and the protection of the methods by which we have to protect that. That's critically important. It's the case of my officers and our human sources that actually risk their lives. We need to protect them. And the importance of our partnerships with many countries who would simply not share with us information if we could not protect that information appropriately.

MR DONALDSON: Well the other aspect of that I would have thought is that if you have a circumstance where those whose central responsibility it is to maintain security, let's say an ASIO officer, if an ASIO officer thought, 'Well even if I breach the secrecy obligations I'm not going to be prosecuted for it because the trial can't be held in a secure way', that would seem to me to be a really terrible outcome and completely contrary to the rule of law really, because those who are centrally responsible for maintaining security are really the only ones who could never be prosecuted for breaching it.

MR BURGESS: I agree, that would be an exceptionally bad circumstance.

MR DONALDSON: All right. Now, I know that you are not going to talk about the Alan Johns circumstance and I'm not going to try and chisel away at any of those. But I wouldn't have thought that it – or would you consider it to be a controversial proposition that when orders are made for the closing of a court, that those orders should in the ordinary course be made public?

MR BURGESS: I would accept that, yes. Save for one thing, of course, and this is why the circumstance always depends. But as a matter of principle, I don't think there should be a secret trial. Of course, courts being closed are one thing, to protect whatever might be needed to protect at that moment in time, but the fact that a court is closed and how that is done may well have also be of interest of where the court location would be held. Because foreign intelligence services could use that information to try and unpick by observing stuff around it, but I also agree that's

something that we, or the party involved in that, can takes steps to be aware of. Make sure the right protections are in place.

MR DONALDSON: Sorry, and perhaps even the dates upon which things are going to be happening, or did happen?

MR BURGESS: There'll be cases that I could foresee for ASIO where I could put forward an argument for that date to be removed as well, or not public.

MR DONALDSON: That is that if it was known that a particular – in relation to a particular matter that it was going to be in court on a particular day. It's a criminal matter, so the presumption is that the accused person is going to be in court or could be in court. That of itself could give rise to issues.

MR BURGESS: That's correct. Or witnesses. Now, we're used to having officers actually give evidence in a way that their identities are protected, but it's more the fact that they may well be there at that time and location, and they'll be get – not picked up by the process in court where their identities can be protected, but it's coming to and from court, and how they get into the court room that you would have to give regard to. I would certainly, for ASIO officers. But other agencies may well have a strong case to do that as well.

MR DONALDSON: Yes. And so, in the – again, I'm not going to talk about the Alan Johns matter, but in the Alan Johns matter one of the orders that was made was that any time when he was physically present in the court, the court had to be closed. It would seem to me that there would be technical means available to perhaps be able to have an accused person, or a witness, somewhere else, and their identity or what they say protected in some way. Might not be a Zoom call, there's probably not a secure means, but I would expect that there are other sort of secure means that might be valid.

MR BURGESS: I would absolutely agree with you on that.

MR DONALDSON: All right. Well, I'm very grateful for you coming here today, and for the submissions that you've made. And I think you've made it very clear that you're not a lawyer, and the intricacies of the *NSI Act* are going to be dealt with by the Attorney-General's Department in due course in any event. But I found your explanation of those background matters very helpful and informative, so thank you very much for that.

MR BURGESS: Thank you.

SESSION 2: Office of National Intelligence

MR DONALDSON: All right. Thank you. Who have we got? Yes, Kathryn. Welcome. So, the next person we're going to hear from today is Kathryn McMullan. Kathryn is the First Assistant Director- General for intelligence coordination, integration, and engagement at the Office of National Intelligence. That's a fair mouthful. But I'm very grateful that you've been able to attend this morning, and I've been greatly assisted in the course of this review by the written material that's been provided and coordinated by ONI, so I'm grateful for ONI performing that helpful role for me. And I think it was very helpful and valuable to have, as it were, a coordinated view of the intelligence services in relation to those matters. So, thanks very much. Thanks very much for that. Were you wanting to make some initial observations?

MS MCMULLAN: Yes, I will. Thank you. And, first of all, I'd like to pass on the apologies of our Director-General. He's overseas, and so I am a second fiddle on his behalf. But thank you for the opportunity to address the hearing today. As you noted, ONI's written submission represents the views of ASIO, ASD, ASIS, AGO, and DIO, and we've really tried to focus on the importance of intelligence and the public interest in protecting intelligence information. I would note that a couple of my comments do cover the same ground as the Director-General of Security, so apologies for that. And I'll also reinforce the Director-General's statement that we obviously can't comment on the specific Alan Johns matter as well.

MR DONALDSON: No.

MS MCMULLAN: But to my opening remarks. Intelligence is important for a number of reasons. The Justice Hope's 1977 comments in his public report from the Royal Commission on Intelligence and Security do remain as relevant today as they were then. Intelligence does continue to go to the heart of protecting Australia's security and its citizens, and is vitally important to supporting the ADF and developing defence capabilities. Many of Australia's agencies, including ASD, AGO, and ASIS have a long history of supporting military operations. ASD provides critical support to the nation's war fighters, including providing intelligence on threats to Australian personnel, and tracking the location of military adversaries to enable ADF and coalition partners to conduct highly targeted operations.

Intelligence can also be an active tool for disrupting plans for those seeking to do harm to Australia and Australians, including in areas such as cybersecurity and terrorism. Intelligence is also invaluable to Australia's law enforcement agencies, who are now part of the broader national intelligence community. Intelligence plays a vital role in enabling key decisions to be made. It assists governments in many ways. For example, it can provide early warning of planned terrorist attacks, information on insurgent networks, any more broadly the intentions of potential foreign adversaries. Intelligence also improves the quality of strategic decision making, assisting government in the prosecution of Australia's foreign and trade interests, helping to enhance regional stability, and to avoid strategic miscalculation.

Whether intelligence delivers strategic insight, early warning, or provides validation of information gleaned elsewhere, it all contributes towards providing decision makers and government with a competitive advantage. So, it is important to protect that information wherever possible. As the Director-General said, 'Australia's intelligence agencies are transparent about the broad nature of their work'. But to be effective, Australia's intelligence agencies need to operate securely.

Generally, this requires the agencies to operate with high levels of secrecy about their capabilities, methodologies, operations, and personnel. This is particularly the case where the information would be of interest to a determined foreign intelligence service. In many cases, the likely damage resulting from disclosure or publication of intelligence information is serious, or exceptionally grave damage to Australia's national interest.

This harm can occur even when the information may appear innocuous, or historical. So, the need to maintain secrecy about Australia's intelligence agencies is recognised in a number of pieces of legislation, including the *ISA*, the *ASIO Act*, and the *ONI Act* itself. For some agencies, the collection of intelligence depends upon people who put their lives and liberties at considerable risk. But personal risk to intelligence personnel and human sources has increased in recent years and will continue to do so as some countries that Australia's foreign intelligence agencies focus on become less stable.

For example, disclosing information revealing the identity of a source embedded in a terrorist group could have serious implications, including threat to life. Australia's intelligence agencies maintain a sophisticated set of national security capabilities and methodologies to enable them to carry out their mandates. Developing and maintaining such capabilities requires significant investments by the agencies of any government.

Disclosing or publishing national security capabilities and methodologies could allow adversaries to render these capabilities obsolete, cause critical vulnerabilities in Australia's security responses, and undermine the effectiveness of those agencies' operations. Operations undertaken by Australia's intelligence agencies are also vital to protecting Australia and its citizens, and so the disclosure or publication of these operations should reveal to adversaries the focus of Australia's intelligence efforts. It could also enable adversaries to detect, defeat, or impeded activities, making them less effective or obsolete. But we don't do this work in isolation. Australia's national security depends on a network of international intelligence partnerships that extend well beyond our traditional allies; the U.S, the U.K, Canada and New Zealand, and it includes partners in North and South Asia, ASEAN, Europe and the Middle East.

The unauthorised disclosure or publication of foreign partner information could have serious ramifications, including putting at risk Australia's relationship with those partners and countries.

To put it bluntly, partners who do not trust Australia's intelligence agencies to keep their intelligence information secret won't share it. Australia's national security also depends on highly classified and sensitive assessments and reports produced by the intelligence assessment agencies like ONI and DIO. These assessments provide highly sensitive insights into what the Australian intelligence community knows or does not know about national security issues at a specific point in time.

If made public, it could allow adversaries to make accurate inferences about highly sensitive sources of intelligence or disclose foreign partner information, putting at risk these relationships. Finally, Australia's intelligence agencies often conduct their operations from undisclosed facilities or locations. The publication of information about such locations could be used by adversaries to monitor, attack or disrupt intelligence agencies, capabilities or operations. So, ultimately, decisions about the public disclosure of intelligence information require complex and careful considerations about the possible harm that could occur from any disclosures on a case-by-case basis.

For these reasons, where intelligence information becomes part of criminal proceedings, there must be appropriate mechanisms and processes such as currently exists in the *NSI Act* to ensure that any intelligence information disclosed to parties and the Court is appropriately protected. Thank you for allowing me to make an opening statement and I welcome questions.

MR DONALDSON: Thank you very much for that. One of the things that you referred to there is - are provisions of the *ASIO Act* and *Intelligence Services Act* that relate to certain matters. Some of those provisions actually create offences of identifying or giving rise to the identification of an ASIO employee or employees of other - of other of the security agencies.

MS MCMULLAN: Yes.

MR DONALDSON: And that obviously has a consequence to when proceedings are brought against certain individuals, I take it.

MS MCMULLAN: Yes.

MR DONALDSON: All right. One other thing that you touched on their, which I would be grateful for some expansion on if you could is the sensitivity of some things that might seem on the face of them to be relatively benign, and so - and I know you're not going to talk - I don't want you to talk about the details of the Alan Johns matter but could you perhaps explain how it is that the fact that a particular person is in a - a court building at a particular time may give rise to a vulnerability? I think that was an example that you used.

MS MCMULLAN: Yes.

MR DONALDSON: Could you perhaps explain that in a little more detail to me?

MS MCMULLAN: Yes, absolutely. I mean, the participation by personnel who are members of intelligence agencies in criminal proceedings means that it provides opportunities for determined adversaries to identify them, it provides opportunities for them to undertake, potentially, collection activities around that. We live in a very interconnected world and the ability to identify, link, gather information about individuals not only exposes them as an individual but potentially their broader network of colleagues, professional colleagues, or indeed their own, sort of, family network as well. So, that protection ultimately is about protecting that individual and what they do, but also ensuring that they're not being exposed to opportunities where they could be targeted.

MR DONALDSON: And to use an example I suppose if an ASIO agent - an ASIO employee was to be giving evidence in a - in a matter and even though orders were made that that evidence be heard in a closed hearing or something of that kind, the fact that that particular employee was giving

evidence on a particular day, I suppose, could theoretically persist a - what did you say, a committed adversary.

MS MCMULLAN: A determined adversary.

MR DONALDSON: A determined adversary.

MS MCMULLAN: Yes. Absolutely, it's a collection opportunity for them.

MR DONALDSON: Yes. And I suppose if an accused in a criminal matter is actually a senior Commonwealth employee, that fact of itself might be relevant also, I suppose.

MS MCMULLAN: Yes, indeed. And depending on the nature of that accused's previous employment history and previous involvement in some of the things I touched on around operations or methodologies or locations of facilities, I mean, that's information and knowledge that potentially becomes accessible.

MR DONALDSON: Could I ask you what might appear a rather mundane question?

MS MCMULLAN: Sure.

MR DONALDSON: But here you are. One of the issues that's - that has been suggested to me is that in trials that involve national security information where reasons are - where reasons are published or is it not - where reasons are suppressed at least to a degree, that there should be a repository of those unsuppressed judgments or expressions of reasons and over time they are reviewed to determine whether the need for the suppression still exists. So, as often happens in many matters of different types, a judge prepares a set of reasons which explains the full reasons for a particular decision, if there is a reason for part of those reasons to not be published, a process is followed whereby certain things are suppressed or a summary is prepared and that is publicly made available. So, there's an open and a closed set of reasons, as it were.

MS MCMULLAN: Yes.

MR DONALDSON: So, one thing that has been put is that there should a repository of closed reasons and they should be reviewed from time to time to determine whether the reason why there was a redaction or an amendment to the reasons is reviewed. Do you see the benefit in that, and

if you see the benefit in it, are there any other factors other than 'that sounds like a good idea' that I should have in mind?

MS MCMULLAN: Look, I think - I mean, there's two factors. One is about ensuring the security around the said repository, which would attach its own, sort of, security protections around it from an ICT access and information and all of those sorts of things.

MR DONALDSON: Yes.

MS MCMULLAN: The second which I think you get into more is that concept of a periodic review. And look, I think there is merit, of course, in providing courts flexibility if it - giving court that flexibility to decide if a periodic review is appropriate, it will be on a case-by-case basis. Often the reasons it's being redacted will be because it's relating to individuals or human sources and so actually those issues and the reasons for keeping that information more tightly held will remain for the life of those individuals. So, the period of review might actually be of such a length that it becomes, kind of, you know, less effective. But giving the flexibility to consider that as an option - - -

MR DONALDSON: I'm thinking of something slightly different, and that is whether the Attorney-General or whatever branch it is of the Commonwealth has a positive obligation to review that over time. Now, is that - and I'm really asking whether there is an administrative burden involved in that that you consider would be difficult to hand?

MS MCMULLAN: I mean, I'd defer to Attorney-General's Department to make a sort of judgment on it but on a straight 'is there an administrative burden involved in it', yes there is. I mean, there's lots of administrative burden involved in the work of intelligence agencies, which is fair and appropriate to the nature of their work. I think, again, there - it would be around maintaining that information and all of the protections that must go around that repository, the vetting of individuals who have access to it, how it's shared and managed, et cetera, going forward.

MR DONALDSON: I don't think anybody would envisage that that repository would not be held in the - in an extremely secure way.

MS MCMULLAN: Yes. Yes.

MR DONALDSON: One thing that arises out of that that it may assist if I could ask you a question or two about, I think the Cold War told us that there are many secret sources of intelligence services that can stay in place for a very long time; Gordievsky was a source for 25 years.

MS MCMULLAN: Yes.

MR DONALDSON: And so, from what you've said, it is conceivable that if the basis for non-publication of certain information was that it may give rise to the identification of a - a foreign source, then there may well be circumstances in which publication of that might not happen even with the best will in the world for a very long period of time.

MS MCMULLAN: Indeed.

MR DONALDSON: Is that right?

MS MCMULLAN: That's right.

MR DONALDSON: Yes, I suppose though let's think of it in terms of 25 years say, just using my example, if it's to be reviewed annually for 25 years and in 25 years' time nobody who was ever involved in it really necessarily knows what was going on and I suppose that might of itself give rise to issues as to the utility of some review process.

MS MCMULLAN: Indeed.

MR DONALDSON: Maybe not utility but the means by which it can best be done.

MS MCMULLAN: Yes, and I think you'd want to consider what factors might lead to the need for a review rather than - - -

MR DONALDSON: They automatically happen every particular period of time because let's say if there was a requirement for an annual review of every order made under the *NSI Act* for the whether the order remains that would be a fair burden, I suppose. Closed court hearings, probably less so but there would still be an administrative burden imposed if it was required to be done at a regular period, annually for instance.

MS MCMULLAN: Indeed.

MR DONALDSON: So I'd be right in proceeding on that understanding that there would be administrative issues involved in that?

MS MCMULLAN: I think so. I mean, Attorney-General's can speak to that further but I would say yes.

MR DONALDSON: All right. Well, that's been very helpful. Thank you and I think as you made clear there are, if you like, legal aspects of the operation of the NSI provisions that are perhaps best addressed by the Attorney-General's Department and we're going to be hearing from them later on today but I'm very grateful that you've come along, very grateful to your Office that have prepared the submission that it did, it's been very helpful.

MS MCMULLAN: Great, thank you very much.

MR DONALDSON: So thanks very much. Thank you. Are you ready to go Anthony?

MR WHEALY: Yes.

SESSION 2: The Hon Anthony Whealy QC

MR DONALDSON: Okay. Just come straight up thanks. Can we organise a glass of water for Anthony? Just bear with me for one second Anthony. Thank you. So the next person that we're going to hear from is the Honourable Anthony Whealy QC. Anthony was a long-term judge of the New South Wales Supreme Court and I think it would be fair to say has had perhaps a more extensive experience with NSI matters than any other judge who served in Australia and certainly was involved in the early matters where the *NSI Act* was invoked and he delivered many judgments that are referred to regularly in relation to how very parts of the *NSI Act* operate. He's made himself available really to me in the nature of an expert witness to provide insights from his experience and other matters that will assist me in this review, so I really am very, very grateful that you have made your time available to me. So Anthony did you want to say anything by way of opening remarks?

MR WHEALY: Just briefly if I may?

MR DONALDSON: Please do.

MR WHEALY: And it really derives from my experience when I was a judge and involved in these issues. I've tried to keep up to date with matters about the *NSI Act* and I'm reasonably familiar with the trials in NSW that have taken place since I retired. What I want to say really is that the inherent jurisdiction of the court is a fundamental matter and, indeed, may I say Mr Donaldson, that all the things that I'll be talking

about today really in one way either directly or indirectly focus on judges and their duties.

MR DONALDSON: Yes.

MR WHEALY: And their obligations and so on.

MR DONALDSON: That would be very helpful.

MR WHEALY: So the concept of the inherent jurisdiction of a court in a criminal trial focuses on a number of matters and this has been the subject of academic discussion. I don't pretend this is exhaustive but first of all, the primary one is to ensure a fair trial for a person accused of an offence, secondly to protect the principles of open justice, thirdly to prevent any abuse of process in the proceedings and fourthly to protect the criminal process itself, that's a protection that Professor Walker spoke about in his treatise on this matter and that as an Englishman, alas he comes from the north of England so I'm not so sure he'd describe himself as an Englishman but he points out that it's a concept that goes back to medieval times that the need to protect the criminal process itself.

So those matters are to some degree recognised in s.3 of the *NSI Act*. Mr Donaldson as you referred to this morning reminding me that it's not just the protection of, or prevention of disclosure of information that might be likely to prejudice national security but there's another concept in that section, that is the need to prevent those steps seriously interfering with the administration of justice. And I think that's often overlooked and in a review a little bit more recently Justice Hope's review, the Richardson Review that author said that the agencies and he included the Attorney-General's Department don't – they don't always appreciate that that balance needs to be struck and listening to Mr Burgess this morning, in particular, I'd think we'd all accept that there's information that has to be protected in court proceedings, there's no doubt about that at all and it's very important that it be protected at the highest possible level. However, there does need to be struck a balance and in looking at the *NSI Act* I think that as judges we have to bear in mind constantly that that's what we have to do. We have to strike that balance between those two concepts and they're often in conflict with one another.

Now, against the background of that basic proposition I would say that the lesson we learn from the Alan Johns case is we note the absence of any submissions that have been made in relation to the s.22 orders that were made at various stages of the proceedings. We note the absence of published reasons and we're in the dark really as to what all the information was, at least we as members of the public are in the dark and

so are therefore concerned at the extraordinary outcome that there's an entirely secret trial held, something we associate with totalitarian countries and countries where there's a complete absence of the rule of law. But when we get to know about it a bit more we realise it's perhaps – although it's a stark observation to make and that it seems extraordinary that that would occur we can see that by looking at your website that there's plenty of information that's now in the public arena that could have been in the public arena much earlier and therefore it leads us to question the proportionality of the situation that arose.

The final thing I wanted to say in opening is there's a clear danger in the case of the agreement procedures under s.22 that the courts will unhesitatingly act on the parties' agreement without adequate scrutiny or without reflection perhaps or without consideration of unintended consequences. So I'd have to say that in my experience s.22 agreements are alluringly attractive. The first trial I was involved in, as Mr Boulten knows was a (indistinct) trial and the *NSI Act* almost took over the proceedings in terms of preliminary judgments and the like and therefore when I came years later to do a much longer trial, the *Pendennis* trial I was absolutely startled to see that the *NSI Act* was hardly - scarcely mentioned because the parties had agreed on all the protective measures to be imposed. I was waiting for the arguments but they never emerged. However, I didn't see any real problem with the orders that were agreed to between the parties, but I think that - I am told by judges who now sit on these cases that public interest immunity arguments still occur quite frequently but NSI arguments under s.22 don't arise at all.

So, I think the lesson to be learnt from that is, it's rather dangerous because we come to accept that when parties come before us as judges, and they've said that there's a consent order to be made, we simply make it and we don't think about it carefully enough, and I think that's, with all due respect to the judge and magistrate in the Alan Johns case, that's probably the situation that arose.

MR DONALDSON: What can be done about that though in a sense, because it's a bit hard to have legislation to the effect that judges can't make alluringly attractive orders or something along those lines?

MR WHEALY: No, and I mean - - -

MR DONALDSON: We really do rely, do we not, on the judges to - - -

MR WHEALY: We do. I think the judges need more assistance. That's the first thing I would say.

MR DONALDSON: Yes.

MR WHEALY: Now that assistance could take three - there could be three ways, I think. First of all, I think there needs to be better education of judges and better counselling of judges. We have this in the United Kingdom system where they've got a more specialised court dealing with terrorism cases for example. Of course today we're not interested in terrorism cases only but the idea of national security information, there are clearly judges in Australia who are specialists in that in the sense that they've done work on it, and I can't see any reason why their experience can't be channelled into the various jurisdictions around Australia in some way or other to provide some sort of counselling, education processes for judges and I think it could certainly extend to understanding the principles of open justice as they apply in a case like this.

It would certainly apply particularly in relation to any matter that arises under the *NSI Act* and it could certainly apply to matters where a s.22 order is about to be made and what judges need to do and what they need to consider. So that I would put under the heading of education and counselling. Everybody might have a different idea of what form that should take and it would no doubt, you know, require the cooperation of Chief Justices around the country, but I'm sure they'd embrace it willingly because it is for the benefit of the administration of justice. And I think, again I don't want to disrespectfully dip my toe into the water of national security but since we're talking about transparency, I think it also wouldn't hurt if judges were given a bit of a crash course, having regard to existing cases, on what a real risk to national security means.

In other words, to be able to be sensitive to and alive to picking up perhaps an overstatement, as can sometimes happen, by the security agencies when they want to protect it. Mr Boulten won't mind me reminding him that in the *Lodhi* trial, which was a long while ago, the security agencies wanted to suppress the idea that telephones could be tapped because they didn't want that particular capability to be revealed to the public - Mr Boulten, rather.

MR DONALDSON: Well it was a long while ago but not that long ago.

MR WHEALY: No, not that long ago. It was certainly after Alexander Bell, but Mr Boulten didn't take long to persuade me that that was a foolish idea. There were some other capabilities though that perhaps did require protection, but not that one. But security agencies sometimes don't see the difference.

MR DONALDSON: Yes.

MR WHEALY: And that's all I'm saying, that judges need to be aware that they are entitled, even though they respect the evidence that's put before them, just to dig a little deeper into it because it may be that it's not necessary to go as far as the agencies want to go. So that's under the heading of education.

MR DONALDSON: Yes.

MR WHEALY: The second thing is, if we come to s.22 now.

MR DONALDSON: Yes.

MR WHEALY: And if we just think practically about the situation where the parties come into court and they say, 'Here are some orders we want you to make'. Now I think the first difficulty is - well, it's not so much a difficulty but the first matter that will occur to a judge is to look at those orders and say how extreme are they, and they may be not extreme at all, they may be just what you'd expect.

MR DONALDSON: Yes.

MR WHEALY: Pseudonyms for people who are going to give evidence, the idea of witnesses giving evidence from remote locations, even screen some witnesses from the view of the accused person. There may be a - - -

MR DONALDSON: What happens in sexual offences trials quite often. So it's quite - - -

MR WHEALY: Exactly. So all those things I don't think that - the hackles wouldn't rise about that point. And the difficulty with what we've been discussing this morning is to know when the hackles do rise and when they generally rise, how we pick the case. That's difficult to answer, very difficult, but I think we could say, looking at the orders that were made here and the Alan Johns case, that was definitely a case where I think, properly instructed, a judge might say, 'This is going much too far on the face of it. I need to explore it further', and so my suggestion there is we probably need to have ways in which to assist the judge.

So, there could be, it seems to me, two areas of direct assistance. One is to have protocols or guidelines that could be again formulated generally to suggest matters that might require special attention, and I think the entire suppression of a trial and the core evidence in a trial would obviously be one of them. So, I'm not talking about legislation.

MR DONALDSON: No.

MR WHEALY: I mean legislation is a possibility but how you legislate is the problem. I mean I think in the ideal world, of course we would legislate to have that protection but just how you could do that I'm not sure. I don't rule it out but I just wonder about the practicality of achieving it.

MR DONALDSON: Could I make another observation, without interrupting you too much, but the other issue that occurs to me, that very often with these matters of course, particularly when they involve secrecy matters, things will happen very, very quickly at the start.

MR WHEALY: Yes.

MR DONALDSON: And so if a judge comes in cold, with no experience with these matters, it might in a sense be overwhelming. Here's the Commonwealth Attorney turning up with the consent of the parties. 'This is what normally happens, your Honour.'

MR WHEALY: I've been on the Bench two minutes.

MR DONALDSON: 'This is what normally happens, your Honour', so off - - -

MR WHEALY: It's what did happen.

MR DONALDSON: Off you go. And I think the other thing to bear in mind is, certainly in New South Wales and Victoria now, there is a very solid core of experience with judges who have done - been involved in these matters for a long time. But Commonwealth offences of course are brought in the court of the, effectively the residence of the accused.
MR WHEALY: Yes.

MR DONALDSON: And so with secrecy matters that is very often going to be the ACT, one would expect, and here is an example.

MR WHEALY: Yes, I see.

MR DONALDSON: So the experiences that are available to the Supreme Courts of New South Wales and Victoria - - -

MR WHEALY: May be less.

MR DONALDSON: It would be good if the courts amongst themselves could perhaps arrange for some education or assistance to judges.

MR WHEALY: Yes. I'm thinking of written guidelines or protocols, it's whether - this is differently from my first suggestion which was more in the nature of seminars and direct face to face contact.

MR DONALDSON: Yes.

MR WHEALY: But this is protocols and guidelines. Now, that leads me then to the third way in which I think judges could get assistance, and that is from a special advocate in an appropriate case. Now, again we have the problem of definition; what is an appropriate case.

MR DONALDSON: Yes.

MR WHEALY: Well, it's a bit like pornography isn't it, as they say; we don't know how to define it but we know it when we see it. Even that's becoming a problematic proposition these days. But I do think we would know an extreme case when we see it. We ought to anyway. And with counselling and guidance and protocols it's more likely judges will know it, and then if they could ask for assistance of a special advocate in that situation.

I combine that suggestion with the next point and that is the role of the Attorney-General. In my opinion, the Attorney-General is the First Law Officer of the land and surely in that role he ought: (a), to recognise the inherent jurisdiction of the court and, (b), the need to respect the principles of open justice. So what I'm suggesting is that the Attorney-General needs a little bit of education too in one - if I may put that in a not disrespectful way, and that is just to be reminded that, rather than just simply embracing the ideas that come out of the security agencies, he too ought to recognise the unusual feature of what the agencies are suggesting in the way of protective orders, and he ought to take a kind of middle stance of saying 'Well, some submissions should be made to the judge by me, as the Attorney-General' and indeed, I think the judge would have the assistance of a special advocate.

MR DONALDSON: I think it is critical to observe that. As you know, this particular provision in the *NSI Act* was amended in 2010 to in fact insert the Attorney-General into the process.

MR WHEALY: Yes.

MR DONALDSON: Prior to that it simply the Commonwealth DPP and the defendant.

MR WHEALY: Yes.

MR DONALDSON: And no doubt the reason for the insertion of the Attorney-General, who really takes the running of these matters under s.22, was firstly, to have the commonwealth officer who was more acutely aware of national security information that the Commonwealth DPP, but secondly because the Attorney-General is the First Law Officer of the Crown.

MR WHEALY: Yes.

MR DONALDSON: And has broader responsibilities and should have broader perspectives than simply rubber stamping a request from intelligence agencies.

MR WHEALY: Yes. As I say, I think he could take a middle ground without embracing the position of the accused in a criminal trial. He could never see it as a role of assisting the court which I would have thought would be a welcome thing. Well, I think in the early *Lodhi* trial, Mr Boulten might remember, I think senior counsel was briefed on behalf of the Commonwealth, but not on behalf of the DPP I don't think. The Commonwealth sought to intervene perhaps. Anyway - - -

MR DONALDSON: So it's now required. It is now required to be, yes.

MR WHEALY: So those are the matters that I would put forward just initially that is – the difficulty of recognising what is a special case - - -

MR DONALDSON: Yes.

MR WHEALY: - - - and distinguishing it from a garden variety case could be addressed by education, protocols and guidelines, by a more vigilant role by the Attorney-General, and by submissions, some sort of requirement. I don't know whether it would have to be legislative or not, probably not, a suggestion that the Attorney-General in the appropriate case see it as necessary to make submissions to the judge, and consequently that the judge would be – I come to the next point, which is even more difficult – one would expect the judge would give reasons for the orders he made.

He may agree or disagree with what is being put up, let's say he agrees, well then the reasons will establish why. If he disagrees and wants an

amendment, just wants some amendments or changes, one would think he might be able to massage the parties to accept that. What if they don't becomes the issue? Let's assume a situation where an advocate has come in to help the judge and has suggested those matters. So is it desirable to move into the realm of s32 or not? That's a difficult question and again because it's a rather messy sort of legislative mass there, isn't it? I mean, would the Crown – I'm sorry, would the special advocate have any right of appeal? You would think not. It would seem to be an odd idea.

MR DONALDSON: And would they necessarily be adding more to what an experienced - - -

MR WHEALY: No.

MR DONALDSON: - - - well informed judge - - -

MR WHEALY: No, the judge has had the benefit of the assistance, so the judge makes the orders, but of course, the Attorney-General could appeal that decision but at least then it would go to a superior court, in other words, processes would be, one would hope, more open because reasons would be published by the appellate court and whatever the result, the process would be much improved than it was here in this case.

MR DONALDSON: Yes.

MR WHEALY: So I think the problem about pushing it into a s32 statutory framework does have difficulties but I acknowledge it could be done, but the difficulties might out-weigh the benefits. In one sense we don't want to encourage endless appeals.

MR DONALDSON: Yes.

MR WHEALY: At the same time we do want first instant judges to have all the assistance they can get.

MR DONALDSON: Yes.

MR WHEALY: In coming to a conclusion. So I guess that's basically what I feel about that.

MR DONALDSON: It is a bit more than basic if you don't mind me saying, it has been very helpful.

MR WHEALY: All right. Other things you might like to consider. I hope Mr Boulten doesn't mind me saying that I do think the court should

recognise its own power to disagree with the arrangements that are being suggested. I realise that there's an appeal point there that could be argued, but the section doesn't – it talks about whether the arrangements are appropriate. That's not the orders that are sought, it's the arrangements. The arrangements proceed the orders.

MR DONALDSON: Yes.

MR WHEALY: So I can't see why a judge can't say, 'Well, when I fashioned my orders they're going to reflect the arrangements in the way that I think protects national security, but at least doesn't interfere with the administration of justice'.

MR DONALDSON: I don't believe the section is precluding that.

MR WHEALY: No. Well, who knows?

MR DONALDSON: But if there's any – if well-intention people think there's an issue with that, then it should be clarified.

MR WHEALY: Yes. I agree.

MR DONALDSON: That is, and I think again, Justice Bongiorno has made this very clear in a number of judgments.

MR WHEALY: Yes.

MR DONALDSON: The orders and the processes provided for in the orders are in control of the court.

MR WHEALY: Well, the whole idea that there's an appeal right on the Attorney-General seems to me to make it clear, even though s.22's not specific there – no, I'm sorry, it is, s.22 is specifically there, so there's a right of appeal it presupposes that orders will be made if the Attorney-General is not happy. So I think that that's - - -

MR DONALDSON: Yes.

MR WHEALY: Any other matters that I can help with?

MR DONALDSON: Can I ask a couple of questions of you?

MR WHEALY: Sure.

MR DONALDSON: So one of the matters that's come through in what you've said today and also in other submissions that I've heard is how important it is that the Attorney-General when making submissions to the court seeking closed hearing orders, can I just pause there.

MR WHEALY: Yes.

MR DONALDSON: I think things like what's the combination to the safe in the judge's office.

MR WHEALY: No.

MR DONALDSON: They're relatively uncontroversial most of those things. We're really talking about closed court hearings and maybe suppression orders. But when those sorts of orders are sought, there should be a requirement on the Attorney-General to bring certain matters of principle clearly to the attention of the court, and I think that you would accept that that would be an appropriate course to be followed.

MR WHEALY: I do.

MR DONALDSON: That doesn't seem to me to be something that is required to be in the Act itself. It could be either in regulations or in their various Commonwealth instruments that impose obligations upon legal representatives and advisors of the Commonwealth in different circumstances. So it might be able to be done there. But it seems to me that that would be an important thing that a judge would always be assisted by that at least.

MR WHEALY: And I think there's two aspects of it. One is whether to make the order to close the court, and two, whether there's any possibility of, you know, making supplementary orders that enable some parts of the closed hearing to be made public, even during the hearing.

MR DONALDSON: Yes.

MR WHEALY: It may not be appropriate or it might be. As Mr Boulten mentioned during the *Lodhi* trial, we did, in fashioning the orders to close the court, make allowance for the publication of a transcript of what had occurred provided that the transcript was available promptly and the parties had an opportunity to consider and make submissions about redacting it.

It may have required the redaction of the whole lot of the material or it may have simply required the elimination of the name of the agency that

was involved or the name of a person who was involved or the date on which something had happened or the like.

MR DONALDSON: Yes.

MR WHEALY: That, I think, went a long way in my mind towards keeping the principles of open justice operating. Now, whether it could happen in a matter such as Alan Johns, I don't know. Obviously the secret information that had been disclosed, should remain secret.

MR DONALDSON: Yes.

MR WHEALY: But there may have been aspects of the – one thing that occurred to me as we talked this morning was, we're talking about a plea of guilty here.

MR DONALDSON: Yes.

MR WHEALY: And therefore the hearing would be probably quite short and the evidence would be reasonably confined. What if it were a plea of not guilty and a jury? How would that play out against these orders that were made?

MR DONALDSON: Well, I think it has occurred to everybody who's had to think about the operation of s.22 in secrecy matters where there would be a trial, because of course it's a trial of a common law offence which would mean - - -

MR WHEALY: Jury.

MR DONALDSON: It has to be a jury trial.

MR WHEALY: So, what do we do? Suppress the jurors? Suppress them? Don't let them go home. Don't let them tell anyone about – that they're a juror? I mean, it's just – but, look, I merely raise that just to contrast how serious a problem it can - - -

MR DONALDSON: No, it's a matter to which I'm very alive. The other issue that arose in the Alan Johns matter as a result of s.22 was that, although this wasn't the subject of an order, but the orders themselves giving rise to the closed court orders, and the other orders, were never published. Now of course if they had been publicly available, people would have at least known that there was going to be a trial or a prosecution before the courts in which at least large parts of the matter were going to be heard in the closed hearing.

MR WHEALY: That'd be a good start, wouldn't it?

MR DONALDSON: Well, I think at least if people know there is a secret trial going on, that's better than not knowing.

MR WHEALY: I think the problem here also began with the fact that the court proceeding itself is not only closed, but no one knew it was happening. It's all very well to say what's happening in the court room, when we didn't even know there was a courtroom. So that raises a sort of preliminary question. And we also didn't know the end result, that's what makes it so striking, doesn't it?

MR DONALDSON: Well, it's interesting. I know you were sitting here when we heard the evidence on behalf of ONI, but sometimes you would expect logically the physical identity of a person on a particular day may be itself very sensitive information.

MR WHEALY: I can understand that.

MR DONALDSON: So, these are very complicated matters.

MR WHEALY: But you can immediately fashion an order that might cover that sort of situation.

MR DONALDSON: I would've thought technological means might be available to deal with those things in the circumstances in which they arise. And then of course another unusual aspect of this matter is there's been no published for the making of those orders. And that customarily happens, I must say. You delivered extensive reasons in relation to why various closed court hearing orders were made again, just as Justice Bongiorno did in *Benbrika*, Justice Refshauge did in the *Scerba* matter.

MR WHEALY: But I didn't during the *Pendennis* trial, when the s.22 orders were made. Looking back on that,that may have been a failure on my part. Almost certainly was. But again, I was seduced into thinking, well the parties are making the order. If they want me to make it by consent, they're happy with it, why should I interfere?

MR DONALDSON: And it may be then that the obligation that will be on the Attorney-General's legal advisors to address the court, specifically into these - - -

MR WHEALY: Even if briefly, yes.

MR DONALDSON: Could also say, and of course it's important for your Honour to give reasons in relation to this matter.

MR WHEALY: Yes, I think so. Yes, I think so.

MR DONALDSON: Particularly when, as you've referred, there is an allure to making these orders because of the consent of the parties.

MR WHEALY: And then there's issues about whether those reasons should be made public, or to what extent. And of course, I think once a judge is alerted to the seriousness of the possibility of risks to national security, it's easy enough to give an open judgment that's quite brief, but indicates that an order's been made, and perhaps the terms of the order as we've said. And then a closed judgment that more precisely, but confidentially, explains the reasons for it.

MR DONALDSON: Well, the other matter that often arises in these matters is, and again I'm sure your experience is consistent with that, but the evidentiary basis for the making of the orders is a hand-up affidavit.

MR WHEALY: Yes.

MR DONALDSON: Which is then handed back because of the sensitivity of the information in it.

MR WHEALY: And a confidential judgment can reflect a little more detail on that.

MR DONALDSON: But maybe even a public judgment could be – I had been provided with an affidavit, it has satisfied me that there are valid reasons why - - -

MR WHEALY: It can be the briefest possible judgment. Yes.

MR DONALDSON: A judgment in that form. At least everybody is – and that's not a particularly uncommon form of judgment I've got to say. A judgment in that form tells the public that, well, if these orders are being made because they know what the orders are, a judge has looked at the evidence which is put up as justifying those orders, and the judge is satisfied that that evidence supports the making of the orders that are sought. That's a fair bit of information.

MR WHEALY: My recollection of *Lodhi* was that there were two judgments in relation to particular material. One was of that fashion,that you've indicated. Short, and didn't give much away, except expressing

satisfaction with the sections that had been enabled – the confidential orders to be made. And then a more detailed one that actually mentioned the evidence, which was published secretly. But as I recall both those judgments were then the subject of an appeal to the Court of Criminal Appeals. So, The Court of Criminal Appeals had the opportunity of scrutinizing, not just the formal judgment, but also the confidential one, and then made a ruling on it itself annexing a confidential aspect to its reasons. So, that worked all right, I think.

MR DONALDSON: And that's not an uncommon process, that in many contexts judges provide concluded reasons, would then invite the parties to make submissions as to why certain matters might be not publicly disclosed in the reasons. So, intellectual property cases, many commercial matters, those sorts of orders.

MR WHEALY: Yes, I agree.

MR DONALDSON: Can I ask you something about this, and I think you referred to the definitional issue that may arise with providing for basic minimum standards of what has to be made publicly available. In a sense, there's not only a definitional issue in that, but it proceeds on an understanding that the court should not have discretion to make orders in certain circumstances. Now, would it be your view, and I don't want to put you on the spot – but it would be your view that if the court had access to an independent counsel, if a court wished to be assisted in that way, and was addressed by an independent counsel in relation to closed court orders that were sought, but that would be sufficient to deal with the openness of matters that should be open? Rather than prescribing minimum standards that must be met, or that a judge has no discretion over?

MR WHEALY: Well, I think you have put me on the spot. But I'm happy to be there. Look, I think we all, as lawyers, think that there are matters that ought to always be in the public domain. But that said, we can't always envisage situations where some of those might themselves be the precise matter that must be supressed. So, I think my answer would be, whilst I have absolute sympathy with all the submission that have put that proposition to you, I think in the short term, and perhaps in the first term, it would be safer passage to follow the second or alternative procedure you've suggested, and then to see how it works out. Initially whether it's sufficient or not.

MR DONALDSON: Yes. And if there was a statutory mechanism for the court to be able to call upon the assistance of an independent counsel, again it would be really, seems to me impossible, to define the circumstances in which a judge should or could seek that assistance. It's

really a matter for the judge, I would have thought, to seek that assistance in - - -

MR WHEALY: And for evidence before the judge. In other words, it's not possible, really, just to say, 'Well, we need to know the date of the charge as an absolute imperative'. There may be evidence that shows that that would be a real risk to national security. But then again, with an advocate there who could say, 'Well, that looks like it might be so on the surface, but if you dig deeper, it isn't so', so the judge could have a better final view about what order he should make.

MR DONALDSON: And the other thing that emerged from some of the observations that were made this morning is, it's not even necessarily in all orders closing a court that there's going to be controversy.

MR WHEALY: Not at all.

MR DONALDSON: Some matters will be actually – sometimes that a court is closed for a limited time, or for a limited purpose, are relatively uncontroversial. And so, again if we have – if we try and define minimum standards, it might sweep up circumstances like that that really don't require anything more than the judge to make a sensible decision.

MR WHEALY: Yes, I'd have to agree with that, I think.

MR DONALDSON: And I wouldn't've thought that you would disagree with the notion that, if there exists any doubt now because of the way in which the legislation is enacted that a judge could have access to an independent counsel that the legislation should make it clear that that is open to the judge.

MR WHEALY: Certainly.

MR DONALDSON: So, I know what you said in *Lodhi*, but - - -

MR WHEALY: Well, yes. But that was hypothetical really.

MR DONALDSON: It was, yeah. Well, it didn't actually arise in the case. And so, if that mechanism is to exist, it would be your view that that should be, either in the legislation or somewhere.

MR WHEALY: I wouldn't want to see it being challenged and going to all the courts of the land because there's no legislative background for it. I think that would be undesirable.

MR DONALDSON: Yes. It seems to me that people, or that some judges have proceeded on the basis that that facility is actually available, but it should be put beyond any doubt - - -

MR WHEALY: I would think so.

MR DONALDSON: - - - if it's going to happen, one would have thought. And then, could I just ask you finally. Well, two things actually. The orders that were made in this matter that weren't published, courts don't normally publish orders as it were, they'll publish judgments and reasons. It would seem to me that if orders are made under s.22 that give rise to a closed hearing, that it would not be beyond the wit of courts and the Attorney-General to come up with a mechanism for the publication of those orders. And so, a circumstance that has occurred to me is the Federal Court has a function on its website where it loads documents relevant to particular matters of public importance. And then you can go into this portal and see orders, all sorts of things. It would seem to me that something along those lines should be able to be implemented for the publication of orders that are made in – under s.22 for the closing of courts.

MR WHEALY: I can't see any danger in providing for that, and I can see a lot of benefits.

MR DONALDSON: And I suppose the fair – if there are reasons to redact orders, they simply put on the website in the redacted form, and no doubt people will see that they're redacted and think, 'That's a bit unusual'. So at least people would know that.

MR WHEALY: Well, and I mean the Court of Criminal Appeal in New South Wales commonly indicates on its website and elsewhere that decisions have been made but indicates that there suppressed judgments.

MR DONALDSON: Well, virtually, as you know – virtually every judgment of the Court of Criminal Appeal sending a matter back for a retrial, the judgments are suppressed until the retrial. Yes, so again, I wouldn't have thought that the publication of orders would pose any great difficulty.

MR WHEALY: The security agencies mightn't agree with us on that point, but I can't see a problem with it.

MR DONALDSON: Well, it was interesting in this matter that, as you've observed, that - - -

MR WHEALY: Yes, true.

MR DONALDSON: - - - the orders were published on the INSLM website.

MR WHEALY: Website, yes.

MR DONALDSON: And as I said in opening - - -

MR WHEALY: And the summary of offending.

MR DONALDSON: - - - there was no particular reason why that couldn't have happened earlier.

MR WHEALY: A lot earlier, yeah.

MR DONALDSON: Again, what it shows is that there needs to be a focus of all of those involved in these processes, that the starting proposition is, everything's open.

MR WHEALY: Yes. And I think if all of that, along those lines were done, I think we could safely, I think, say to ourselves that this probably would be unlikely to happen again. But if an extraordinary case came along, then we'd have some indication that it is happening, rather than none which is what happened here.

MR DONALDSON: See, I can imagine a circumstance, let's say prosecution of an undercover police officer for seeking to seeking to sell information as to another undercover police officer and sources, and that police officer's prosecuted. The simple fact that he was an undercover police officer, that he was seeking to sell information, would itself be pretty significant, one would have thought, if made public. And that there were others still in place whose security would be compromised by all of that becoming public.

MR WHEALY: And evidence about the nature of the operation.

MR DONALDSON: All of that. You could imagine a circumstance in which a lot of that would be – a lot of that matter would be held in a closed hearing, and not published at least for a time. Would you agree with that proposition?

MR WHEALY: Looking at it as a theoretical matter, yes. But you'd need again to look at it a bit more closely to see - if you were the judge, you'd want to say, 'Well, to what extent can I make anything public here'.

And as far as you could without endangering the lives of others or risking the revelations about the nature of a particular operation, you would try and give it a public – as far as you could, a public presence so that it wasn't entirely eroded from the public mind.

MR DONALDSON: Could I just ask you something about – I know you've been sitting here this morning, the notion of a repository of judgments, and a process for their review over time. Did that ever happen with any matter in which you were involved? That parties came back to you after a matter had been finally dealt with, and make submissions that certain information could now be made public after the matter had ended?

MR WHEALY: I don't recall it happening.

MR DONALDSON: In a sense, the matter's functus.

MR WHEALY: Yes. Yes, I think if you had a system, however, where judgments – like the English system where judgments – unredacted judgments were kept in a secure place, and it may come back to that just to look at what might be a secure place. Then the idea of a review, you would think, first of all, it should be left in the hands of the judges really. It wouldn't have to be the judge who'd heard the case. Indeed, it might be undesirable in some ways for that to be the case. So, if in such a system the Chief Justice could allocate a judge to consider a review, I think that such a system could be worked out in a practical way that would do that task. Just how you'd keep the judgments, I don't know. But I do recall that in the days of the *Lodhi* trial, which was in, what, 2004, or thereabouts.

MR DONALDSON: Yes. Started in 2004.

MR WHEALY: The Attorney-General, I think, and the security services provided us with a safe which was to be kept in the judge's room. Unfortunately, we kept forgetting the combination. But I think that's a bit old fashioned, quite frankly.

MR DONALDSON: I think there has to be a central repository of these - - -

MR WHEALY: Would it be in digital form these days? Rather than a redacted decision. I don't know, I imagine it might be. So, that's something that could be taken up with the Attorney-General's Department, I think, to see what would be the best way to keep it say, consistent with it being a judgment of the court. So, between the courts and the Attorney-General you'd think that a solution could be worked out

as to how these judgments could be kept in what format. And then for the review processes we would think that – I would've thought that the Chief Justice should be the instigator of a review, but it could be at the request of the Attorney-General, or it - it'd be unlikely to be at the request of the defendant. It'd probably be the prosecutors forgotten all about it by then.

MR DONALDSON: Yes. Well, the difficulty with having it, as it were, on the motion of the court is it does put an obligation on the court. How would the court know whether circumstances have changed?

MR WHEALY: Exactly, yes.

MR DONALDSON: It seems to me the only way in which that process of review could sensibly operate is if there was a positive obligation on the Attorney to have regard to that matter over time.

MR WHEALY: Yes. To look at it after a certain time. Yes.

MR DONALDSON: I think the issue that you've just noted about the central repository though is a very important one. And that is, even if it were to be, say, physically in a facility that was under the immediate control of the Attorney-General, it would be important that the court have access to it. Because these are actually judgments of a court, not judgments of the Attorney-General.

MR WHEALY: Yes, I certainly wouldn't want a sort of – with respect, disappear under the moors of the ASIO, or one of the bodies like that.

MR DONALDSON: No, but my point is more that the court must have access to these judgments. And I think you referred to the English orders that have been made. I think they're actually – it's in the form of a practice directory.

MR WHEALY: Yes, practice note there on that.

MR DONALDSON: For that central repository, and who might have access to - - -

MR WHEALY: Yes, I think it's in the court itself.

MR DONALDSON: It is there, yes. And one assumes that that's occurred because the executive government has satisfied itself that there's a secure means by which they can be held there.

MR WHEALY: Yes, and I'm sure that could be worked out in Australia as well.

MR MOONEY: And apart from review – periodic review, would that be repository of judgments be helpful to a judge to be able to access?

MR WHEALY: I think it'd be very useful as an educational facility for judges.

MR MOONEY: And in the normal way that a judge does to see what previous judges had done confronted with a similar - - -

MR WHEALY: The only difficulty you'll run into there is if it's an unredacted – set of unredacted judgments. What would be the attitude of the security bodies or the agencies, to a plethora of judges having access to it - - -

MR DONALDSON: Well, I would have thought the answer to that is that judges would have access to it, they're judgments of the court, I would have thought, and what could a security agency say, 'We don't want a particular judge to have access to particular judgments'.

MR WHEALY: The only reason I raise it is because if you look at the orders that were made in the Alan Johns case, there was a very significant restriction placed on the trial judge as to who he could give his published judgments to.

MR DONALDSON: Yes.

MR WHEALY: It had to be to one of the relevant parties as defined in the orders, and it really confined the judge in a way that I've not struck before.

MR DONALDSON: No.

MR WHEALY: So maybe you'd have to start, I think, with getting agreement from the Attorney-General and the agencies that what we're suggesting would be appropriate, but I personally think it's very appropriate.

MR DONALDSON: Yes.

MR WHEALY: I don't see a problem with the judges having access to their own judgments.

MR DONALDSON: I can't see how they couldn't - - -

MR WHEALY: Yes.

MR DONALDSON: Could I just ask and you've been very helpful and given us an enormous amount of time - - -

MR WHEALY: I've probably talked too much.

MR DONALDSON: No, not at all. Can I just – I think something that you started off with, as I said in New South Wales and Victoria, there's an enormous store of experience and knowledge about NSI matters, mainly in the terrorist field, and as you referred to in the United Kingdom but also in Canada, I think, there are, as it were specialist courts who deal with matters that we would probably understand as giving rise to substantial national security matters, criminal matters anyway.

What is your view of, as it were, specialist judges or specialist courts in relation to those of these sorts of matters? Well, they can't be specialist courts.

MR WHEALY: Well, I think in England you can understand why they've gone that way.

MR DONALDSON: Yes.

MR WHEALY: Because there's an enormous number of cases that they deal with and - - -

MR DONALDSON: And they're not a federation.

MR WHEALY: No, they are not.

MR DONALDSON: Yes.

MR WHEALY: And so the need to have a consistent approach throughout the country is still there, and it works quite well from what I am told. In Australia, it is not quite as easy. So I've got my doubts about specialist judgments and judges because sometimes specialist judges become too specialised and - - -

MR DONALDSON: Yes. And beholden.

MR WHEALY: And beholden, exactly. So I do have my doubts about that.

MR DONALDSON: And so I think the way you've explained it is further education of judges and protocols in place would deal with that.

MR WHEALY: I think so. I don't think you need to go any further than that.

MR DONALDSON: Well, there is a great risk as you say of specialist judges.

MR WHEALY: There is.

MR DONALDSON: You have been of very, very great assistance.

MR WHEALY: Thank you, Mr Donaldson.

MR DONALDSON: Not only in this hearing but also when we approached you to ask if you would be willing to assist us, you - - -

MR WHEALY: I hope I have been of some assistance.

MR DONALDSON: You have been of enormous assistance. I am very grateful for it. So thank you very much.

MR WHEALY: Thank you.

MR DONALDSON: That now concludes the morning session of these matters. So we will be starting again at 2 o'clock. Thank you.

LUNCHEON ADJOURNMENT

RESUMED

Session 3: Dr Rebecca Ananian-Welsh

MR DONALDSON: The hearing has resumed for the afternoon session, welcome back to everybody. The next person who I'm going to hear from is Dr Rebecca Ananian-Welsh who is a senior academic at the University of Queensland with a particular interest and expertise in constitutional law and these matters and I'm again, as I have been with everybody who's put in a submission but particularly I think Rebecca with your submission I'm very grateful to have received it. It was extremely concise and all of it's been of great assistance already and again I'm very glad that you've been able to make the time to come down and help me further today. So, if you have some opening observations you'd like to make then please do.

DR ANANIAN-WELSH: Yes, thank you. Thank you for inviting me to be here today and for having this inquiry particularly that it's focusing on s.22, I think, which can so easily be overlooked in the very complex *NSI Act* scheme. I have the benefit of speaking towards the end of the day so there's certain things that don't need to be gone over. I think it seems common ground that open justice is incredibly important. One thing I do want to focus on though is, and this is raised by Justice Whealy, is that the central safeguard in this whole scheme is that it takes place in a court and that the final say rests with the judge.

Against that kind of main point my central submission is threefold. One is that we need to enhance the actual capacity of the judge to fulfil this difficult role of being the central safeguard in the scheme and that role involves balancing a number of considerations that are almost bound to be in tension with each other for a fair trial, open justice the administration of justice, the avoidance of delay and of course national security which can be protecting the whole nation or protecting individual people. To enhance the actual capacity of the judge to do that I think the importance of making sure all the information that needs to be adjudged is before the judge is critical and that a contradictor can play a key role in certain proceedings to make sure that that happens.

The second aspect of my submission is that public confidence in the justice system needs to be enhanced, so it's not really enough that justice is done it needs to be seen to be done and this is where the publication of reasons, the publication of transcripts, the publication of orders are all critical. Because the *NSI Act* runs counter to the fundamental features of the common law system of justice. It is a scheme for secret evidence.

Sometimes it's going to be necessary to ramp up some of those traditional aspects like the publication of reasons or the publication of orders, more so than would be done in the usual proceedings.

The other thing that's critical for public confidence that has been talked about today or that's come out of the discussion today is that I think it is necessary to legislate for these things. To have this written down in legislation and I'll expand on this – so that the public can see the court has to take these things into account rather than say dealt with in policy or behind the scenes where the public can assume that maybe those things are taken into account but doesn't have that reassurance.

And this goes to my third point which is about clarifying the role of the court and to be honest it isn't really addressed in any depth in my written submission but it struck me today the range of different interpretations of s.22 from the very narrow interpretation put forward by the Law Council that the judge's role is simply to give effect to the consent orders or the arrangements to the Attorney-General's Department's interpretation which is very broad and sees a more fulsome kind of appropriateness analysis. I think clarifying which of those is correct which comes through the case law a little bit but would be better done in legislation.

And not only to say the court does have a broad and substantive role but I would suggest including a list of factors to which the court should have regard and that list of factors should include open justice, making orders that are the least restrictive on open justice as well as fair trial rights and national security.

All those things that the court is having regard to I would hope but to make that clear in legislation and thereby kind of not only enhance the process itself but public confidence in that process. I talk about minimum standards of openness and I think the points raised by the Law Council and the Human Rights Law Centre are really compelling on that point. I put that as a secondary submission to enhancing the process overall though so I do agree with those submissions and I think they're fortunately made elsewhere.

MR DONALDSON: Thanks very much. Can I ask you a few questions about the last matter, and of course I'm being very unfair to you because these matters really only came out clearly this morning but the notion of the minimum levels of disclosure, if you like. I think you would accept that there's a definitional issue involved there and what you've said this afternoon really I think makes clear that if there is – or that one way it could be done is by change to s.22(2) so the issue that there may be some sort of misunderstanding or different view of what s.22(2) entails. I'm a

little bit surprised at that actually, it seems to me pretty clear that what the role of the judge is and that this is a judge driven process when it gets to there, but if there is any uncertainty about that that can be clarified.

But then you're going further and saying and in the process of making clear in 22(2) that these are orders for the judge to make. We're talking about closed hearing orders here really aren't we?

DR ANANIAN-WELSH: Yes.

MR DONALDSON: Orders for judges to make – these are the matters to which the judge must have regard.

DR ANANIAN-WELSH: To be honest I'm talking more broadly than just closed court orders I think having a list of factors to which the judge should have regard like open justice should happen in every s.22 matter whether it's, as you said, kind of garden variety every day suppression or not. Now sometimes that resolution will be obvious and sometimes it will be contested. But yes I think that that could be dealt with in s.22(2). Did I interrupt before you asked your question?

MR DONALDSON: No, not at all.

DR ANANIAN-WELSH: What was your question again?

MR DONALDSON: It was whether the matters that you say a judge should be having regard to in making an order under s.22(2) are, in effect, stated in the section or in the Act as mandatory considerations to which the judge must have regard. So rather than as we discussed this morning or as I've discussed this morning with a number of people, here are matters that must be brought to the courts attention in submissions to it. That's one way of doing it.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: Another way of doing it is saying the following are mandatory or the following matters are matters to which the court must have regard in making a decision under s.22.

DR ANANIAN-WELSH: If you find often where the court has a public interest test to apply, sometimes you find in those test including but not limited to the following concerns. Look, in this context obviously the court is going to have regard to the matters in s.3, the administration of justice and national security - - -

MR DONALDSON: Yes.

DR ANANIAN-WELSH: But as numerous submissions have drawn attention to, open justice can very easily be overlooked. And I think fair trial rights are quite reasonably protected in the existing *NSI Act* scheme with, as Justice Whealy flagged, the inherent jurisdiction of the court, the submissions from the parties, things like that. Open justice on the other hand is easier to overlook. And it struck me that Justice Whealy talked about the informality of these orders often, and when you have - - -

MR DONALDSON: Or the process.

DR ANANIAN-WELSH: Yes. Yes, that if you - that I think enhancing that through something like a list of considerations would prompt submissions on those considerations.

MR DONALDSON: Yes.

DR ANANIAN-WELSH: And then hopefully be translated into a judgment that would be available to be read.

MR DONALDSON: Yes. Yes, I think that's a very interesting suggestion. And that wouldn't be from a drafting point of view when they are set out as 'These are mandatory considerations for the judge', it can be - that could be a degree of flexibility in the expression of those matters, if I can put it that way.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: That is different to saying, 'Here is a set of minimum standards of openness that must be adhered to', which I think is a far - is a different and far more complex drafting exercise.

DR ANANIAN-WELSH: Yes. So those I think could sit next to each other though; that you wouldn't need one or the other. So this point raised by the Law Council that you need statutory mandated minimum standards of openness, I'm - - -

MR DONALDSON: Can you give me an example of one?

DR ANANIAN-WELSH: I think the list that they provide at paragraph 24 about - kind of the number of charges and what were the charges, these kinds of things. The Attorney-General's consent is - that reads really well to me, which is less - I'm less expert at this than they would be. I am more hesitant to lock something in in that way and lock out the discretion of the

court, though even though I struggled to think of a situation and I think everyone today has struggled to think of a situation where those things wouldn't be appropriate, and even in the Alan Johns matter we've seen that most of those things ended up being appropriate, once put.

One suggestion I would have is if locking that in was problematic, then potentially a caveat of except in the highly exceptional circumstances, or something like that, to give the judge that little bit of wriggle room.

MR DONALDSON: Yes.

DR ANANIAN-WELSH: That if there was some unforeseen extreme situation, where you just couldn't reveal the section under which the person had been charged, that was available. But in exceptional circumstances, and I would certainly expect to see a contradictor involved in that kind of determination.

MR DONALDSON: So you see a role for the contradictor which in the circumstances that it would - we discussed earlier today.

DR ANANIAN-WELSH: Very much, yes. And very much in the interests of open justice, more than in the interests, even a fair trial rights. I think having that open - that contradictor, public interest monitor, public interest advocate is important. But particularly important because in so many of these situations there are certain things that are in the public interest that just aren't in the particular interest of anyone else before the court, and it's a lot to be expecting of the Attorney-General to both be making the most sophisticated submissions about national security interests and secrecy, as well as potentially all of the arguments about open justice, another contradictor before the court.

MR DONALDSON: You see I must confess, I don't find that a particularly difficult thing at all, for the Attorney-General. I'm not saying that means there's no need for a contradictor, but I must say I would expect that in most or all of these circumstances that that would - should be what's happening.

DR ANANIAN-WELSH: Perhaps it should be what's happening. My fear I guess - look, it's coming from a place of knowing so little about these things. So the little that we do know says that in the Alan Johns' matter the Attorney-General was present and submissions were made by both parties and the Attorney-General and consent was reached, and yet we still reached this extreme level of closed justice that we can only assume from what's come out afterwards was unnecessarily extreme, which, as someone completely on the outside would indicate, there needed

to be more submissions on open justice in order to assist the court to get to a better balance.

MR DONALDSON: I think that's a very fair point. I was intrigued by your - and I think you've made an excellent point as to the importance of public confidence in the process as well, and how, and as I think we've discussed earlier today, public confidence in the process is often enhanced, if not provided, by the publication of orders, transcript, reasons. I think you said to me that you saw a need for there to be legislative requirements for those matters to occur, and I see why you say that because they didn't happen in this particular matter. Whereas if there was a requirement in some sort of statutory instrument for that, then it couldn't be overlooked. I wouldn't necessarily have thought though have to be in the Act itself. It could be in regulations or something of that kind.

DR ANANIAN-WELSH: I think practice directions could play a really clear role there.

MR DONALDSON: Yes.

DR ANANIAN-WELSH: It's certainly distressing that - or disturbing that there were - that it was agreed that there would be sentencing remarks and that there haven't been.

MR DONALDSON: Yes.

DR ANANIAN-WELSH: But, yes, so far as the provision of reasons, I mean it's certainly not excluded by the Act. So, so far as the provisions of reasons or - - -

MR DONALDSON: Well, no. Well, you couldn't exclude - it would be an interesting provision that said a judge can't give reasons for something.

DR ANANIAN-WELSH: Yes or remove the obligation even to give reasons.

MR DONALDSON: Yes, all right. And it's why, I must say, the notion that there is some sort of obligation, because it's a pretty odd - it would be a pretty odd bit of legislation that said a judge must give reasons for this.

DR ANANIAN-WELSH: Exactly.

MR DONALDSON: Because a judge should be giving reasons for these matters.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: It's more the publication mechanism for the reasons I would have thought. And I suppose if you have a mechanism in there for publication of reasons, it rather presupposes that there will be reasons, and that might be enough.

DR ANANIAN-WELSH: I suppose it's the odd context of this being consent orders. It's so easy to take what is a really exceptional important process from the perspective of open justice in the common law system of open justice that this is secret evidence and secrecy in a way that runs counter to everything, and yet when you overlay it with something like 'Oh, but it's happening by consent', it can start to look like. So maybe it's more of a reminder to the court that this may not look like an important part of a trial, but it is and therefore the giving of reasons is more important than it usually would be.

MR DONALDSON: Yes.

DR ANANIAN-WELSH: But no, I don't think that would necessarily need to be legislated. A practice direction would probably be enough.

MR DONALDSON: Yes, and I think the point that you make is a very important one; that it should never be overlooked by anybody in the process how exceptional orders to close a court are, but they're not uncommon.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: But they're always exceptional in that sense.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: All right, well that's very helpful, thank you. Now, I think you are the source of the idea about a public register or repository of reasons, in your written report anyway which dealt with it very thoroughly.

DR ANANIAN-WELSH: I think I'd have to give that privilege to the Human Rights Law Centre who inspired me.

MR DONALDSON: It might be that I read yours before I read theirs. Never know. But anyway you address it in your submissions. So with that - and I think the point you make in your submissions is that could ultimately be an important historical source, as well as for other reasons.

And I think that you were here when Anthony Whealy was assisting us earlier today. Would you accept that something along those lines would involve obviously a secure repository which could be under the - could be maintained by the Attorney-General's Department, say, to which the court had access when required?

DR ANANIAN-WELSH: Yes.

MR DONALDSON: And this notion of reviewing reasons over time - or orders, reasons, transcripts is the other thing that's arisen today.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: Which is important as well because that repository should be probably a repository of transcript as well.

DR ANANIAN-WELSH: Definitely, yes.

MR DONALDSON: And so if there is to be a process of reviewing of those matters over time, do you have any thoughts about that?

DR ANANIAN-WELSH: The one thing I'd add that hasn't been raised today, I think, is - I understand this can happen with suppression orders, I think, but that there should be the possibility that if this is clearly going to be tied, say, to somebody's life then that that can have, in making these orders, you could give a time limit. Or at least an indication to say the secrecy isn't just always going to be enduring until somebody else out there decides that it shouldn't be anymore, that at least until the end of this person's life, or such and such. As would happen in, you were raising the example of things that are completely suppressed while another proceeding is on foot. These kinds of things. So, there's a chance that that good be appropriate in some cases.

MR DONALDSON: And in fact, that could be addressed even more easily than that. Let's say the event is there's still a undercover operative somewhere. So, rather than express it in the order, until the undercover operative comes out, which gives the game away in a sense, it could simply be time limited. So, within X time period, the Attorney-General advise the court of whether the reasons for secrecy orders still exist.

DR ANANIAN-WELSH: It's almost like a sunset. Yes. Or as some indicative review period. Yes.

MR DONALDSON: Well, and as you say, but you may be able to tailor that in certain circumstances where there is a specific explanation for why

these things can't be published openly. So, it could just be done with bespoke time period in relation to the particular matter.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: Well, that would be a very clear way of actually dealing with that.

DR ANANIAN-WELSH: And I imagine, you know, in some cases that's going to be available. In other cases, it won't be. But it's certainly an option that's there and could help assist this, we have to review every single one from scratch every year. Which may or may not be a problem.

MR DONALDSON: Well, and the other thing that would emerge in that process as well is some of the examples that were given by the representatives of the security agencies earlier today. Which is, well some of this information may need to remain suppressed for a very long time. And I can understand that.

And I understand exactly the reasons, or why they have explained that, and it seems entirely correct to me. But that could be addressed in this way, that, in relation to certain matters, the Attorney-General comes back on a particular time period – within a particular time period, then another time period. But the judge may also have the power to bring the matter back for the judge to have it all explained how it is that that reason seems to be going on for as long as it is.

DR ANANIAN-WELSH: Yes. The one thing I'd say too, as an academic, is even if it takes 25 years or 50 years for something to see the light of day, it's still incredibly valuable that it does see the light of day. So, there's ongoing research of things that have – how cases were handled in war time, of how we've managed, say, espionage, and things like that in the past. The more information that people, lawyers, academics, historians, can know about that, not only is great for the integrity of the justice system and things, but it can actually enhance the reputation of our security agencies to show fantastic intelligence operations that have happened in the past, and ways that they've operated effectively. And ways that we've cracked down on corruption and misconduct. So, there's good stories as well as less good stories that could be told. And if they get told 70 years later, I mean, from my perspective, that's still incredibly valuable.

MR DONALDSON: Well, I think that's a very important insight. Because, things, for instance, like Ultra during the Second World War. So, the details of that really didn't come out until – well it's probably

1982 when Welchman, who was one of the senior people there, wanted to publish a book. So, you know, the fact that the allies had cracked the Germans' Enigma code during the Second World War didn't really come out for 40 years. But still important that it's come out.

DR ANANIAN-WELSH: Exactly.

MR DONALDSON: And of historical significance.

DR ANANIAN-WELSH: Yes.

MR DONALDSON: I think that's a very important point. And as you say, it's a valuable source for – or would be a valuable source for academics and something that the community should know about at some point in time, however long it takes to occur.

DR ANANIAN-WELSH: Very much. Yes.

MR DONALDSON: I understand that. Thank you. So, is there anything else you wanted to ask me? Rebecca, thank you very much for coming along. There are other matters that we went through with other people this morning thoroughly, but it was very valuable to go through some of these other matters that I didn't have a chance to do with some of the other people as well. So, again, thank you very much for participating in this process, both with your written submission and attending today. It's been very helpful indeed. Thank you.

Session 3: Attorney-General's Department

MR DONALDSON: All right. So, the next people who are helping me are the representatives of the Attorney-General's Department. So, we have Sarah Chidgey, who is the Deputy Secretary Integrity and International Group. Welcome, and thank you very much. And Andrew Walter, who's the First Assistant Secretary Integrity and Security Division of the Attorney-General's Department as well. Thank you very much for coming along. Could I also thank the department very much for the written submission that it provided to this inquiry, and it should surprise nobody to know that I have been liaising with the Attorney-General's Department in relation to various of these issues for some time, and the department has been extremely helpful in the assistance that it has given. So, I am most grateful for that. And again, to both of you for coming along today, and helping with this hearing. So, were you wanting to make some sort of opening observations?

MS CHIDGEY: I did have an opening statement if that was all right with you?

MR DONALDSON: Sure, yes.

MS CHIDGEY: So, thank you for your invitation to participate in the hearing. The Attorney-General's Department supports the Monitor's role, and reviews like this one, are an important accountability mechanism for Australia's national security and counter terrorism laws, and particularly in ensuring that they're balanced with appropriate oversight and protections for rights and freedoms. As we set out in our submission, broadly speaking, the *NSI Act* provides a framework to enable national security information to be protected, and the introduction of that Act has allowed courts to balance the public interests in protecting national security, maintaining the accused's right to a fair trial, and the principle of open justice.

It's provided a mechanism for courts to make appropriate orders, to protect national security information at any time in either criminal or civil proceedings without excluding information entirely. Specifically, for the purposes of this review, s.22 of the *NSI Act* provides a mechanism for parties to be able to agree from the onset of proceedings the most appropriate arrangements for the disclosure protection, storage handling, or destruction of national security information based on the circumstances of each case. In these situations where parties are operating based on agreement, there are certain safeguards in the legislation to protect open justice. The Attorney-General must approve orders agreed by parties, but most significantly the court must ultimately determine if it's appropriate to give effect to the arrangement that's been agreed between the parties and the Attorney-General.

In determining what is appropriate, the court must have regard to the object of the Act, and that object set out in s3 of the Act recognises the importance of maintaining the independence of the judiciary, and the accused's right to a fair trial in considering what protections are appropriate to safeguard Australia's national security interests. As we set out in more detail in our submission, the mechanism in s.22 of the *NSI Act* strikes a balance between those competing interests and gives flexibilities to the parties while preserving the courts ultimate discretion to manage proceedings. In terms of the specifics of the Alan Johns matter that's the subject of this review, the circumstances were unique. The Attorney-General was advised by the relevant agency about the risk, sensitivities, and potential catastrophic harm that could result from the disclosure of

information in the case, and that included endangering the lives or safety of others.

The orders made in the case of Alan Johns were agreed by the parties, approved by the Attorney-General and made by the Court as it considered appropriated to give effect to the agreed arrangements and those orders enabled the defendant and his legal representative to access sensitive national security information in the proceeding and enabled the defendant to defend the allegations against him. The orders also allowed the defendant to disclose the fact of his conviction, the terms of his sentence and that the nature of his offending involved mishandling classified information.

They also, in the circumstance of this case, specifically provided amongst other safeguards, that the Attorney-General as First Law Officer periodically review the Court's reasons for judgment and advise the Court which parts of those reasons could be released publicly. As we indicated in the submission, the Attorney-General made submissions on two occasions following the sentencing decision in the matter to assist the Court to consider what information the Court could release publicly in respect of the matter, and that was specific advice about information that we advised could be made public.

It was ultimately a matter for the Court to determine any public judgment in the proceeding and the Attorney-General specifically submitted to the Court that he was conscious of the desirability of achieving open justice wherever this is possible, and that national security interests much be balanced against this important principle. Generally, in any proceeding where the *NSI Act* is invoked, the starting position of the department and the Attorney-General is for proceedings to be conducted in open court as far that is possible, consistent with the principle of open justice, and we look forward to considering any recommendations from your review. Thank you.

MR DONALDSON: Did you want to add anything Andrew?

MR WALTER: No, thank you.

MR DONALDSON: Well, thank you very much for those opening observations, and I'm glad that you made it clear it that the orders made in Alan Johns actually contemplated that after the sentencing there would be public sentencing remarks made available and that that - that hasn't happened, and it is the case, and I have seen them, that the Attorney-General made submissions in relation to that matter. And having regard to all of that, can I perhaps go through certain of the issues that have arisen,

and again, this is not a commission of inquiry into the Alan Johns matter as we know, but it disclosed some unusual features of how the s.22 process can operate.

So, in relation to the publication of orders that are made under s.22 for closing a court, and again, I don't know if you've been here for earlier sessions today but it's clearly the matter - it's clearly the case that the matter which is of greatest concern to really everybody who has come are the orders for the closing of the court, I think everybody accepts that certain of the orders made in this matter about storing of information are relatively uncontroversial. So, in relation to orders that are made for closed court or for closed hearings during these processes, I take it that the Attorney-General's Department doesn't foresee any real difficulty with the publication of those orders?

MS CHIDGEY: I think for me probably it just goes back to the principle that yes, ideally orders would be published, I think it would just be about the nature of the content of those orders and the timing having regard and to whether that potentially creates risks and the Court managing any such risks as far as - - -

MR DONALDSON: Yes, and I can understand that there may be - well, it's conceivable that in certain orders there may be information that doesn't need to be disclosed or shouldn't ideally be disclosed but that could generally be dealt with by redaction, if necessary, I would have thought, and again the representatives of the intelligence agencies were before us earlier and explained how sensitive some things that might appear benign to most people can be, such as time and the like, but as a general principle I think it must be so that the publication of orders would generally be of assistance in these sorts of matters.

MS CHIDGEY: Yes, and I think our starting point with the Act and s.22 in general is that as much to be made public as possible unless there's a particular risk that needs to be managed through redactions or delay.

MR DONALDSON: Yes, and the mechanism for that - there are many ways that these sorts of things can be published by courts and there are - there are various matters that the Attorney-General's Department refers to in its annual report that has - I'm not talking about publishing them there but things like the number of s.22 orders that are made and those sorts of things could be published in the annual report, if that was thought desirable.

MS CHIDGEY: Yes, and we've considered that and can see that there would be benefit from also including the matters in which s.22 orders

have been made, the number of matters so that that provides a more complete picture of that annual report.

MR DONALDSON: Yes, so 'Section 22 orders have been made in the following matters, and in each matter this number of orders has been made', or something along those lines.

MS CHIDGEY: Yes.

MR WALTER: Can I just make one small observation? I know you're talking about the particular point about closing a court.

MR DONALDSON: Yes.

MR WALTER: The observation I'd make is where - I think we're - consistent , to what Ms Chidgey has said, with that idea however for some kinds of orders beyond that, like, sort of, lesser orders, it may actually slow down the process. Some of the orders that are made under s.22 are pretty benign, they're really, you know, 'store this in a filing cabinet', you know, 'don't disclose this fairly small piece of information', so we wouldn't want - we think it would be - probably get impractical if we have to give reasons for every one of those little decisions that's made if we're focused on that really core 'You are closing the Court' type decision, we think that's - that's very clear that there should be some process.

MR DONALDSON: Well, I think we might be at cross-purposes. I wouldn't have thought - because, I wouldn't have thought it would be very difficult for the Attorney-General's Department publishing a list, say - - -

MR WALTER: That bit is fine.

MR DONALDSON: I see.

MR WALTER: Yes. Sorry, it's just in relation to the reasons at first point.

MR DONALDSON: We haven't got on to reasons yet.

MR WALTER: Okay.

MR DONALDSON: So, publication of orders and matters in which s.22 matters are done,that seems unproblematic then. Insofar as the publication of the orders is concerned, I think I referred earlier today, and I'm not sure you were here, but the Federal Court, for instance, has a process wherein

matters of public interest, there is a portal and things such as orders and the like can be accessed; that's probably a more appropriate place for the publication of orders than by the Attorney-General's Department, I would have - - -

MS CHIDGEY: Yes, we agree that - yes. It would make sense for the Court to publish if orders can be made public.

MR DONALDSON: Yes. And, if necessary, the Attorney-General's Department would have to liaise - or should liaise with the courts to ensure that something like that exists, because I know it does in the Federal Court, for instance. I'm not sure of every other court, but that should be a process that could be undertaken, I would imagine.

MS CHIDGEY: I couldn't comment on all the arrangements every court has, so presumably we need to be - a decision made by each court, and I'd assume they've all got some form of at least publishing judgments.

MR DONALDSON: Yes. But I'd expect that where there's a will, there's a way, so it should be able to be done. I'm not suggesting by the department but by the courts. So, then we get to reasons and so for the - I think anybody would - I don't think that anybody would doubt that reasons are required for the making of orders such as this and then an issue become - the issue then becomes the publication of those reasons and, again, it is unexceptional that certain of those reasons - that it would be possible to disclose information that should not be disclosed if fulsome reasons are published openly, so there should be a process by which the Attorney-General, say, could review reasons for the Court for the making of such orders and for advising the Court of any - or suggesting to the Court of any changes that could be made.

Again, that's a process that's fairly well understood, and there's a provision in the Act, s.32, which deals with it in a slightly different context, and in relation to those sorts of reasons I would not expect that that would need to be the case for orders other than perhaps for closed hearing, perhaps some suppressions orders. So, I'm not talking about the requirement for - or the elaborate reasons for routine orders, it's really for closed hearing orders that I've got these matters in mind, and again, the process of courts or judges providing reasons to parties for input as to matters that should be summarised without disclosing the confidential information is pretty well understood. All right. So, that's a process that would be then in the ordinary course unproblematic.

Now one issue that's arisen in some of the submissions that have been made and some of what I've heard earlier today is for the role of a

contradictor in certain circumstances in this process. I don't think anybody has suggested that it should be mandated that there be a contradictor in every event or in every instance, even of a closed hearing set of orders and I think that that's a wise thing.

But do have a view on the appropriateness of the court being able to require a contradictor to be brought into the process to assist the court?

MS CHIDGEY: I think we think that is something that the court would currently have discretion to do and generally support - - -

MR DONALDSON: If that's right – sorry.

MS CHIDGEY: And continuing, maintaining that situation that a court would assist in the context of the particular orders being able to ask for a contradictor.

MR DONALDSON: So it would follow from that I think that, to the extent that there was any doubt about that,that could be clarified by legislation or regulations.

MS CHIDGEY: Yes.

MR DONALDSON: And that wouldn't pose any particular difficulty in relation to assisting the court in submissions initially and perhaps the conclusion of the reasons?

MS CHIDGEY: Yes. I mean there'd be the practical issues about security clearance.

MR DONALDSON: There will be practical issues.

MS CHIDGEY: Et cetera but that would be manageable.

MR DONALDSON: Yes, and that's why it would only really be in circumstances where we're talking about closed hearings because I would envisage a judge being able to require an independent counsel to talk about what sort of safe they should have in their office, for instance, in those sorts of matters.

MS CHIDGEY: Yes.

MR DONALDSON: All right, well that's very helpful, thank you. And then when we get to the conclusion of proceedings and we're talking about publication of sentencing remarks, for instance, the same sort of

process could exist there as well for an independent counsel if needed in the first instance for the judge to be providing complete reasons and seek submissions from the parties, as happened in this case, from the Attorney-General as to particular matters.

MS CHIDGEY: Yes.

MR DONALDSON: And again it was really the process that occurred in this matter,that is submissions were made in accordance with the orders.

MS CHIDGEY: Yes.

MR DONALDSON: Are you able to assist me with one matter of detail, and if you're not, just please tell me. Is there any particular reason why in this matter it was a six month period for that assistance to be provided to the judge? I know that neither of you were actually involved as solicitors in the matter.

MS CHIDGEY: In particular I think that had a relationship to issues about managing any potential disclosure of the identity of the defendant in the matter so that that six months was a sort of period that was considered appropriate by which that risk could be significantly reduced in terms of the publication of some information on the record about the matter and charges but that's my - - -

MR DONALDSON: Thank you.

MR WALTER: That's my understanding as well.

MR DONALDSON: So by that there was thought given to it and reasons why because that seems, of the face of it, a pretty lengthy period of time but that was the explanation for it?

MR WALTER: That's right and, you know, particular factors in this case and where the person was to be detained made identification more likely and so I don't think there's exact science to the date but it was considered a reasonable length of time.

MR DONALDSON: Yes.

MR WALTER: To make sure that identification couldn't occur.

MR DONALDSON: Thank you. And another matter that I took from your thoughtful observations to start were really highlighted in the Law Council's submissions this morning and that is what seems to be the view

that what appears to me to be very clear in s.22(2) is not as clear as it is. That is, it seems to me s.22 is very clear in its terms that the decision as to whether orders are made or not made is a matter for the judge.

MS CHIDGEY: Yes.

MR DONALDSON: And there is no limitation on the power of the judge to either made orders or not make orders and I must say I was a little surprised that there seems to be doubt about that. But I can take it from what you have said that if I formed a view that actually that was a matter of uncertainty as a result of the drafting of the section that a recommendation that the section provide that would have no difficulty or would be unproblematic.

MS CHIDGEY: No, any clarification that the court has first and ultimate complete discretion is the understanding of the way it works and if that can be made clearer and more explicit, that is something we'd be comfortable with and we also consider that in exercising its discretion it should be clear as well what regards have to be had to the ultimate object of the Act which takes into account the administration of justice as well.

MR DONALDSON: Well that's clear under – or should be clear under s.3(2) anyway.

MS CHIDGEY: Yes.

MR DONALDSON: And that gives rise to the next issue I think, which is the matters to which the courts should have regard when making an order under s.22(2) and there has been some suggestion from some people who have assisted me that were really one of two things or perhaps both things. One is that it should be set out somewhere that these particular matters must be addressed by the Attorney when making submissions to the court seeking s.22 orders and they would primarily be one, the importance of the open court principle; two that the process is one controlled by the court; and the like. Now I take it the Attorney-General's Department would have no issue with, and would ordinarily make submissions to that effect in any event, would they not?

MS CHIDGEY: I think the only sort of slight caveat to that, I think there are generally oral submissions – I think Mr Walter averted to that issue previously that the range of s.22 orders is very varied so some of them are more substantial in terms of closed court and general protection of information.

MR DONALDSON: I think I'm only talking about closed court orders.

MS CHIDGEY: Yes, I think in that case this would be comfortable I think. The issue that arises generally with respect to s.22 orders is that some of them, like matters that I've got at the moment, they're more generally covered by sort of certificates and court decisions on that and the s.22 orders happen to be very narrow, more administrative in nature where having lengthy written submissions would be less at risk.

MR DONALDSON: I know. I understand that. I'm really am referring only to closed court hearing. Now if I thought that that - - -

MR WALTER: Sorry, can I just - - -

MR DONALDSON: Sure.

MR WALTER: With the two things you mentioned, the first one averting to open justice and why it's in the interest of open justice, all those interests I don't think we'd have any concerns about that. I just wasn't clear what the second proposition was. I think it was about the fact that this is ultimately a matter for the court which just struck me as a little bit odd that we would make submissions on that because from our perspective it is absolutely a decision for the court and that would be in the Act.

MR DONALDSON: Well if the amendment's made to the Act that's probably right.

MR WALTER: We'll, of course, take on board your recommendations, we think that is very clear that that is the situation under the Act and either as it is or as amended with think that is patently clear.

MR DONALDSON: The only reason I really raise it I too think it's relatively clear under s.22(2) but the Law Council of Australia doesn't and so if the Law Council of Australia doesn't think that that's clear and if the Act's not amended then it may be a useful thing in submissions to make it clear what the Attorney-General's view is in any event as to the scope of the power of the judge under 22(2).

MS CHIDGEY: It's certainly the way every matter to date has proceeded.

MR WALTER: Has proceeded, yes.

MS CHIDGEY: On the basis that the court is making - - -

MR DONALDSON: You made that clear and as I said it seemed to be the section was relatively clear in that respect but if the Law Council of Australia doesn't think it is then I think the Attorney-General's view can be expressed to the court as to that without too many difficulties. So really what I had in mind was reminding me that there be submissions made as to the central importance to the administration of justice of the open court principle that the making of orders under s.22(2) are matters for the court, making appropriate orders are matters for the court. And I must say, I would've thought something of value that could also be pointed out are observations that Justice Bongiorno made in *Benbrika* in one of his sets of orders, which is really to reinforce that these matters are for the court. They can be reviewed by the court, they can be recalled by the court in the event that circumstances change or orders have unintended or unforeseen consequences. So it would be something along those lines.

And if that was thought by me to be a good idea and that this is something that the Commonwealth should do, I wouldn't want to burden the Act with something like that. That is probably the means by which that could be done. Could be done, I would have thought in - even if not regulations. There are I know Commonwealth Government - - -

MS CHIDGEY: The Commonwealth has obligations as a model litigant and with - - -

MR DONALDSON: Something along - - -

MS CHIDGEY: Yes, to take account of that recommendation.

MR DONALDSON: Something along - - -

MR WALTER: The Legal Services Directions.

MR DONALDSON: What do they call it?

MR WALTER: Legal Services Directions.

MR DONALDSON: Legal Services Directions, that's what I was fossicking for, the Legal Services Directions. So something in that form that made that obligation clear to everybody would be, I would've thought, unproblematic.

MS CHIDGEY: Yes, we'd need to speak to colleagues about who would administer. So if there is a specific suggestion that that particular content, I think it would be a bit unusual to actually insert potentially that in the

legal services directions but the general intent of what you're saying we support.

MR WALTER: The thrust of it.

MS CHIDGEY: Yes.

MR DONALDSON: All right. Okay, well that's very helpful. And then the notion that there should be mandated in the legislation matters to which the court must have regard in making orders under s.22(2). As I said, that's as it were the second part of that. Now at one level the judge might not need that if submissions are made. These are the matters to which the court should have regard.

I suppose the advantage of having a mandated list of matters to which the court must have regard is that the court must have regard to them, as opposed to a submission from counsel that it's a matter the court should have regard to. So again, do you see any particular issue with that sort of prescription of mandatory conditions to which the court should have regard?

MR WALTER: Obviously we might see what the conditions were.

MR DONALDSON: Yes.

MR WALTER: But we already have in the objects of the Act s.3.

MR DONALDSON: Yes.

MR WALTER: Sub-section (2), the 'In exercising powers or performance functions under the Act a court must have regard to the object of the Act', which includes, you know, considering the extent to which the disclosure would interfere with the administration of justice, which we interpret to include the principle of open justice.

MR DONALDSON: Yes.

MR WALTER: So we do already have that in the Act and perhaps it's as simple as just fleshing out the object of the Act a little bit more in terms of that open justice principle.

MS CHIDGEY: But conscious that some of the provisions that refer to the court making decisions on certificates. For example, there are provisions that do set out factors to be considered by the court. So we could do the same for s.22 orders. Ideally from our perspective there

would be a level of consistency between those provisions on factors to be considered by the court across the various provisions.

MR DONALDSON: Yes, because I was going to refer of course to s.31, which for many people is problematic in some respects. I know it's valid but - so a provision such as 31(7) and 31(8). So 31(8) requires primacy to be given to a particular consideration. One would've thought if it was a good idea to say 'These are mandatory requirements for the court' there may be some suggestion that, 'Oh well, the court would then be assisted by a provision such as (8)', which gives primacy to, in this instance, the risk to national security as opposed to whether the defendant gets a fair trial.

MS CHIDGEY: Yes.

MR DONALDSON: That's just a comment more than anything else.

MS CHIDGEY: I think from our perspective it would make sense to have a level of consistency and commonality across that to be considered by the court. I mean ultimately I think because s.22 orders are in their first instance by consent - - -

MR DONALDSON: Yes.

MS CHIDGEY: I suppose ultimately if there was a different outcome than one the Commonwealth was comfortable with on orders under that provision, in a sense you then revert to the court making decisions on certificates.

MR DONALDSON: Yes.

MS CHIDGEY: Instead of using s.22. Yes, I mean we haven't sort of necessarily considered in detail but I can see there might be issues if you had different sets of factors considered by the court in making decisions.

MR DONALDSON: I agree. I think that's a - that had occurred to me and why I was going to raise s.31 in that context as well. What would be undesirable is to think that the s.22 mechanism is a wholly separate mechanism to which different considerations apply, than the considerations that apply when the non-consensual provisions of the *NSI Act* are used. So I think that's a - that's a very helpful observation and it would obviously be undesirable were that to be the case, I would've thought.

All right. Now, repositories. Again there have been - I am sure that you've seen some of the written submissions that have been provided in relation to that?

MS CHIDGEY: Yes.

MR DONALDSON: And on the face of it, it seems a very sensible notion that there be a - somewhere where all material that can't be published for national security reasons is. And again I think that there has been a consensus among people who have assisted me today that it obviously has to be a secure - in a secure facility and that that could be administered by the Attorney-General. And equally it would be probable or uncontroversial that that would have to be able to be accessed by the courts if they require to do so for various reasons.

MS CHIDGEY: I would just say that latter part is certainly more challenging, so we're happy to talk more about that if that would assist you.

MR DONALDSON: Access by the court?

MS CHIDGEY: Yes.

MR DONALDSON: Why would that be a challenge?

MS CHIDGEY: Because of circumstances of access. So we administer as the department, the Commonwealth protective security policy framework and when it - and when it's very highly classified information, as is so the case in the Johns matter; top secret, multiple code words. There are very specific circumstances, so we - it might be - you know, within the Commonwealth we've got top secret terminals but when accessing it's not just a matter of the IT system alone, it's the whole physical security environment in which someone accessing that system and the level of clearance that they've got. So I think there's just a lot more detail. I don't think it would be as simple as all of this information could be sitting in an IT solution that the courts could simply access from chambers for instance.

MR DONALDSON: I must say, I didn't actually have that sort of thing in mind as I've been thinking about it. Like it occurred to me that it would necessarily be a matter - and it maybe it depends the level of security of certain of the information, but certainly in some matters it would only really be able to be accessed, if you like, physically.

MS CHIDGEY: Yes.

MR DONALDSON: That is, somebody comes to a particular facility and reads it there.

MS CHIDGEY: Yes, or that, you know, some of the arrangements we use while a proceeding is on foot where - - -

MR DONALDSON: Yes.
MS CHIDGEY: We have to provide particular solutions.

MR DONALDSON: Yes.

MS CHIDGEY: And provide information and take it away or when it's finished being read or - - -

MR DONALDSON: Yes.

MS CHIDGEY: Yes, other arrangements.

MR DONALDSON: But the issue you raise about security clearances. So, for instance, if a judge wanted to access it, judges don't need security clearances.

MS CHIDGEY: No.

MR DONALDSON: And there may be an issue, and I think there was an issue in - early in the Collaery matter as to some court staff. Again I would've thought those sorts of issues could be ironed out. But it would be - what I have in mind is a central repository that could be accessed by the court and for some material that may be - like 'It may be accessed by the court' means an officer of the Attorney-General's Department physically takes a written document.

MS CHIDGEY: Might have to print something off and carry it over, or have someone come and - - -

MR DONALDSON: Correct.

MS CHIDGEY: Yes.

MR DONALDSON: Yes. All right. So again there's no particular difficulty with that in that respect, other than the detail of it. Then the other matter that has come up very clearly today is the notion of review, ongoing review of matters to determine whether there can be material that might be made available after the reason for its non-publication has

passed. Do you have any views on that; because I can understand that there would be administrative issues involved, but do you have any observations that you could assist me with in relation to something along those lines?

MS CHIDGEY: Yes. So I think from our perspective I think it's absolutely the case that you would want an arrangement like occurred in Johns where there was that periodic - where there was that review and the requirement to come back with submissions within a set period of time. I think from our perspective it would just be whatever's proposed ideally would be something where then once there was, say, a judgment, sentencing remarks in a form on the public record, that there wouldn't be just unlimited, inconclusive, ongoing obligation to continuously potentially add extra bits over time. Partly because those sentencing remarks are very much the court's, so it would just get very complex if it was a requirement without sort of any boundaries. So I think it would be very important in our view that there then be something on the public record, with a basic level of information, but beyond that it's quite challenging if it's the idea that you then keep reviewing it from - - -

MR DONALDSON: Every year you have to review every matter to - - -

MS CHIDGEY: Yes, again and again on every matter for every piece of sentencing remarks to determine whether an extra few words or a sentence might be added because it's become less sensitive. I think from our perspective it's hard to see how that would be tasked - - -

MR WALTER: Workable.

MS CHIDGEY: That could be managed and could work in practice.

MR WALTER: And of course - - -

MR DONALDSON: Sorry. It's difficult to see how it could.

MR WALTER: Yes.

MS CHIDGEY: It's hard to see how that could work in practice, so we think that would be very problematic and potentially so unwieldly as to be really not possible to manage over time as you end up with more sentencing remarks and changing circumstances how - and having to go back to the court each time because it is very much their, the court's, remarks.

MR DONALDSON: Yes.

MR WALTER: And of course - - -

MR DONALDSON: I understand the complexity, particularly if - and we heard from the security agencies or representatives from the security agencies earlier today, and again it's perfectly logical that certain information may, for very good reasons, have to remain confidential for decades.

MS CHIDGEY: Yes.

MR DONALDSON: And if there's, you know, an annual obligation to do that, I could understand over time how that could give rise to an administrative burden anyway.

MR WALTER: And of course there's always the capacity of somebody to go back and ask for the orders to be reconsidered. So if we've got extant orders that we're operating under, if somebody has standing they can seek the review of those orders and the court can control that.

MR DONALDSON: Yes. Well the difficulty withstanding in that context would - who's going to have standing? Well the defendant would, but the defendant wanted it to be suppressed in the first place. The Commonwealth DPP is not going to do anything. It's difficult to know who else would have standing there.

MR WALTER: No, I agree. But there is a mechanism by which the orders can be looked at again, nonetheless.

MS CHIDGEY: Yes. I mean it could always be something that is raised with the Attorney-General or the department to - with that idea - - -

MR WALTER: The Attorney could have standing.

MR DONALDSON: Why haven't you disclosed more.

MS CHIDGEY: Yes. With that idea that, as much as possible, we should be supporting that principle of open justice and could then on that basis revisit it where that was raised. I think, yes, the idea of an obligation to review makes a lot of sense when - say as occurred in this matter, when something had not been put on the public record but at the point that occurs I think, yes, our concerns would be an open-ended, unbounded, ongoing requirement to keep reviewing then beyond that point.

MR DONALDSON: And your concern is not a matter of - not a concern of principle, it's an administrative burden.

MS CHIDGEY: Yes, just how that could be managed.

MR WALTER: And that's on us as a department, but it would also be on the agencies who review the material.

MR DONALDSON: Well I was going to say, - - -

MS CHIDGEY: And on the court.

MR WALTER: And on the court.

MR DONALDSON: Well the Attorney-General's Department would actually only be receiving - well, in many instances presumably would be acting on advice given to you by an agency in relation to a particular matter. And so it would be an administrative burden on departments, in many instances actually on departments as opposed to the Attorney-General's Department.

MS CHIDGEY: Us as well in that - in that I think we'd be the central managing point. So if we had an obligation, you know every year or every six months we'd have to go out and seek the advice. Sometimes it would be multiple agencies who would have a stake. Go to the Attorney, go to the court. Yes, so a collective challenge.

MR DONALDSON: All right, I understand what you say. Thank you. The only other matter that I might ask about that is, let's say there is a central repository of this material, which I think we could all understand could be of great historical significance and importance in some instances, possibly not all of it but some of it. Would that sort of information at all come within archives legislation or anything of that - or anything of that kind? I think you're rather knowledgeable about these things.

MR WALTER: Oh, am I? The *Archives Act* doesn't apply to court proceedings, so it wouldn't naturally fall within the *Archives Act* in this instance. I'll double-check that but I'm pretty sure that's the case. And so, no, the archives regime would not normally apply in this instance.

MR DONALDSON: Not apply to this. And let's say that legislature change was suggested, and I haven't given any thought to this I must say, but to suggest that this sort of information come within the archives regime, what is the practical effect of that?

MR WALTER: Yes, so the normal operation of the *Archives Act* would mean that once the - once a record that's covered by the *Archives Act* is no longer required for, you know, stamped use each day in this department, then it is transferred to the National Archives and then they are responsible for managing it under the *Archives Act*, and the normal proposition is it would then be made publicly available after 20 years, so that's the current archive period. There are longer periods for certain categories of information; so 50 years for Cabinet documents - sorry, Cabinet notebook, be very precise about that, and then there's 99 years for a couple of other smaller categories.

The issue here from a purely pragmatic perspective will be what security arrangements are in place for that material, and for certain categories of the material the archives actually make arrangements for others to keep them because they are better placed to provide secure storage for the material and that applies to a number of departments and agencies that actually retain, under the direction of the Director-General of the Archives, that material for safekeeping because the Archives is not set up to hold that classified level of material.

MR DONALDSON: That's very - - -

MR WALTER: So Sarah - sorry, Ms Chidgey has quite rightly pointed out, when a document comes into the so-called open access period, so after 20 years or 99, it won't always be released.

MR DONALDSON: No, no.

MR WALTER: There are actual limitations and that can include things like national security and foreign relations and all those sorts of things.

MR DONALDSON: Yes, I - - -

MR WALTER: So it's not an automatic.

MR DONALDSON: No, but I'm very grateful for that explanation because what it shows to me is that if we are considering this material really for its historical importance, it may be the more obvious or regime for it to be dealt with for that purpose is actually in the archives. Because the archives would have material in it that is plainly national security information and sensitive national security information I would've thought.

MR WALTER: There is a large amount of material that the archives either - that falls under the *Archives Act*, so it falls under the stewardship,

if I can call it that, of the Director-General, that includes national security content. Again for - a lot of that material is not physically held by the archives because they don't have the appropriate storage arrangements for some of that, and it actually continues to be held by departments or agencies as appropriate, but the Director-General - you know, it's dealt with under the *Archives Act* and the Director-General has to be satisfied that appropriate arrangements are in place for the care and preservation and all those things.

MR DONALDSON: Yes. Well, to perhaps avoid me having to become an expert on the Archives Act, - - -

MR WALTER: It's entertaining.

MR DONALDSON: If I think this is a good idea it may be a recommendation that the Department think about something along those lines rather than necessarily - - -

MR WALTER: So it might be one that I take on notice and I'll go away and give you some thoughts on - - -

MR DONALDSON: That would be helpful, if you wouldn't mind.

MR WALTER: On how the *Archives Act* works.

MR DONALDSON: Could you? That would be - - -

MR WALTER: Because I'll just need to - - -

MR DONALDSON: A further written submission.

MR WALTER: Absolutely, confirm that court issue. It's been a while since I've looked at that, but also what the implications are.

MR DONALDSON: Yes, would you mind doing that.

MR WALTER: I can do that.

MR DONALDSON: That would be very helpful to me. Well they are all the questions that I had. Thank you both very much for coming along today, that's been very helpful indeed. Is there anything else either of you wanted to add?

MS CHIDGEY: No, thank you.

MR DONALDSON: And again, thank you to the Department for the assistance that it's given me in many respects.

Session 3: Question and Answer

MR DONALDSON: All right, so that comes to the - that brings us to the end of the open session. I had envisaged that if there were - if there was anybody here who wished to ask me any questions, I'm quite happy to, well, listen to the questions if not answer them, or react or respond to them in any way. So is there anybody here who wished just to raise anything about the scope of the matters that are - and which I'm reviewing? Yes, there we go.

MS BASFORD CANALES: I'm probably loud enough without a mic, but I'll take it anyway.

MR DONALDSON: Could you just - sorry, what is your name?

MS BASFORD CANALES: I'm Sarah Basford Canales from The Canberra Times.

MR DONALDSON: Thanks Sarah. Could you just hold on for one moment?

MS BASFORD CANALES: No worries.

MR DONALDSON: Can you pick Sarah up with that microphone now? All right, thanks.

MS BASFORD CANALES: Good?

MR DONALDSON: Yes, Sarah?

MS BASFORD CANALES: I'm just wondering, in the scope of your inquiry whether you will be speaking with Alan Johns specifically?

MR DONALDSON: Efforts have been made to speak with Alan - for me to speak with Alan Johns. I am hoping to.

MS BASFORD CANALES: Okay. So it hasn't happened yet?

MR DONALDSON: No.

MS BASFORD CANALES: Okay. That's the only question I had.

MR DONALDSON: Thank you.

MS BYRNE: I've just got a very basic question. Do you know when you might deliver some recommendations?

MR DONALDSON: When?

MS BYRNE: Yes.

MR DONALDSON: There is a timing issue that I have, which is that a person whom I need to speak to, who is not Alan Johns but somebody else, I'm not able to speak to for at least another month, and so it won't be - it won't be within that period of time. And the other thing I should say to you is that - - -

MS BYRNE: Could we say before the end of the year?

MR DONALDSON: As a person who's come from outside the public service, sometimes when I finish writing something to when it's actually published can take a bit of time, but it would certainly - it will certainly be done by the end of this year and I would hope that it would be - I'll put Mark on the spot here, but I would hope that we would be able to do it by September.

MS BYRNE: Okay. So once you've done your recommendations, what happens then?

MR DONALDSON: So the reports that I prepare are recommendations that are sent to the Government and they respond to the recommendations. It's not to say that the Government, Executive Government has on all occasions where recommendations have been made, responded to them. But my report will be made public and if there is anybody here who would specifically like me to send them a copy of the report, please let me know and I'll do that. It will be available on my website though.

MS BYRNE: Just on that question about Alan Johns. Will you have to like talk to him on the telephone or something, because you - I mean do you have a security clearance to know who he is? Because his identity will have to remain secret forever, I would presume.

MR DONALDSON: I have a full security clearance.

MS BYRNE: So it could be in person?

MR DONALDSON: Could be.

MS BYRNE: Okay. Okay, good.

MR PENDER: This might seem a bit cheeky and you might not - you might decline to answer but it just - it strikes me that everyone agrees that this matter was unprecedented and raises concerns and various groups, including myself, have articulated the troubles associated with a fully secret trial, and yet all of the Government representatives from the intelligence agencies and from the Attorney-General's Department today didn't seem to be too troubled by what has happened. Are you surprised by that?

MR DONALDSON: Well, yes, I think that actually is a bit cheeky. I don't think that you should be - that you should proceed on the basis that the - anybody from the Government side who was involved in this process didn't think this was unprecedented at all. And so I think that everybody is alive to that and I think many people have learned - have learned things from the process. And equally I wouldn't take that from the way in which people have expressed themselves today that they think that this was a perfect process or that this happens every day or that it should be happening tomorrow. I don't think that you should assume that at all. We're done? No, sorry. Yes.

MS BASFORD CANALES: Sorry. Sorry, we're back.

MR DONALDSON: No, no, that's all right.

MS BASFORD CANALES: A few months ago you mentioned that you were considering inquiries into the use of legislation for the Witness K in the Collaery case. I'm just wondering if there's been any headway made on that.

MR DONALDSON: So what I announced at that time was that I was very eager to undertake a review in relation to s.22 because of the circumstances of the Alan Johns matter and the disquiet that had occurred. But there are broader issues with the *NSI Act* and I know that there's great deal of controversy, public controversy about it arising out of the Collaery matter and it's also relevant in the Roberts-Smith matter as well. I said then, and this is the position now, that once the - once the matters where those parts of the Act are being used presently and where there's great controversy about it are done, I will then make a decision as to whether to undertake in effect a review of the whole of the Act. So I haven't come to that - I haven't come to that decision yet.

And part of the reason that I'm not doing that now is because I think that it would be a very dangerous - well, it would be a very unwise thing to be conducting a session such as this, for instance, in the middle of something like the Collaery trial. I just don't think it would be helpful to the power that I have to exercise or to the court there.

But what I can say to you is that as soon as - and I think the Collaery matter is the matter in which these issues have become the most controversial, but once the Collaery matter is - comes to an end, then I'll be making a decision pretty quickly after that as to the best way to proceed. But then again it may be my successor who has to deal with that, depending on how long the Collaery matter goes. So that's the current position, and that will be the position until that matter is resolved.

MS BASFORD CANALES: And is that likely to be - that's with Witness K consideration as well?

MR DONALDSON: I can't hear you, sorry?

MS BASFORD CANALES: Sorry. Is that with Witness K consideration as well?

MR DONALDSON: Unless the circumstance of Witness K can be differentiated from the circumstance of Collaery. Thank you. Are we done? Thank you all very much for coming.

HEARING CLOSED