
NSI Act Issues in the Prosecution of Bernard Collaery

Submission to the Independent National
Security Legislation Monitor's Review into
the operation and effectiveness of the
*National Security Information (Criminal and
Civil Proceedings) Act 2004*

Submission from:

Members of the Collaery Defence Legal Team

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1 Introduction

This submission is in response to the Independent National Security Legislation Monitor's (INSLM) review into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act).¹

The submission addresses issues relating to the NSI Act which arose in the criminal prosecution of Mr Bernard Collaery. On 30 May 2018, Mr Collaery was charged with criminal offences under the *Intelligence Services Act 2001* (Cth) (IS Act). Those charges arose in part out of statements made by Mr Collaery to the media in 2013, in which he made allegations of secret bugging by Australia against Timor-Leste in 2004 during negotiations between the two countries over oil and gas interests in the Timor Sea. The Collaery allegations were widely reported, nationally and internationally, and raised issues of considerable public, political and media interest.

The Attorney-General took the view that the offences that Mr Collaery was charged with raised issues relating to national security. Consequently, the provisions and processes of the NSI Act were triggered.

The Commonwealth took the position of neither confirming nor denying the allegations made by Mr Collaery. For the Commonwealth to preserve that position in Mr Collaery's criminal trial, most of the trial needed to be in closed court. Under the NSI Act, for the trial court to be closed for certain evidence on the basis of national security requires a court order following a hearing. The Commonwealth pressed strongly for that position, dedicating over \$5m of legal resources to its case.²

The Collaery defence team challenged that position, and used the provisions of the NSI Act to press Mr Collaery's case for an open trial. Mr Collaery, a Canberra lawyer and former Attorney-General in the ACT, was strongly committed to seeking an open trial, allowing public disclosure of the issues, and ensuring that his charges were heard in an open court. This included leading evidence from eminent witnesses contesting the evidence of the Commonwealth on national security, and pressing the case against a closed trial. The proceedings took thousands of hours of pro bono legal time.

In the four years between the charges being laid and the discontinuation of the prosecution by Attorney-General the Hon Mark Dreyfus KC, MP on 7 July 2022, there were numerous court appearances and interlocutory proceedings, predominantly held under the NSI Act with respect to the issue of whether national security concerns provided a basis for the trial court to be closed. These included:

- 59 appearances and hearings, in the Australian Capital Territory (ACT) Magistrates Court, the ACT Supreme Court, the ACT Court of Appeal, and the High Court, around half of which were held entirely or substantially in closed Court;³
- 12 judgments from Mossop J in the ACT Supreme Court; and
- 3 from the ACT Court of Appeal.

¹ This submission is made by the following legal practitioners involved in the defence of Mr Bernard Collaery in proceedings commenced in 2018 and concluded in 2022 - Senior Counsel, Phillip Boulten SC and Dr Christopher Ward SC, Gilbert + Tobin current and former lawyers, Dr Kate Harrison, Laura Lombardo, Georgia Fennell, Marcus Thomson, and Harry Meixner; and Christopher Flynn (former partner of Gilbert + Tobin, current partner of White & Case). Mr Collaery was represented pro bono by the legal team in the proceedings brought against him. In addition to the practitioners who have contributed to this submission, Mr Collaery was represented or assisted by other counsel, including Bret Walker SC, David Jackson AM KC, Ken Archer, Rose Khalilizadeh, Luke Livingston SC, Ben Dighton and Stephen Robinson, and other lawyers and former lawyers of Gilbert + Tobin.

² Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 14 February 2023, 83 (Sarah Chidgey, Deputy Secretary, National Security and Criminal Justice Group, Attorney-General's Department).

³ Annexure A to this submission is a timeline of the court appearances and hearings in this case.

The time taken in the NSI proceedings, which had to be completed before the criminal trial could commence, meant that at the time of the discontinuance of the prosecution, although some pre-trial issues had come before the court, not only had Mr Collaery's criminal trial not yet commenced, the NSI Act proceedings to determine how much of the trial could be open had not concluded.

As a result, under the NSI Act, the secrecy obligations that were meant to be in place only until a final Court ruling on how open the trial would be, remain in place. Mr Collaery and all of the lawyers in the case remain subject to continuing obligations of secrecy on national security grounds as key points of contention between Mr Collaery and the Commonwealth remain unresolved, and will now never be tested or the subject of a final ruling before a court.

Notwithstanding the absence of a final ruling, the Collaery proceedings highlight a number of issues as to the operation and workability of the NSI Act and its impact on the preparation of a defence for trial. Understanding the circuitous course of the proceedings provides a base from which to identify those issues, and for that reason, the course of proceedings is set out in some detail below.

The issues at stake in the case, which involved important matters of considerable public interest, highlight the need to re-examine whether the NSI Act as currently framed provides an appropriate framework for the determination of the contest between open justice and public confidence in the administration of justice, and genuinely necessary secrecy to protect Australia's national security, as well as the ability of an individual defendant to sustain and prepare a defence to any charges laid against them.

2 The Collaery proceedings

2.1 Commencement of the prosecution

On 30 May 2018, Mr Collaery was issued with a summons that required him to appear in the Magistrates Court of the Australian Capital Territory (**ACT**) on 25 July 2018 to respond to the following charges:

- Contrary to section 11.5 of the Criminal Code (Cth) and section 39 of the IS Act, between about 1 December 2012 and 31 May 2013 at Canberra in the ACT and elsewhere, Mr Collaery conspired with a person known as Witness K to communicate information or matter to the Government of Timor-Leste, that was prepared by or on behalf of ASIS in connection with its functions or related to the performance by ASIS of its functions, which information or matter had come to the knowledge of Witness K by reason of his being, or having been, a staff member of ASIS; and
- Contrary to section 39 of the IS Act, on 3 December 2013, Mr Collaery communicated information to named media and others that was prepared by or on behalf of ASIS in connection with its functions or related to the performance by ASIS of its functions.

Section 39 of the IS Act provides that it is an offence to communicate information or matter that was acquired or prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions, where the information or matter came into the knowledge or possession of the person by reason of, amongst other ways, having entered into a contract, agreement or arrangement with ASIS. The penalty for contravention of this provision is currently imprisonment for 10 years.

At the time that the charges were laid, the Commonwealth Director of Public Prosecutions (**CDPP**) gave a notice under section 6 of the NSI Act to Mr Collaery, his legal representatives and the Court that the NSI Act applied to any proceedings relating to those charges. From that point, the obligations imposed by the NSI Act applied.

On 12 October 2018, Mr Collaery made an application under section 21 of the NSI Act which allows a defendant (or others) to apply to the Court to hold a hearing to consider issues relating to the disclosure, protection, storage and handling or destruction of national security information in the proceeding. That process envisages the making of agreed arrangements under section 22 of the NSI Act⁴, or the issuing of a notice notifying of expected disclosures of national security information in the proceedings under section 24.

On 6 November 2018,⁵ the CDPP gave a notice to Mr Collaery, his legal representatives and the Court under section 24 of the NSI Act, that it anticipated the disclosure of national security information in the proceedings.

A further CDPP notice was given under section 24(1) on 21 August 2019, that the prosecutor believed he would be disclosing national security information in the proceeding, being “information contained in the documents in the prosecution Brief of Evidence in the proceedings (the Classified Prosecution Brief)”.

The Classified Prosecution Brief had been prepared in a form which applied:

- yellow highlighting - to the classified information forming part of the brief, as well as
- solid black redactions - of classified information which the prosecution was not intending to rely on.

The CDPP’s notices provided the basis on which the then Attorney-General, the Hon Christian Porter, on 19 December 2018, issued a certificate pursuant to section 26 of the NSI Act (the **2018 Certificate**), referring to the notices given by the CDPP under sections 6(2) and 24(1) of the NSI Act in proceedings brought against Mr Collaery and Witness K. The 2018 Certificate was amended on 15 January 2019, 26 February 2019, 13 March 2019 and 20 May 2019. The 2018 Certificate was subsequently revoked with respect to the Collaery proceedings (but not with respect to the proceeding against Witness K) and replaced by a certificate issued by Mr Porter on 18 September 2019, which was amended on 20 November 2019 and 22 July 2021. References in this submission to the Certificate are to the final version of the Certificate as amended, unless otherwise noted.

The Certificate was directed to the prosecutor (the CDPP), the defendant, and the defendant’s legal representatives. The Certificate noted the Attorney-General’s expectation that in the course of the proceeding national security information (defined as “Sensitive Information”) would be disclosed, and stated that the Attorney-General considered that the disclosure of the Sensitive Information “is likely to prejudice national security” unless controlled and protected in accordance with the Certificate.

The Certificate required that whether in the proceedings or otherwise, Sensitive Information could not be disclosed except in Permitted Circumstances, which were set out in Annexures to the Certificate. In summary, the “Sensitive Information” could not be disclosed to anyone other than “relevant persons”, including the parties and their lawyers, witnesses for the prosecution holding particular security clearances, and empanelled jurors.

Notably there were four categories of ‘Relevant Persons’ who were entitled to see the Sensitive Information – the judge’s associate and court officials, court transcribers, members of the AFP, and other persons approved by the Commonwealth – who were included only if they had entered into an arrangement with ASIS for the purposes of Part 6 of the IS Act. Those requirements were

⁴ Section 22 of the NSI Act provides a mechanism by which the Attorney-General, prosecutor and defendant can agree an arrangement about the disclosure, protection, storage, handling, or destruction of national security information in the proceeding. Any agreement may be given effect by a Court order. If there is no agreement, any party may apply to the Court for an order to be made pursuant to s19(1A) of the NSI Act.

⁵ See *Dean v Collaery (No 1)*; *Dean v Witness K (a pseudonym) (No 1)* [2018] ACTMC 29.

subsequently relaxed for the associate, the judge, the registrar and court officials, and replaced with a requirement that a security briefing had occurred.

The Certificate also set out restrictions as to how documents were to be filed and stored at the Court, the approval of transcription equipment for closed court, the redaction and release of court transcripts, and the use of electronic devices in court.

The Certificate provided that Mr Collaery was not permitted to store or handle documents or any equipment containing or providing access to Sensitive Information, unless in the presence of a member of his legal team.

The scope and terms of the Certificate, in relation to what could not be disclosed, are important. The Sensitive Information, as set out in the 2019 Certificate, consisted of:

- (a) information highlighted in yellow in the Classified Prosecution Brief;
- (b) information which might directly or indirectly reveal information highlighted in yellow in the Classified Prosecution Brief; and
- (c) information that tends to confirm or deny information highlighted in yellow in the Classified Prosecution Brief.

That description of the Sensitive Information, which was at the heart of the NSI Act proceedings to determine what could or could not be said in an open courtroom, was both broad and lacking in certainty. It went well beyond the actual information covered by yellow highlights in the Classified Prosecution Brief, extending not only to information that “directly or indirectly revealed”, but also to information that “tended” to confirm or deny the Sensitive Information.

The brief was served on 21 December 2018, two days after the Attorney-General issued the 2018 Certificate.

In addition to those parts of the brief that were highlighted in yellow and caught by the Certificate, substantial parts of some documents in the brief were entirely redacted and could not be viewed by Mr Collaery or his legal team.

With the section 6 and section 24 notices and the Certificate issued, section 27 of the NSI Act then required the Court to hold a hearing to decide whether to make an order for the purposes of section 31 preventing disclosure of the information identified in the Certificate.⁶

The outcome of that hearing would determine whether any or all of the Sensitive Information could be disclosed in Mr Collaery’s criminal trial in open court, and what information was required to be kept secret, and dealt with in closed court.⁷

Accordingly, the issuing of the 2018 Certificate set in motion the four-year process of court hearings under section 27(3) of the NSI Act to determine the extent to which Mr Collaery’s criminal trial would be held in public, and the parts which would have to be held in closed court.

⁶ NSI Act section 27(3).

⁷ In the Collaery proceedings, information and material that the Commonwealth did not want disclosed publicly was variously referred to, marked or described as ‘secret’ or ‘top secret’ (on documents), ‘Sensitive Information’ in the Certificate, ‘Confidential’ in relation to affidavits, or ‘Classified’ in some section 22 orders. Section 22 orders also normally list the information to which the orders apply. In this submission, we use the term ‘confidential’ to refer to any documents or information the disclosure of which was opposed by the Attorney-General. The term ‘open’ is used to refer to documents or information that can be disclosed publicly, and the term ‘court-only’ is used to refer to information that the Commonwealth wanted disclosed only to the Court.

In August 2019, Mr Collaery's exercised his right to seek a jury trial and the proceedings were committed by the ACT Magistrates Court to the ACT Supreme Court. On 12 September 2019, the CDPP presented an indictment in the Supreme Court on the charges set out above.

When Attorney-General Mark Dreyfus discontinued the prosecution of Mr Collaery under section 71 of the *Judiciary Act 1903* (Cth) on 7 July 2022,⁸ the criminal trial of Mr Collaery had yet to commence.

2.2 Hearing in the Supreme Court of the ACT

The section 27 hearing to decide whether the Court would make a section 31 order preventing disclosure of the information in the Certificate was initially set for December 2019. However, on 27 November 2019, on the then Attorney-General's application, the hearing was vacated to allow the Attorney-General further time to put on additional evidence.⁹ The hearing was relisted in April 2020, with those dates also later vacated due to the COVID-19 outbreak.¹⁰

Ultimately, the hearing proceeded in the ACT Supreme Court over five days from 25 to 29 May 2020. In total, the parties filed affidavits from seventeen witnesses, nine of whom gave evidence.

In coming to a decision under section 31(7) of the NSI Act, Mossop J was required to consider:¹¹

- a) whether, having regard to the Certificate, there would be a risk of prejudice to national security if the information were disclosed in contravention of the Certificate;
- b) whether any order limiting the disclosure of information would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his defence; and
- c) any other matter the Court considered relevant.

Section 31(8) of the NSI Act requires that in making its decision, the Court must give the greatest weight to the risk of prejudice to national security.

Submissions made by the parties

Relevantly, at the section 27 hearing, Mr Collaery did not argue that all of the information subject to the Certificate, or all of the information in the Brief of Evidence, should be public.

Rather he argued that only certain specific information covered by the Certificate and relevant to his prosecution (specifically, six matters which came to be referred to as the "**Identified Matters**") should be able to be publicly disclosed during his trial.¹² The Attorney-General argued that none of the information the subject of the Certificate, including the Identified Matters, should be disclosed to the public.

The dispute before Mossop J about the scope of secrecy and the risk of prejudice to national security and whether any of the information covered by the Certificate was publicly disclosable, was made more problematic by the fact that there had been extensive media coverage of the allegations made by Mr Collaery. Indeed, Mr Collaery's making of those allegations to the media

⁸ See Joint Media Release of Attorney-General Hon Mark Dreyfus QC MP and Minister for Foreign Affairs Senator the Hon Penny Wong, available at <<https://ministers.ag.gov.au/media-centre/mr-bernard-collaery-07-07-2022>>. See also Attorney-General Hon Mark Dreyfus QC MP, Bernard Collaery Media Conference, 7 July 2022, available at <<https://markdreyfus.com/media/transcripts/bernard-collaery-media-conference-7-july-2022-mark-dreyfus-qc-mp/>>.

⁹ *R v Collaery (No 3)* [2019] ACTSC 332.

¹⁰ *R v Collaery (No 5)* [2020] ACTSC 68.

¹¹ NSI Act section 31(7).

¹² See *R v Collaery (No 7)* [2020] ACTSC 165 at [46], *R v Collaery (No 10)* [2021] ACTSC 311 at [8] and *Collaery v The Queen* (No 2) [2021] ACTCA 28 Judgment Summary.

was in part the basis for his criminal charges. The implication of the prosecution of Mr Collaery was also reflected by Mossop J in *R v Collaery (No 7)*:¹³

The substance of the application made by the Attorney-General is that orders should be made which permit the evidence led by the Crown that establishes what part of the matters communicated by Mr Collaery were true, to be confined to those immediately involved in the case and not otherwise disclosed. By this mechanism the Attorney-General hopes to maintain a position of 'neither confirm nor deny' (NCND) in relation to the subject matter of the [redacted]. The Attorney-General contends that to do otherwise would create a risk of prejudice to "national security", as that expression is defined in s 8 of the NSI Act.

The Attorney-General's case in support of secrecy orders, as noted above, was based on a policy of "neither confirming nor denying" reports related to national security matters. The Commonwealth maintained that any evidence as to truth or falsity of any part of the information communicated had to be heard in closed court.

The CDPP adopted an approach consistent with the Attorney-General.

The Attorney-General's evidence

In support of his position in the section 31 hearing, the Attorney-General relied on nine "open" affidavits (no security classification) and seven "confidential" affidavits (disclosed only to the parties and the Court, in accordance with secrecy orders).

The Attorney-General relied upon affidavits from the following witnesses:

- Paul Symon, the Director-General of ASIS (four affidavits);
- Richard Maude, former Deputy Secretary, Indo-Pacific Group, of the Department of Foreign Affairs and Trade (**DFAT**) (four affidavits);
- Heather Cook, Deputy Director-General of Security of the Australian Security Intelligence Organisation (**ASIO**);
- Frances Adamson, former Secretary of DFAT (two affidavits);
- Michael Pezzullo, former Secretary of the Department of Home Affairs (two affidavits);
- Michael Burgess, Director-General of Security of ASIO; and
- Nicholas Warner, Director-General of the Office of National Intelligence (**ONI**) (two affidavits).

Mr Collaery's legal representatives cross-examined each of the Commonwealth's witnesses, except Ms Cook.

The Attorney-General also made an application for protective orders restricting the disclosure of seven "court-only" affidavits, to be read by the Court alone, and which were not to be disclosed to Mr Collaery, his lawyers, or the public. The Attorney-General prepared five of those affidavits after Mr Collaery had filed his evidence.

Mr Collaery opposed the Attorney-General's application and reliance on the court-only material on a number of grounds including that it substantially undermined fundamental notions of procedural fairness, it meant Mr Collaery could not ascertain the knowledge required to challenge

¹³ At [10].

the Attorney-General's case, and there was no basis to doubt the commitment and ability of Mr Collaery and his lawyers to comply with protective measures.

Mr Collaery's evidence

The defence legal team for Mr Collaery, unusually, led evidence from eminent witnesses on the national security issues in the case in response to that of the Commonwealth, countering the Commonwealth's arguments about the risk of prejudice to national security.

Mr Collaery filed the following affidavits:

- His Excellency President Jose Ramos-Horta, current President and former Prime Minister of Timor-Leste (two affidavits);
- His Excellency Kay Rala Xanana Gusmao, former President and Prime Minister of Timor-Leste (two affidavits);
- Professor the Hon Gareth Evans AC KC, former Attorney-General and Minister for Foreign Affairs under the Hawke and Keating governments (two affidavits);
- Admiral Christopher Barrie AC RAN (Ret'd), former Chief of the Defence Force (two affidavits);
- John Philip McCarthy AO, former Australian diplomat, Ambassador and High Commissioner (two affidavits);
- Hon Anthony Whealy SC, barrister and former Judge of the Supreme Court and Court of Appeal. Mr Whealy SC had dealt with national security issues and the NSI Act as a judge in criminal proceedings, including presiding over the trial of Faheem Khalid Lodhi, the first person to be convicted of preparing for a terrorist act;
- Kim Helene McGrath, author and expert government and policy advisor to the Timor-Leste government;
- Hugh Bennett, solicitor employed by the Australian Broadcasting Corporation; and
- two solicitor affidavits, one of which presented a sizeable compilation of approximately 350 publicly available media reports, publications and International Court of Justice records relating to events alleged by Mr Collaery.

An initial difficulty for the defence team was how to obtain evidence from witnesses going to the issue of the possible prejudice to national security of disclosure of certain information, when the witnesses could not actually be given such information.

To address this issue, the three witnesses with experience and past senior positions relating to Australia's national security (Professor Evans, Admiral (Ret'd) Barrie and Mr McCarthy), were asked by the defence to provide their views about the potential risk of prejudice to national security if certain information was disclosed, using a set of "reported facts", based on the reported allegations in the extensive media coverage. Those witnesses were asked to provide their views about the risk of prejudice to national security from the disclosure of those reported facts, assuming first that they were true, and secondly, that they were false.

After providing affidavits on that basis, at the Attorney-General's suggestion, these three witnesses were given access to the Attorney-General's confidential evidence, pursuant to section 22 orders preventing disclosure of that evidence. Each witness prepared a second affidavit in which they maintained their original position after having reviewed the confidential material.

The evidence of the two witnesses from Timor-Leste, Mr Ramos-Horta and Mr Xanana Gusmao, was also based on a set of allegations or “reported facts” based on media reporting, which they were asked to assume were, in the alternative, true or false. The Attorney-General also subsequently proposed a process whereby they were asked to prepare additional affidavits responding to specific questions prepared by the lawyers for the Attorney-General. Each witness prepared a second affidavit responding to those specific questions.

The other witnesses (excluding the solicitors) were not provided with access to any confidential material, or asked to provide evidence on the basis of assumptions.

Professor Evans, Mr McCarthy and Admiral Barrie all gave evidence and were cross-examined by counsel for the Attorney-General during the hearing. None of the other defence witnesses appeared or were cross-examined. As the hearing took place during the COVID-19 pandemic, there were logistical difficulties for witnesses located overseas to attend.

Mossop J’s decision

Section 31 of the NSI Act permitted Mossop J to make one of the following orders:

- (a) an order preventing disclosure of the information except in permitted circumstances;
- (b) an order allowing disclosure of the information in the proceeding; or
- (c) an order preventing disclosure of the information except in permitted circumstances but allowing disclosure of the copy of a document containing the information with the information deleted, and a further option to also permit disclosure of a summary of the information or a statement of facts.

In June 2020, Mossop J found in favour of the Attorney-General’s application for non-disclosure of all of the information covered by the Certificate, and made an order preventing the public disclosure of that information.

The decision meant that the narrow set of “Identified Matters”, which comprised the information Mr Collaery had contended should be disclosed in the proceedings, could not be the subject of evidence in open court. Under Mossop J’s ruling, none of the identified Matters could be publicly disclosed.

In His Honour’s view:

...the nature of the prejudice asserted on behalf of the Attorney-General that would arise from the disclosure of information in the proceedings involves nothing catastrophic. It involves the public disclosure of material which creates a risk of incremental prejudice [redacted]. When and how that prejudice will occur and how grave it will be is impossible to identify with certainty. Having regard to [redacted] it may well be the case that even after any prejudice has occurred it will not be possible to determine whether the cause of that prejudice is the disclosure.¹⁴

In considering principles related to open justice and a defendant’s right to receive a fair trial, His Honour considered the fact that some protective orders would still need to be made for other confidential information and that:

¹⁴ *R v Collaery (No 7)* [2020] ACTSC 165 at [95]. See also [140].

*...the additional restrictions that would be imposed as a result of the orders contended for by the Attorney-General would not be such as to render the defendant's trial unfair or to create a significant risk of the jury being unfairly prejudiced against the defendant.*¹⁵

His Honour concluded that the risk of prejudice to national security was a “real risk” entitled to significant weight.¹⁶

As a result, disclosure of the confidential information was only permitted to the defendant, the lawyers acting in the case, and others specifically approved to receive access for the purpose of the proceedings.

His Honour held that he did not need to consider the Attorney-General's application to rely on the court-only affidavits or read those affidavits, because he had found in favour of the Attorney-General without needing to look at any proposed court-only material.¹⁷

Parts of Mossop J's section 31 judgment were redacted and will remain unpublished.

2.3 Mr Collaery's appeal to the ACT Court of Appeal

Mr Collaery appealed Mossop J's decision to the ACT Court of Appeal, before a bench comprising Chief Justice Murrell and Justices Burns and Wigney. The Court of Appeal had to consider the risk of prejudice to national security if the Identified Matters were disclosed in a public trial, the prejudice to Mr Collaery's right to a fair trial if the information was not disclosed and what weight should be given to principles of the proper administration of justice.

The Appeal was conducted by way of rehearing,¹⁸ with the Court of Appeal applying the ‘correctness’ standard. In doing so, the Court adopted the view that the task for the Court under section 31(1) was not discretionary, but had a single correct outcome, despite elements of section 31 that might suggest that judges might have a discretion as to the weight they accorded different factors and properly reach different outcomes.

The appeal was originally listed for a two-day hearing commencing on 15 February 2021. However, because of a delay by the representatives of the Commonwealth in approving Mr Bret Walker SC (who was briefed for Mr Collaery in the appeal) as a legal representative, which itself was the subject of a decision adverse to the Commonwealth, the February dates were vacated.¹⁹ The appeal was ultimately heard on 17 and 18 May 2021.

On 6 October 2021, the Court of Appeal unanimously allowed Mr Collaery's appeal.²⁰

The Court of Appeal doubted that a significant risk of prejudice to national security would materialise from public disclosure of the Identified Matters. On the other hand, the Court held there was a very real risk of damage to public confidence in the administration of justice if the Identified Matters could not be publicly disclosed. The Court emphasised that the open hearings of criminal trials are important because they deter political prosecutions and allow the public to scrutinise the actions of prosecutors and assess the conduct of an accused person.

¹⁵ *R v Collaery (No 7)* [2020] ACTSC 165 at [139].

¹⁶ *R v Collaery (No 7)* [2020] ACTSC 165 at [150].

¹⁷ *R v Collaery (No 7)* [2020] ACTSC 165.

¹⁸ *Collaery v The Queen (No 2)* [2021] ACTCA 28. The decision remains unpublished but is referred to in *R v Collaery (No 10)* [2021] ACTSC 311 at [3].

¹⁹ *Collaery v The Queen* [2021] ACTA 1 (9 February 2021)

²⁰ *Collaery v The Queen (No 2)* [2021] ACTCA 28 (not yet published).

The Court of Appeal, having allowed the appeal, ordered that the matter be remitted to Mossop J to determine the admissibility of the court-only material and, if it was admissible, the effect of that material on the section 31 order. The Judgment Summary published by the Court added:²¹

Subject to any impact that these affidavits may have, there may be public disclosure of information relating to the truth of the Identified Matters.

The Court of Appeal ordered that, subject to Mossop J's consideration of the admissibility and effect of the court-only material, the order made by Mossop J should be set aside, and an order made limited to protecting from disclosure the yellow highlighted parts of the brief of evidence that Mr Collaery conceded should not be disclosed.²² The effect of this order would have been to allow the public disclosure of the six Identified Matters that Mr Collaery had argued should be disclosed to the public in his criminal trial.

For the reasons set out below, the Court of Appeal's judgment has not been published. At the time of preparing this submission, only the Court of Appeal's orders and a Judgment Summary prepared by the Court of Appeal are publicly available.²³

2.4 Remittal to the Supreme Court of the ACT

Following the Court of Appeal's remittal to the Supreme Court of the ACT, further issues arose before the remittal hearing, including:

- whether the Attorney-General should be permitted to rely on court-only evidence not disclosed to Mr Collaery or his legal team;
- if so, whether the Attorney-General should be permitted to update the court-only evidence it had previously filed for the first hearing; and
- the Attorney-General's proposal to re-classify and allow access to some parts of the affidavits they had prepared as court-only affidavits.

Updates to evidence

The Attorney-General asked the Court to allow some updating of the Court-only affidavit evidence it had previously filed, arguing that the Court of Appeal's order referred to a class of 'court-only' material rather than the specific material previously filed. The Attorney-General also relied on the fact that some of the deponents were no longer Commonwealth officers, and that it was desirable for the court to have up-to-date information before it decided what orders should be made.

The Collaery defence team opposed the Attorney-General's proposal, on the basis that the Court of Appeal's order was clear. The defence also noted that the Attorney-General had submitted before the Court of Appeal that if the appeal was upheld, the appropriate order would be to remit the matter to consider the original court-only affidavits, and at no point in the appeal proceeding had the Attorney-General foreshadowed any proposal to rely on new court-only evidence even though at the time of the appeal one of the deponents had already left their position.

The defence also argued that if the Attorney-General was permitted to update the court-only evidence at that late stage, there would be no reason why the Attorney-General could not also make applications to also update the confidential and open evidence, the inevitable consequence of which would be that new evidence could be filed at each stage of the proceeding, requiring an opportunity to respond, resulting in further delays, and leading to the possibility of further appeals.

²¹ Judgment Summary, *Collaery v The Queen (No 2)* [2021] ACTCA 28.

²² Orders in *Collaery v The Queen (No 2)* [2021] ACTCA 28; see *R v Collaery (No 10)* [2021] ACTSC 311 at [10].

²³ The Judgment Summary can be accessed at https://www.courts.act.gov.au/data/assets/pdf_file/0004/1870627/Collaery-v-The-Queen-Judgment-Summary.pdf

The defence suggested that the Attorney-General's application was an attempt to re-open the matter and re-frame the Attorney-General's case with the benefit of hindsight and benefit of the decisions by the primary judge and Court of Appeal.

On 7 December 2021, Mossop J ruled that despite the desirability of updating evidence to account for changes in the national security environment, the terms of the Court of Appeal's order were such that His Honour could only have regard to the court-only affidavits which already existed.²⁴

Court-only evidence

Mr Collaery also maintained his objection to the Court admitting and relying on any court-only evidence.

The defence argued that no evidence should be received by the court which was not disclosed to Mr Collaery and his legal team and that to allow otherwise would be to undermine fundamental notions of procedural fairness and individual rights. The defence position was that admitting court-only evidence would create a category of evidence which by implication had more weight than other evidence, that was incapable of challenge or contradiction by Mr Collaery, which would deny him procedural fairness as he would be unable to test or respond to the evidence.

The defence also argued there was no need for court-only evidence to be withheld from the defence given the strictures of compliance with protective measures already in place, and there was no evidence of harm to national security from disclosure to Mr Collaery and his lawyers.

Special Counsel

In light of its request that the Court-only evidence not be provided to the defence team, the Attorney-General had also asked the Court to appoint a special counsel, who would have access to the court-only evidence and who could cross-examine witnesses, to represent Mr Collaery's interests.

Mr Collaery objected to the proposed appointment of a special counsel. The defence argued that the procedural and substantive unfairness to him and his legal team not seeing the court-only evidence could not be overcome by the appointment of a special counsel. The defence also argued that there was no power under the NSI Act to appoint a special counsel in such circumstances. The defence also objected to the procedures the Attorney-General proposed with respect to how the special counsel would engage with him, including the restraint on communications after the special counsel had viewed the court-only material.

On 11 March 2022, Mossop J ruled, in *R v Collaery (No 11)* to allow the Attorney-General to rely on court-only evidence that would not be disclosed to Mr Collaery or his legal team.²⁵

Notwithstanding Mr Collaery's opposition, Mossop J also ordered a court-appointed 'special counsel' to represent his interests when the court was dealing with the court-only evidence.

That order was made pursuant to the Court's inherent powers and/or section 19(1A) of the NSI Act, given the absence of any express provision in the NSI Act providing for the appointment of a special counsel in a section 27 hearing in criminal proceedings.

Consequently, Dr James Renwick CSC SC was appointed Special Counsel on 13 April 2022 and Ms Talia Epstein of counsel was appointed Special Counsel on 18 May 2022, effective upon Ms Epstein meeting security requirements.

²⁴ *R v Collaery (No 10)* [2021] ACTSC 311 at [27]-[28].

²⁵ *R v Collaery (No 11)* [2022] ACTSC 40. The option of providing the evidence to the defendant's legal team but not the defendant was not canvassed as the legal team indicated that would not be acceptable.

Dr Renwick and Ms Epstein met with Mr Collaery's defence team to receive instructions prior to inspecting the Court-only material. The Special Counsel were not able to receive further instructions from Mr Collaery once they had inspected the court-only material, without the prior agreement of the Attorney-General or further order of the Court.

'Drop-down' evidence

On 3 March 2022, prior to the decision with respect to the admissibility of court-only evidence, the Attorney-General had provided the court-only affidavits to the Court for inspection on a read and return basis.

However the Attorney-General also identified portions from five of the court-only affidavits that it would seek to rely on as confidential evidence (that is, disclosable to the parties only) subject to section 22 orders, if court-only evidence was not admissible.²⁶ In *R v Collaery (No 11)*, Mossop J determined that these portions of the court-only material should be disclosed to Mr Collaery.²⁷ Section 22 orders were subsequently agreed between the parties so that these portions, referred to as the 'drop down' evidence, were provided to Mr Collaery and his defence team.

The defence team sought and obtained approval to give access to that material to its three national security witnesses, Professor Evans, Admiral (Ret'd) Barrie, and Mr McCarthy, to enable them to provide evidence in response.

Third confidential affidavits from each of Professor Evans, Admiral (Ret'd) Barrie and Mr McCarthy in response to the 'drop-down' formerly Court-only material, were filed in May 2022.

Mr Collaery's response to the court-only evidence

The defence team also considered that Professor Evans, Admiral (Ret'd) Barrie and Mr McCarthy should be given access to the court-only evidence, and have an opportunity to respond to it. All three individuals had held high level security clearances in the past.

Although the defence team's request to the Attorney-General to provide Professor Evans, Admiral (Ret'd) Barrie and Mr McCarthy with access to the court-only affidavits was denied, in addition to the evidence they were giving on the 'drop-down material' they were permitted to read, the defence team asked those witnesses to provide their opinion on matters which the defence team speculated were likely to be the topics and views canvassed in the court-only evidence. Mr Collaery's defence team provided Professor Evans, Admiral (Ret'd) Barrie and Mr McCarthy with a list of confidential assumptions about the possible contents of the court-only affidavits, based on that speculation.

Professor Evans, Admiral (Ret'd) Barrie and Mr McCarthy set out their views on those assumptions in the third confidential affidavits referred to above. The inherent limitations and risks of taking this approach, effectively guessing as to the content of the court-only evidence, are obvious.

During the same period, Mr Collaery foreshadowed to the Court that he intended to provide additional evidence to deal with the 'spectre' of closed court evidence. The Court ordered Mr Collaery to notify the Attorney-General and CDPP of any other witnesses from whom he intended to file evidence and describe the nature of their evidence.

On 31 May 2022, Mr Collaery filed additional evidence in reply to the Court-only evidence, based on speculation as to its contents, from both Mr Ramos-Horta, then the newly-elected President of

²⁶ *R v Collaery (No 11)* [2022] ACTSC 40 at [12].

²⁷ *R v Collaery (No 11)* [2022] ACTSC 40 at [78].

Timor-Leste, and Mr Xanana Gusmao, the former President of Timor-Leste. That evidence was in issue at the time the prosecution was discontinued.

The remittal hearing relating to the court-only evidence, with the involvement of Special Counsel, was set down for a three-day hearing from 29 to 31 August 2022. In accordance with Mossop J's Orders, the Special Counsel could, in the absence of Mr Collaery, make submissions to the Court and cross-examine witnesses if permitted.

2.5 Public disclosure of the Court of Appeal's written reasons

After the Court of Appeal handed down its decision in favour of Mr Collaery in relation to the section 27 hearing, the Attorney-General requested that certain redactions be applied to the judgment before its public release on the basis that the judgment revealed information the subject of the Certificate.

The redactions the Attorney-General sought to the judgment were the subject of a hearing before her Honour Chief Justice Murrell sitting as the Court of Appeal on 2 November 2021, at which the Attorney-General went through the parts of the judgment they considered should be varied or redacted because they revealed information the subject of the Certificate.

On 5 November 2021, Murrell CJ decided to vary the Court of Appeal decision in part, but to allow publication in the Court of Appeal's written reasons of some of the material that the Attorney-General had sought to be redacted.²⁸

The Court placed importance on the administration of justice and public access to core parts of the Court's reasoning. Her Honour had proceeded on the basis that the Certificate continued to protect all matters identified within it until such time as the remittal process was concluded.

The Attorney-General on 3 December 2021 sought special leave from the High Court to appeal Murrell CJ's decision not to apply all of the redactions sought by the Attorney-General.

At the conclusion of the special leave application hearing on 13 April 2022, with the parties' consent, the High Court decided to stand the matter out of the list of applications for special leave pending the determination by Mossop J in the remitted proceeding of a final order under section 31(4) of the NSI Act. The High Court indicated at that time that, if the matter was not so stood out of the list, special leave would have been refused.²⁹

On 23 September 2022, following the discontinuation of the prosecution, the Attorney-General withdrew its application for special leave to appeal to the High Court, without giving any reasons for doing so, and re-agitated the application for redactions before her Honour Chief Justice McCallum sitting as the ACT Court of Appeal.

The decision of McCallum CJ on the issue of whether additional portions of the Court of Appeal judgment should be varied or redacted, beyond those proposed by Murrell CJ in November 2021, remains reserved as at the date of this submission.

2.6 Access to information and witnesses relevant to criminal defence

At the time that the prosecution came to an end, three other interlocutory matters remained outstanding in these proceedings.

In 2021, Mr Collaery had issued subpoenas to ASIS, ASIO, the ONI, the Department of Prime Minister and Cabinet, and DFAT, requiring the production of documents that Mr Collaery

²⁸ *Collaery v The Queen (No 3)* [2021] ACTCA 34.

²⁹ *Attorney-General of the Commonwealth v Collaery* [2022] HCA Trans 066.

contended were relevant to his defence of the criminal charges for which he was being prosecuted. Those documents related to aspects of ASIS and the IS Act.

Those agencies and departments applied to have the subpoenas set aside on the basis that Mr Collaery had no legitimate forensic purpose (**LFP**) for seeking the documents and that the documents were protected by public interest immunity (**PII**).

On 26 and 27 April 2022, Mossop J heard applications to set aside the subpoenas based on the LFP claim, largely in closed Court. On 16 May 2022, Mossop J made a ruling setting aside the subpoenas.³⁰ Mossop J held that section 39(1)(a) of the IS Act requires the Crown to prove that the information or matter communicated was prepared by or on behalf of ASIS in connection with its functions or related to the performance by ASIS of its functions, but did not require the Crown to prove “*compliance with every provision of the IS Act relevant to the activity of ASIS which gives rise to the information or matter disclosed.*”³¹

On 23 May 2022, the defence filed an application seeking leave to appeal Mossop J’s decision with respect to the subpoenas to the Court of Appeal. That application was listed for hearing in the Court of Appeal on 25 July 2022.

The defence also contested not having access to certain portions of the Brief of Evidence which had been redacted. In response, the Attorney-General claimed PII with respect to that material.

A hearing was listed before Mossop J for 8 July 2022 on the following matters:

- PII claims with respect to access to certain redacted parts of the Brief of Evidence and ASIO subpoena material; and
- an application by ASIO to set aside a further subpoena to obtain evidence as to whether search warrants executed by ASIO at Mr Collaery’s home and at Witness K’s home were properly issued and executed on the basis that it lacked a legitimate forensic purpose and was oppressive.

Finally, at the time that the prosecution was discontinued, the defence legal team were engaging with potential witnesses for the criminal trial.

The same problem that arose with witnesses for the section 31 hearing also arose in relation to witnesses for the criminal trial, namely that as a result of the restrictions imposed by the Certificate, the legal team was unable to provide witnesses with information about matters relating to the charges. While workarounds using assumptions had been adopted for the witnesses in the section 31 hearing, the criminal trial was to include witnesses of fact. The NSI Act also required advance notice under section 24 of an expectation that a witness would reveal national security information in their evidence.

The capacity to engage with witnesses was further exacerbated by the fact that some potential witnesses were located overseas.

At the time the prosecution was discontinued, the defence team was engaging with the Commonwealth as to how and where communications and meetings with such witnesses could take place in a secure yet privileged environment. This issue was not resolved when the case ended.

³⁰ *R v Collaery (No 12)* [2022] ACTSC 108.

³¹ *R v Collaery (No 12)* [2022] ACTSC 108 at [81].

2.7 Discontinuance of the proceedings

On 7 July 2022, Attorney-General Mark Dreyfus discontinued the prosecution of Mr Collaery under section 71 of the *Judiciary Act 1903* (Cth).

At the time the prosecution was discontinued:

- there were applications listed before Mossop J for the next day, 8 July 2022, with respect to public interest immunity issues regarding the redactions to the Brief of Evidence and ASIO subpoena material, and an application to set aside a further subpoena to ASIO on the basis that it lacked a legitimate forensic purpose and was oppressive;
- there was a directions hearing scheduled for 8 July 2022 with respect to the court-only evidence and the hearing with the Special Counsel;
- the section 31 hearing on remittal before Mossop J had not been held, but was set down for 29 to 31 August 2022;
- there was an appeal filed and listed for hearing in the Court of Appeal on 25 July 2022 with respect to subpoenas, including issues relating to legitimate forensic purpose;
- the criminal trial had been set down for 24 October 2022 with an estimate of 4 to 5 weeks; and
- the High Court had stood down any decision on special leave to appeal on the publication of the Court of Appeal's judgment pending the outcome of the remittal.

The ending of the criminal prosecution rendered moot the determination of outstanding issues regarding the legitimate forensic purpose of the subpoenas, the public interest immunity claims of the agencies, and the consideration of the further court-only evidence by Mossop J to determine on remittal whether orders should be made to prevent the disclosure of the "Identified Matters".

An inevitable outcome from the discontinuation was that no final decision was ever made, or will ever be made, by any court, as to whether there is a proper legal basis on which the Identified Matters which Mr Collaery wanted disclosed at his trial should remain secret.

Consequently, Mr Collaery and his legal representatives today remain bound by secrecy restrictions with respect to all of the confidential material in the case – by the Certificate, the section 22 orders, the NSI Act and the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth) (the **NSI Regulation**). The Identified Matters cannot be disclosed in any context, despite the Court of Appeal's view that such disclosure could be made.

Finally, as noted above, McCallum CJ remains reserved on the scope of redactions to be applied to the Court of Appeal's judgment from 2021. That decision is unaffected by the discontinuation of the prosecution.

Issues raised in the Collaery proceedings

This account of the Collaery proceedings has been set out in some detail, to demonstrate a number of the problems in the current NSI Act, and the way the Act operated in those proceedings. The issues which arose included:

- the time and legal resources taken up by the NSI Act proceedings (and the impact on criminal trial preparation);
- difficulties having a legal representative approved by the Commonwealth;

- difficulties obtaining evidence from witnesses, who could not be informed about certain matters;
- difficulties finding witnesses who could address national security concerns with the necessary expertise;
- issues in relation to the section 31 test, applied differently by the primary judge and the Court of Appeal;
- the use of court-only evidence;
- the appointment of a special counsel against the wishes of the defendant and the limited ability of the defendant to liaise with and instruct that special counsel;
- difficulties engaging with witnesses for both the section 31 hearing and the criminal trial; and
- practical difficulties as a result of the security protections, in accessing protected material, and in communications between lawyers in different locations and between the legal team and Mr Collaery.

Together, all of these matters significantly affect a defendant's ability to prepare for and sustain a defence in their criminal trial.

3 Overarching concepts and the scope of the application of the NSI Act

Issue 1: The NSI Act defines “national security” and “national security information” too broadly

At a high level, the definitions of “national security” and “national security information” in the NSI Act set the parameters which trigger the application of the Act to a set of proceedings.

The obligation in section 24 of the NSI Act on the prosecutor, the defendant, and the defendant's lawyers to notify the Attorney-General applies to the anticipated disclosure in criminal proceedings of ‘national security information’. That in turn triggers an opportunity for the Attorney-General to consider whether that disclosure is likely to prejudice ‘national security’ and, if the Attorney-General deems it necessary, to issue a section 26 certificate.

The definitions in the NSI Act of both ‘national security’ and ‘national security information’ are enormously broad, and go well beyond the appropriate scope of material that might generally be considered to have national security implications. Indeed the scope of the definitions are so broad that it is conceivable that the Act could be triggered by the prospect of uncontroversial and innocuous evidence that has no relevance to genuine national security concerns.

To properly focus its application and scope, the NSI Act should apply to information that has a more direct relationship with, or implications for, more focussed national security interests, such as espionage, defence interests, political violence or coercion by a foreign actor.

The current scope of the NSI Act and its over-breadth is apparent from the scope of the definitions.

‘National security’ is defined to mean “*Australia’s defence, security, international relations or law enforcement interests*”.³²

³² NSI Act section 8.

'International relations' is very broadly defined to mean Australia's "*political, military and economic relations with foreign governments and international organisations*".³³ That definition would capture almost every aspect of Australia's international engagements or relationships, with any country, from treaties to commercial dealings to friendly visits, regardless of any actual security implications.

'Defence' is not defined by the NSI Act. As such, it extends to all aspects of defence, again including defence matters that have no security implications.

The term 'security' has the same meaning as in the *Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act)*, which definition embodies a much narrower range of matters with security implications. The definition in the ASIO Act is instructive as to the appropriate scope of matters which should be included in the definition of national security in the NSI Act. The ASIO Act definition of 'security' reads:³⁴

- (a) *the protection of, and of the people of, the Commonwealth and the several States and Territories from:*
 - (i) *espionage;*
 - (ii) *sabotage;*
 - (iii) *politically motivated violence;*
 - (iv) *promotion of communal violence;*
 - (v) *attacks on Australia's defence system; or*
 - (vi) *acts of foreign interference;*

whether directed from, or committed within, Australia or not; and
- (aa) *the protection of Australia's territorial and border integrity from serious threats; and*
- (b) *the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).*

In the NSI Act, 'law enforcement interests' includes interests such as: avoiding disruption to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence; protecting technologies and methods used to collect, analyse or secure intelligence; protecting informants and their associates; and ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.³⁵

Given these definitions, particularly the definition of 'international relations', the meaning of 'national security' in the NSI Act is far broader than necessary, going well beyond issues having

³³ NSI Act section 10.

³⁴ NSI Act section 9; *Australian Security Intelligence Organisation Act 1979 (Cth)* section 4.

³⁵ NSI Act section 11.

implications for national security to encompass any aspect of international relations or defence, including domestic, administrative or historic matters.

The NSI Act further broadens its potential application by defining 'national security information' to mean information:

- (a) that relates to national security; or
- (b) the disclosure of which may affect national security.³⁶

Information only has to relate to, for example, defence or international relations, to fall within the meaning of national security information. Accordingly, any information about any matter relating to international relations or defence, becomes national security information.

The current definitions do not effectively serve the proper or efficient application of the NSI Act. Indeed, they may operate to make the NSI Act unworkable if taken literally.

This review should recommend revising the definitions to narrow the focus of national security and national security information under the NSI Act to matters that actually relate to or have security implications. The matters within the scope of the definition of national security should extend to such areas as protection against espionage, sabotage, political or communal violence, attacks on Australia's defence system, and acts of foreign interference, but "national security" should not, in our submission, include the full spectrum of Australia's international relations or defence.

Guidance for a revised definition is to be found in the ASIO Act definition of security. It is suggested that the definition of national security be amended to require a connection with the kind of security protections listed in the ASIO Act definition. International relations matters, for example, would then only fall within the meaning of national security if they related to the protection of Australia from espionage, sabotage, acts of foreign interference, and such.

We also consider that to avoid the definition of national security information applying much more broadly than it needs to, it should include an element of potential effect or harm from disclosure. The definition of 'national security information' is currently couched in the alternative as being information relating to national security, or information the disclosure of which may affect national security. In our view both elements should be required for information to fall within the definition, given the nature of the material which should be in issue and the outcomes the anticipated disclosure of that information triggers in court proceedings.

We further consider the words "*may affect national security*" should be amended to read "*is likely to prejudice national security*" in the definition of 'national security information' so as to exclude the capture of information where there is no real possibility of any adverse effect from the information being disclosed, and align the provision with section 17 of the NSI Act.

The inclusion of 'economic relations with foreign governments and international organisations' as a part of the definition of international relations, potentially captures any commercial engagements Australia may have with other countries or organisations into national security matters. Extending or applying a scheme to determine the legitimacy of the secrecy provisions which should apply in criminal proceedings to protect Australia's national security interests to the maintenance of commercial secrecy over contracts, arrangements or negotiations of a commercial kind is an inappropriate extension of scope and should not fall within the NSI scheme. The reference to 'economic relations' should be excluded from the definition of international relations. Any economic matter which genuinely had security implications would still be caught if appropriate as part of Australia's security interests, re-defined as suggested above.

³⁶ NSI Act section 7.

Recommendations

- 1.1. The definition of 'national security' in the NSI Act should be amended so that its scope is limited to matters relating to national security concerns. An example would be to add to the current definition words such as "*in so far as those matters concern or involve the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, sabotage, acts of foreign interference...*" and like matters modelled on the definition of security in the ASIO Act.
- 1.2. The definition of 'national security' information should be amended so that both limbs are required for information to fall within the definition, and the words "*may affect national security*" should be replaced with "*is likely to prejudice national security*".
- 1.3. The definition of 'international relations' should be amended to exclude the reference to 'economic relations'.

Issue 2: The NSI Act requires the Court to make decisions based on point-in-time evidence and does not contemplate changes to the national security environment during the proceedings

The Court's decision to make an order pursuant to section 31 of the NSI Act is based on evidence filed by the parties that goes to the risk of prejudice to national security at the time the evidence is filed.

However, in the context of constantly evolving national security, the risk of prejudice to national security if certain information is publicly disclosed may change over time. In some cases, the risk of prejudice may decrease or completely disappear, and in other cases, that risk may increase.

This issue arose in Mr Collaery's case because, by the time of the Court of Appeal remittal to the Supreme Court to consider the court-only evidence, around 18 months had passed since the parties had prepared and filed their evidence and witnesses had been cross-examined about the risk of prejudice to national security arising out of certain disclosures being made in open court in the proceedings. As set out earlier, it was Mr Collaery's position that the Attorney-General should not be permitted to update, on remittal, evidence filed in the original proceeding. Had Mr Collaery been unsuccessful and the Attorney-General permitted to update that evidence, there was a significant risk that the parties would have found themselves facing the "*perpetual vortex*" issue described by Mossop J in the hearing which preceded the reasons published as *R v Collaery (No 10)* [ACTSC] 311. Mossop J also considered that the issue was exacerbated by the Court of Appeal's decision that a decision under section 31 could be reviewed on appeal against a standard of correctness.³⁷

In his reasons, Mossop J described the issue as "*the underlying problem*":³⁸

[24] *Much has happened within [a] year which, having regard to material in the public domain, may legitimately be argued to alter the environment in which any decision under section 31 has to be made both in relation to:*

- (a) *Australia's international relations (which, by reason of the definitions in ss 8 and 10 of the NSI Act is the relevant component of Australia's "national security"); and*
- (b) *matters which would reflect upon public confidence in the proper administration of justice (a matter upon which the Court of Appeal placed particular emphasis).*

³⁷ *Collaery v The Queen (No 2)* [2021] ACTA 28 at [46]ff; *R v Collaery (No 10)* [ACTSC] 311 at [5].

³⁸ *R v Collaery (No 10)* [ACTSC] 311 at [23]ff.

...

[26] ... [T]he passage of time creates a tension. Given that the Court has to make a decision fairly on the basis of the evidence before it and not on the basis of its own perception of Australia's national security and international relations, how can that exercise be properly undertaken if the effect of the orders of the Court of Appeal is to freeze in time the evidence that can be considered and hence exclude from consideration everything that has happened since May 2020? On the other hand, if evidence is not frozen in time, how can it be updated without restarting the whole of the evidentiary process in a manner that would let all parties lead evidence and contest the significance of that evidence for the ultimate section 31(4) issue?

However, there may be circumstances in which significant changes to the risk to national security reasonably necessitate a revisiting of the orders after section 31 orders have been made.

Currently, while there may be a right to make a further application to the court in any event, the NSI Act does not provide a specific mechanism for section 31 orders to be revisited. In our view, the NSI Act should include such a mechanism. Its operation should be limited to applications made after all section 31 appeals have been exhausted and the threshold for what constitutes significant change to the risk to national security should be high, to ensure that inconsequential changes to the security environment cannot be the basis for such an application. This is consistent with Mossop J's view that "orders made under section 31 might be revisited if circumstances were shown to have changed in a way that warranted their alteration".³⁹

Recommendations

- 2.1** Provide in the NSI Act a procedure providing a right for any party to bring an application to reconsider an order under section 31 where the risk to national security has significantly changed. The change should be assessed as between:
- (a) the date the Court received the evidence which formed the basis of its earlier section 31 order (i.e., not the date of the order); and
 - (b) the date the Court received the evidence regarding the application for a review of that order.

4 Engagement between the defendant and their lawyers

Issue 3: The procedures and statutory protections for approving legal representatives should be amended.

Under section 39(2) of the NSI Act, a legal representative for a defendant in relevant federal criminal proceedings may apply to the Secretary of the Attorney-General's Department for an appropriate security clearance in order to access necessary national security information.

The NSI Act does not impose a time frame within which the approval process must be completed and does not require the Commonwealth to provide reasons if a security clearance is refused. It also provides no recourse for a legal representative to challenge a decision by the Attorney-General Department to refuse a security clearance. In the Collaery proceedings, legal representatives for the defendant were approved by the Commonwealth, and security briefed, before being given access to confidential material. Those approvals were usually provided in a matter of days, with one exception which demonstrates the need for providing the proposed protections in the process.

³⁹ *R v Collaery (No 10)* [ACTSC] 311 at [30].

By late 2021, Mr Collaery's appeal from Mossop J's decision on the section 31 hearing had been listed for hearing commencing on 15 February 2021. The defence team requested that Mr Bret Walker SC be added to the defence legal team for the appeal. The Australian Government Solicitor (**AGS**), the legal representatives for the Attorney-General, were asked on 23 December 2020 to seek the approval of Mr Walker SC as a Legal Representative of the defendant, to enable him to access the confidential material and prepare for the appeal. The AGS was also advised that Mr Walker SC was unavailable on the listed dates.

On the same day, the AGS responded to the effect that the Commonwealth would wish to carefully consider the suggestion that the date for the appeal be varied and that it was unlikely that instructions would be received that day, or perhaps until after the New Year.

On 24 December 2020, the defence legal team filed an application seeking orders that the application be heard outside the term and that the date for the hearing of the appeal be vacated.

On 22 January 2021, the AGS advised that the Commonwealth proposed to await the outcome of the application to vacate the hearing dates, which had been listed for 27 January 2021, before determining whether Mr Walker would be added to the certificate permitting him to see the confidential material. The request for approval had then been outstanding for four weeks, the hearing was scheduled for around three weeks later, and Mr Walker had been unable to access any of the large amount of confidential material in the case to provide advice.

By email on the same date, Mr Collaery's solicitors responded:

As we advised in late December, Mr Walker SC has been briefed to advise and appear for Mr Collaery in this matter. Unavailability on particular dates does not render him inactive in the matter.

The position taken by the Commonwealth is prejudicial to our client, both the unwarranted delay in responding to this request and the decision to decline to add a senior counsel briefed in the matter to the certificate without further information. This is unfair to our client in circumstances where the appeal is listed imminently and may still proceed on those dates.

We repeat our request for Mr Walker to be added to the certificate immediately.

On 25 January 2021, the AGS advised that Mr Walker was approved as a member of the defendant's Legal Representatives for the purposes of the Certificate and the section 22 orders made in the proceeding. On the basis of this delayed approval, His Honour Justice Burns allowed Mr Collaery's application to vacate the February appeal dates, noting that the delay in acting upon the request was unfair to Mr Collaery. Burns J observed at [17]:

The power reposed in the Attorney-General by the NSI Act effectively enables the Attorney-General to veto an election by an accused person to instruct a particular lawyer in proceedings to which the NSI Act applies. Because of the extraordinary nature of this power it becomes the Attorney-General to exercise it with the greatest efficiency that the particular case permits, and strictly for the purposes for which the power was given. The power to refuse to include a lawyer nominated by an accused person should not be exercised in order to gain a forensic advantage. Nor is it any part of the role of the Attorney-General to base his or her decision on whether he or she thinks that it is necessary for the accused to instruct that particular lawyer. The email from AGS to the appellant's solicitors on 22 January 2021... carries a disturbing suggestion that those who represented and advised the Attorney-General perceived that their satisfaction at the necessity for Mr Walker to be briefed by the appellant was in some way relevant. It clearly was not.

This experience in itself demonstrates the need to separate the role of the Secretary in the handling of requests for the approval of legal representatives from the lawyers representing the

Attorney-General in the proceedings, and supports the need for the inclusion of a right to reasons and a review process in the NSI Act.

Recommendations

- 3.1** Section 39 of the NSI Act should be amended to require the Commonwealth to provide:
- (a) a time frame within which requests for approvals of legal representatives must be answered;
 - (b) reasons, if approval or a security clearance is refused; and
 - (c) an avenue for review and ultimately appeal.
- 3.2** The approval and security clearance process should be managed separately to the lawyers acting for the Attorney-General in the NSI Act proceeding, to minimise any possibility of interference or delay in the process of providing security clearances or approving legal representatives for the defendant.

Issue 4: The NSI Act and the practices adopted in relation to security unreasonably expose legal representatives to criminal liability

The NSI Act and Regulation unreasonably expose lawyers to criminal liability for doing their jobs, which may impede the discharge of their duties to their client and the court. Legal representatives acting for defendants are subject to strict obligations under the NSI Act with respect to the protection of confidential information, as well as the need to make notifications as required under the NSI Act, and are themselves subject to the risk of prosecution.

Part 5 of the NSI Act sets out a number of offences which may apply to lawyers, including:

- (a) disclosing information identified in a section 24 notice before the Attorney-General gives a section 26 certificate;⁴⁰
- (b) failing to give notice to the Attorney-General under section 24 that national security information may be disclosed during a proceeding;⁴¹
- (c) disclosing information contrary to the Attorney-General's section 26 certificate.⁴²

Each offence carries a penalty of imprisonment for 2 years.

Exacerbating the potentially difficult position for lawyers, there can be a degree of uncertainty as to when something is caught by a section 26 certificate issued by the Attorney-General, for example because of the broad scope of the certificate and/or vagueness of its terms. A prime example of this is the disagreement between the Attorney-General and the Court of Appeal in the Collaery proceedings as to whether certain material in the Appeal Court's judgment, as yet unpublished, falls within the scope of the Certificate or not.

In the Collaery proceedings, the Certificate, and the confidentiality obligations it imposes, apply to yellow highlighted text in the Confidential Brief of Evidence, interspersed amongst information that can be discussed openly. Subjective assessments are needed as to whether a particular piece of information or statement might "*indirectly reveal*" or "*tend to confirm or deny*" yellow-highlighted

⁴⁰ NSI Act section 40.

⁴¹ NSI Act section 42.

⁴² NSI Act section 43.

information. Assessments as to whether something has such a tendency may not always be straightforward.

Lawyers should not be subject to obligations that are not completely clear but carry penalties including custodial sentences for conduct in breach of those obligations even if inadvertent or unintentional.

Ironically, while legal practitioners face the risk of specific statutory penalties for release of information, on top of their legal professional obligations and their duties to the Court, jury members, who may have no experience dealing with NSI matters or court orders, may be subject only to a direction of the trial judge. Equally, court staff, the judge's staff, and the judge, all of whom may be imperfect in administering and adhering to the security orders and carrying out the associated administrative work, are not subject to those statutory penalty provisions.

No lawyer acting in the performance of their duties should be liable to criminal prosecution unless their conduct is demonstrably a breach of a substantive criminal offence under the Criminal Code or under the IS Act. Lawyers who find they have been involved in an unintentional inadvertent or minor breach of the security provisions governing the handling or communication of national security information, for example, should not be prosecuted for such an offence.

An alternative approach should be considered, namely imposing any essential obligations on the lawyers in the proceedings by court order, and having any breach of those orders dealt with by the Court. Any serious breach of orders made under the NSI Act would in almost every circumstance be a contempt of the Court, rendering the person responsible liable to punishment under the contempt regime.

The practices of the Commonwealth in attempting to impose further obligations on lawyers and other handling national security information in the proceedings are also of concern. Additional risks of prosecution for a breach of the IS Act can be imposed on lawyers or others involved in the case (including court staff and the judges staff) if they enter into 'arrangements' with ASIS under Part 6 of the IS Act.

The position with respect to associates and court officers and staff was the subject of a decision by Mossop J.⁴³ Mossop J noted that initial orders proposed by the Attorney-General had included a requirement that associates given access to certain confidential affidavits had to enter into an arrangement with ASIS under Part 6 of the IS Act. Although that requirement was subsequently removed and replaced with specific orders, such a requirement was still proposed for the Registrar and the Principal Registrar. Mossop J expressed the view that any doubts about the effectiveness of either section 45 of the NSI Act or the court's powers to punish for contempt were unlikely to justify such a requirement, with its exposure to an increased penalty. Adopting an approach by which the confidential documents did not need to be handled by the Principal Registrar made it unnecessary for Mossop J to need to determine whether it would ever be appropriate to impose such requirements on court staff where not compelled by legislation.⁴⁴ Mossop J also declined to make orders requiring court officers such as the sheriff officers present in a hearing to enter into an agreement with ASIS.⁴⁵

In the Collaery proceedings, the Commonwealth also asked the legal team acting for Mr Collaery to enter into 'arrangements' with ASIS under Part 6 of the IS Act. Entering into such arrangements would have exposed the lawyers to additional criminal liability for disclosing confidential material under sections 39-41 of the IS Act, which contains offence provisions carrying maximum penalties of 10 years imprisonment in comparison to the 2-year penalties for offences in the NSI Act. Mr

⁴³ *R v Collaery* [2019] ACTSC 278.

⁴⁴ *R v Collaery* [2019] ACTSC 278 at [13].

⁴⁵ *R v Collaery* [2019] ACTSC 278 at [14].

Collaery's lawyers refused the Commonwealth's request to enter into Part 6 'arrangements', despite considerable pressure to do so.

It is not appropriate for lawyers to be asked to enter into such arrangements with the Commonwealth. It is also unnecessary given the provisions of the NSI Act, or if our proposed option is adopted, the authority of the court to control adherence with its orders. Equally, in accordance with the view taken in Mossop J's decision, it is not appropriate or necessary to ask court staff to enter into those arrangements.

Lawyers should not be asked to enter into Part 6 'arrangements' or be made subject to any additional offences or risk of prosecution, nor should legal representatives be at risk of imprisonment for disclosures of national security information that are made in good faith performance of their professional obligations. Instead, to the extent that any additional oversight is required, the consequences of a breach of a court order ought to be sufficient.

Recommendations

- 4.1** Legal representatives should not be liable for prosecution under the NSI Act or a similar statutory framework. Any such prosecution should be restricted to a demonstrable breach of a substantive criminal offence, such as under the Criminal Code or the IS Act.
- 4.2** Any essential obligations on the lawyers in the proceedings should be the subject of court orders, with any breach of those orders dealt with by the Court.
- 4.3** The Commonwealth should not ask lawyers or Court staff to enter into arrangements under Part 6 of the IS Act in the context of NSI Act proceedings.

Issue 5: The NSI Act does not expressly enable a defendant to provide instructions to their lawyers which include the disclosure of national security information

A further example of the unreasonable risk of prosecution that legal representatives face is that the NSI Act does not contemplate circumstances in which a defendant would need or want to disclose national security information to their lawyers, in the course of giving instructions, beyond the scope of the information covered by the section 26 certificate or existing section 22 orders.

This issue arose in Mr Collaery's case, where Mr Collaery's instructions on matters of national security were relevant and probative to his defence. To allow Mr Collaery to provide those instructions to his legal representatives, it was necessary for his legal representatives to seek agreement from the Commonwealth to provide section 22 orders covering the material disclosed.

The Attorney-General agreed to section 22 orders permitting Mr Collaery to disclose national security information that was not the subject of the Certificate or subject to other NSI Act orders made in his proceeding to his legal representatives, provided that such disclosure:

- (a) was made for the purposes of the conduct of the proceedings;
- (b) occurred at a location approved in the manner that would be required if section 12(2)(a) of the NSI Regulation applied; and
- (c) was otherwise made in a manner that is consistent with the section 22 orders and with the NSI Regulation.

The orders also allowed for disclosure of the national security information between members of Mr Collaery's legal team subject to the same provisions.

This provided a practical solution to the issue, however, it required Mr Collaery and his legal representatives to identify the issue without contravening the obligations under the NSI Act and the Certificate and to then take steps to reach an agreement with the Commonwealth.

The NSI Act should expressly provide for the making of such disclosures by the defendant. Consideration could be given to including a provision covering information which may be disclosed by the defendant in the Certificate, or alternatively, section 22 orders could be utilised.

Recommendations

- 5.1 Section 26 certificates should expressly permit and cover the disclosure of national security information by the defendant to their lawyers, for the purpose of the proceedings.
- 5.2 Alternatively, section 22 orders in the form agreed in the Collaery proceedings should be made by the Court as a matter of course in proceedings under the NSI Act and so should be expressly contemplated in the NSI Act.

5 Disclosure by the Commonwealth

Issue 6: The NSI Act requires a defendant to consent to secrecy orders to facilitate the disclosure of essential information to the defendant, whether or not that secrecy is ultimately justified

As noted earlier, Mr Collaery opposed the form of the section 31 order sought by the Attorney-General. However, notwithstanding that opposition to the making of the section 31 order, Mr Collaery consented to the making of multiple preliminary section 22 orders in the proceedings.

Over 20 section 22 orders were made by consent over the course of the proceedings. These included:

- the section 22 orders discussed above which permitted Mr Collaery to disclose national security information that was not the subject of the Certificate or subject to other NSI Act orders to his legal representatives,
- section 22 orders facilitating the disclosure of information by the Commonwealth to Mr Collaery and his legal representatives including confidential affidavit evidence relied on by the Commonwealth in the hearing for the section 31 order;
- section 22 orders facilitating the production of documents to subpoenas issued by Mr Collaery upon various government agencies; and
- section 22 orders facilitating the disclosure of national security information to Mr Collaery's witnesses for the purposes of the section 31 hearing and the preparation of their affidavit evidence.

As canvassed in the *Report into the operation of Part 3 Division 1 of the National Security Information (Criminal and Civil Proceedings Act) 2004 as it applies in the Alan Johns matter (INSLM Report into the Alan Johns Matter)*, and illustrated by the examples provided above, there can be practical benefits to the making of section 22 orders. In Mr Collaery's case, they were a very useful and efficient means of facilitating the flow of national security information between the parties in the proceeding.

However, any negotiation and ultimate agreement to section 22 orders is inevitably undertaken by the defendant in an 'information vacuum'. Before receiving the information the subject of the section 22 order, there was no way for Mr Collaery to assess the sensitivity of that information and whether section 22 orders were in fact required. Although it was open to Mr Collaery to

attempt to re-negotiate the terms of the section 22 arrangements, there are limits to this given the section 22 orders presuppose secrecy until a section 31 decision is made.

As Mossop J said in *R v Collaery* [2019] ACTS 278 at [12]:

Prior to the section 27 hearing, it is difficult to assess the merits of the Attorney-General's claim that such measures are necessary. It is undesirable, if at all possible, to attempt to do so at this stage because the whole point of the interim regime proposed in the orders is to get to a section 27 hearing at which point the Court has greater freedom to assess the significance of the national security issues and to make appropriate orders.

In cases where questions about the legitimacy of the Commonwealth's claims to secrecy of information are not central to a proceeding, perhaps the *Alan Johns* matter being an example, section 22 orders may serve as an efficient way of dealing with 'uncontroversial' matters.⁴⁶ However, even as an 'interim' measure to resolve matters concerning the protection, storage and handling of information the Commonwealth says is national security information, there is a risk that those orders come to be seen as the legitimate benchmark for how and whether national security information should be disclosed or protected, absent Court oversight.

In cases where questions about the legitimacy of the Commonwealth's claims to secrecy are central to the proceeding, those risks are even more pronounced. At the time of the Attorney-General's decision not to continue his prosecution of Mr Collaery, the legitimacy of the Commonwealth's claims to secrecy had been protected by multiple agreed section 22 orders. There is now no opportunity for the 'interim regime' to ever be displaced.

As a result, the section 22 orders in Mr Collaery's matter serve as a further example of the concern that section 22 orders:⁴⁷

...can be used to conduct a federal criminal prosecution in 'secret' from start to finish and to maintain this secrecy, seemingly indefinitely.

As the INSLM concluded in his Report into the Alan Johns Matter, this should not have happened. The NSI Act provides no avenue for the application of the orders to the information to be reviewed or re-assessed, even for example, twenty or fifty years from now.

Recommendations

6.1 We agree with the following recommendations made in the INSLM Report into the Alan Johns Matter:

- (a) First recommendation: Where closed Court orders are sought from any Court under section 22, the Attorney-General be required to make submissions to the Court to explain why such orders are appropriate and should be made having regard to the object of the NSI Act and the deeply rooted common law tradition of the open Court.
- (b) The INSLM's alternate framing for the Second recommendation: Where *any* orders are sought under section 22 (as opposed to where *closed* Court orders are sought, as per the first framing), the Court has power to appoint a contradictor to make submissions to the Court on such orders.

We qualify this by suggesting that a defendant should retain their right to make submissions to the Court on such orders, whether or not a contradictor is appointed.

⁴⁶ See INSLM Report into the Alan Johns Matter at [34]-[36].

⁴⁷ See INSLM Report into the Alan Johns Matter at [37].

- (c) Third set of recommendations: Orders made under section 22 of the NSI Act be made publicly available, and the NSI Act be amended to add matters to be included in the annual report (as set out in the INSLM Report into the Alan Johns Matter);
- (d) Fourth set of recommendations: Where closed Court orders are sought from any Court under section 22, the Attorney-General be required to seek that reasons be given.
- (e) Section 22 orders should be seen as an interim measure only until a substantive decision can be made by the Court about public disclosure of the information.
- (f) The fact of a defendant's consent or otherwise to section 22 orders should not be a matter taken into account at the sentencing stage of a criminal proceedings, as the Practitioners' Guide currently indicates to be the case.⁴⁸

Issue 7: Public interest immunity claims should be considered in light of the protection of information under the NSI Act

In the course of the proceedings, Mr Collaery caused subpoenas to be issued to various Commonwealth Government agencies, seeking production of documents the defence legal team argued were relevant to his defence. In response to those subpoenas, on behalf of the Commonwealth agencies named in the subpoenas, the Commonwealth made various claims resisting production of the documents in whole or in part on the bases that the documents were subject to public interest immunity (the **PII claims**) and/or that Mr Collaery did not have a legitimate forensic purpose in seeking the documents.

The Commonwealth's PII arguments included contentions that disclosure would have a chilling effect on Australia's ability to engage in open, direct and frank confidential discussions with high-ranking officials of other foreign countries, undermining Australia's ability to build relationships, discuss sensitive issues, make frank representations and negotiate confidential agreements with foreign partners.

The PII claims were made pursuant to the *Evidence Act 2011* (ACT) (the **ACT Evidence Act**) and were run by the Commonwealth on the premise that the documents, if released, would be released to the public at large rather than the limited number of people who were authorised to access material under the Certificate or section 22 orders. That is, the Commonwealth was not merely seeking to protect the information from public disclosure; it was also seeking to prevent any disclosure to the defence.

The reliance on PII as a basis to resist subpoenas in the Collaery proceedings highlights an issue which can arise where the PII claim is based on similar or related national security concerns as may be in issue in the NSI proceedings, as to the alignment between the protection against public disclosure under the NSI Act, which can be challenged and tested, and confidentiality based on PII, where the relevant material is not disclosed at all to the defence, making the claim more difficult to challenge.

Whereas any successful application under the NSI Act would have resulted in production of the information to Mr Collaery and the defence legal team while protecting the information from disclosure more broadly, a successful PII claim prevented disclosure of the information from everyone and by-passed the options available under the NSI Act to protect the information. Indeed, the Commonwealth foreshadowed that should it not be successful in its PII claims, it would make an application under the NSI Act. Given that the material sought under the subpoenas almost certainly contained national security information within the definitions of the NSI Act, and the application was made in the context of an NSI hearing in relation to disclosures at the criminal trial, there is a strong argument that the basis for resisting the subpoenas should more appropriately have been assessed under the more permissive regime of the NSI Act than under

⁴⁸ Available at <<https://www.ag.gov.au/sites/default/files/2020-03/Practitioners%20Guide%20to%20the%20NSI%20Act.pdf>>

PII principles. At a minimum, the assessment of the PII claims should have factored in a consideration that access might be provided to the defendant and his legal team under the NSI regime.⁴⁹

Recommendation

- 7.1 Where PII claims are made in the context of NSI Act proceedings and are based on similar or related national security concerns as are in issue in the NSI proceedings, the NSI Act should require the Court to consider those claims in the context of the orders for non-disclosure of that information that may be made under the NSI Act. For example, this could be achieved by inserting text into s 130(5)(g) of the ACT Evidence Act (and equivalent State and territory legislation) which reads:

If the proceeding is a proceeding to which the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) applies—whether the publication of the information or document could be limited by any provisions of that Act, or any certificate issued, or order made, under that Act.

6 Court-only evidence, special counsel and contradictors

Issue 8: The NSI Act does not address whether court-only evidence should be permitted, or whether a special advocate may be appointed, and if so what protections and procedures should apply

During the course of the s 31 hearing, the Commonwealth advised that it had prepared a number of affidavits which for national security reasons could be provided only to the Court, and not to the defendant and his legal team (the court-only evidence). The view was taken that in the event that Mossop J had formed a view in favour of the Attorney-General's position in the section 31 hearing without reading the court-only evidence, there was no need for it to be relied on. As Mossop J did find for the Attorney-General's position, the court-only evidence was not read in the section 31 hearing.

As a result of the appeal, the case was remitted to enable the Court to consider the admissibility and effect of the court-only material. As noted above, Mr Collaery strongly opposed the admission of the court-only evidence and the defence legal team argued that it should not be admitted. The defence legal team argued that the detailed protections which applied to the defendant and the legal team in relation to confidential material should also apply to the additional evidence, which should be made available to the defendant as a matter of principle. That position was not accepted.⁵⁰

The absence of any provisions in the NSI Act with respect to whether court-only evidence is permitted or the circumstances in which it could be relied on is surprising. The current position leaves open the possibility that the Attorney-General could hold back the core evidence going to the basis of their position in open and confidential evidence, and in effect put their strongest evidence and arguments directly to the judge in secret. Court-only evidence may also be the subject of submissions which have to be court-only, further denying the defendant the opportunity to understand the case put against them.

Allowing the Attorney-General to rely on court-only evidence in NSI Act proceedings which keeps the core of the secrecy case secret undercuts the fundamental purpose of the NSI Act, which is to enable scrutiny through a proper debate between the Attorney-General and the defendant, before a judge, in a closed court where necessary, of the position which should be taken towards

⁴⁹ See *R v Collaery (No 9)* [2020] ACTSC 291.

⁵⁰ *R v Collaery (No 11)* [2022] ACTSC 40. The defence legal team did not propose and would not have accepted access being provided to some or all of the legal team and not to Mr Collaery.

secrecy in the trial. Relying on such evidence risks turning the section 31 process into simply a judicial scrutiny of the Attorney-General's position, in the absence of contest around the facts, the evidence or the impact of disclosure.

Leaving the admissibility of court-only evidence for the judge to determine in each case does not overcome this issue. In our view, there should be no opportunity for court-only evidence to be admitted or relied on in a section 31 hearing, or for court-only submissions to be made, and that position should be made clear in the legislation. The NSI Act and Regulation provide an entire legal process governing the handling and access to confidential material in the course of a section 31 hearing, and that process should be relied on for all evidence.

In the event that this recommendation is not accepted, it is suggested that the NSI Act should be amended to provide that court-only evidence should only be permitted in exceptional circumstances, being where the Court determines that:

- (a) there is a serious risk of significant prejudice to national security if the information in the court-only evidence was disclosed publicly; and
- (b) there is a serious risk that the evidence would not remain confidential if made available on a "read and return" basis to the defendant or the defence legal team.

The argument with respect to the admissibility of the court-only evidence also dealt with whether a special counsel should be appointed in relation to the court-only evidence, as proposed by the Attorney-General (and opposed by Mr Collaery). The NSI Act is silent on the issue of appointing a special counsel in NSI proceedings in relation to criminal matters, although it does include detailed provisions for the appointment and role of a special advocate in control order proceedings.⁵¹

In addition to determining that the court-only evidence could be admitted, Mossop J also made an order providing for the appointment of a special counsel pursuant to the Court's inherent powers and/or s 19(1A) of the NSI Act.⁵²

If court-only evidence is to be admissible in a section 31 hearing, then the NSI Act should be amended to include provisions for the appointment of a special counsel or special advocate. The provisions in the NSI Act in relation to the appointment of a special advocate in control order proceedings serve as an appropriate model, confirming that the advocate is not serving as the legal representative of the defendant, yet protecting privilege in discussions between the advocate and the defendant.⁵³ The special counsel or advocate's powers should be expressly stated in the NSI Act including the ability to see all court-only evidence, tender evidence on behalf of the defendant, cross-examine the Commonwealth's witnesses and make submissions.

The amendments should also include a provision similar to subsection 38PA(3) that allows the defendant to request the appointment of a particular person, unless there are reasons as set out in the NSI Act why that person should not be appointed.

In the Collaery proceedings, the Attorney-General proposed a set of procedures to govern interaction between the special counsel and the defendant and the defence legal team. The procedures reflected the approach taken in relation to the special advocate in control order proceedings, as set out in the NSI Act.⁵⁴

Under the proposed procedures, as for the special advocate, communications between the defence and the special counsel were permitted prior to the special counsel having access to the

⁵¹ NSI Act section 38PA-38PI.

⁵² *R v Collaery* (No 11) [2022] ACTSC 40

⁵³ NSI Act sections 38PB, 38PC.

⁵⁴ NSI Act sections 38PD-38PG.

court-only material, but after having such access, any communications had to take place in writing through the court. It is suggested that this restrictive process is unnecessary. It suggests that the special counsel, inevitably a senior and experienced counsel, can be trusted sufficiently to see the court-only material, but not trusted not to disclose it. It closes down the capacity for the special counsel to continue to engage with the defence without the scrutiny of the Court, for example to obtain further background or information, or more fully understand the defence position, which would not involve disclosing any of the court-only material. The requirement should not be necessary, as the special counsel would be aware of the restrictions on communicating or advertizing to any of the court-only material, as imposed by the court and under the legislation.

In the event that the defendant opposes the appointment of any special counsel, or does not wish to engage with the special counsel or advocate or have them represent his or her interests, a person should nevertheless be appointed to the position to perform the role of a contradictor in relation to the court-only evidence.

Although performing a different role to that of a special counsel who represents the defendant's interests, a contradictor still has an important function and role to play in testing the court-only evidence, cross-examining witnesses, and making submissions to the Court in response to the position put by the Attorney-General. It is suggested that having a contradictor perform that function if there is no special counsel or advocate appearing for the defendant is critical to ensure the integrity of the process.

In addition, there should be an absolute ban on the prosecution seeking to rely on court-only evidence in the substantive criminal proceeding. An accused should not be denied the right to see all of the evidence against them in their substantive criminal proceeding.

Recommendations

- 8.1** The NSI Act should be amended to provide that court-only evidence should not be permitted in section 31 hearings.
- 8.2** If that recommendation is not accepted, the NSI Act should be amended to provide that court-only evidence should only be admitted in a section 31 hearing in exceptional circumstances, where:
 - (a) there is a serious risk of significant prejudice to national security if the information in the court-only evidence was disclosed publicly; and
 - (b) there is a serious risk that the court-only evidence would not remain confidential if made available on a "read and return" basis to the defendant or the defence legal team.
- 8.3** The NSI Act should be amended to:
 - (a) provide for the appointment of a special counsel or advocate in the event that court-only evidence is to be admitted in a section 31 hearing;
 - (b) set out the requirements for such special counsel or advocate;
 - (c) enable the defendant to request the appointment of a particular person; and
 - (d) set out the procedures to be followed by the special counsel or advocate. This procedure should allow the special counsel to communicate with the defendant after seeing court-only material, with appropriate limitations
- 8.4** The amendments should also provide that in the event the defendant does not agree to the appointment of a special counsel, or want to communicate with the individual

appointed, the role of the special counsel or advocate becomes the role of a contradictor in the proceedings.

8.5 Court-only evidence should never be permitted in the substantive criminal proceeding.

7 The defendant's preparation of evidence and disclosure obligations

Issue 9: The processes of the NSI Act limit the defendant's capacity to engage effectively and confidentially with potential witnesses

The processes of the NSI Act create particular problems for a defendant and the defence legal team in engaging with potential witnesses. These include:

- (a) the fact that witnesses cannot be told of any national security information covered by a section 26 certificate or by section 22 orders, unless expressly authorised to receive that information; and
- (b) the fact that the defence has to notify the Attorney-General if they know or believe that the witness will disclose national security information in giving evidence.

These processes are of particular concern because they require the defence legal team to give the Attorney-General advance notice of any potential witness who might comment on national security information. That advance notice would also extend to the judge and the CDPP if section 22 orders are made referring to that potential witness.

The requirement to give advance notice of a defendant's witnesses and the evidence they are expected to give is uncontroversial in civil proceedings.⁵⁵ However this is not the case in criminal proceedings, where the defendant has long been entitled not to give any notice to the Crown of the evidence they intend to rely on, with some exceptions for matters including alibi⁵⁶ and expert evidence.⁵⁷

Defendants in criminal matters which include proceedings under the NSI Act are as a result potentially disadvantaged by the early disclosure of the witnesses in their criminal trial, as well as by the disclosure of potential witnesses who are subsequently not called.

There is currently no mechanism in the NSI Act by which a defendant may approach potential witnesses and provide them with national security information, without seeking a specific authorisation to do that, making it impossible to engage confidentially with witnesses to understand what their evidence would be on matters in issue, without that engagement being known to the Attorney-General. Section 22 orders that allow some national security information to be given to potential witnesses, as happened with witnesses Professor Evans, Admiral (Ret'd) Barrie and Mr McCarthy, require both a disclosure to the Attorney-General that the person is considered a potential witness, and an agreement as to what national security information can be given to that person.

Further, under section 24 of the NSI Act, a defendant who knows or believes that a person they intend to call as a witness will disclose national security information, *must*, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief. The form for the notice to the Attorney-General requires the information to be contained within it or attached to it, resulting

⁵⁵ See, e.g., UCPR (NSW) r 31.4.

⁵⁶ *Criminal Procedure Act 1986* (NSW) section 150.

⁵⁷ *Criminal Procedure Act 1986* (NSW) section 151.

in a further advance notification of evidence from a potential witness for the defendant.⁵⁸ Failure to give notice is an offence attracting a term of imprisonment of 2 years.

Where section 22 orders are entered into to allow a witness to be given national security information, knowledge as to the identity of the witness would also come to the attention of the judge, and as their agreement to the orders is required, the CDPP.

The need for the advance notice of witnesses and evidence required under the NSI Act puts the defendant at a disadvantage in their criminal trial. Finding a solution to this problem however is not straightforward, given the strictures of the NSI Act and the procedures in place to limit the disclosure of national security information.

In the course of preparation for Mr Collaery's criminal trial, the defence legal team contacted the AGS by letter dated 21 December 2020 to raise a number of issues relating to potential trial witnesses and the problem of advance disclosure of identities.

To determine the extent to which section 22 orders relating to potential witnesses would be necessary, the letter noted that potential witnesses fell into three categories – those who could give evidence without access to any national security information, those who could give evidence on the basis of dual assumptions as to truth and falsity, and those who needed national security information disclosed to them in order to give their evidence.⁵⁹

The letter from the defence team sought confirmation that section 22 orders would only be needed in relation to witnesses in the third category.

On that issue, the AGS response, some six months later, was that it was not possible to be certain that section 22 orders were only needed for category three witnesses, as the assumptions provided to category two witnesses may reveal or "give basis for an inference" about sensitive information. The AGS sought more information about the assumptions framework, queried the need for a witness to have national security information disclosed to them in order to give evidence, confirmed the need for section 22 orders or other protections in the event of any such disclosure, and invited further discussion about the witness engagement problem.

The letter also sought an undertaking from the Attorney-General in light of the fact that the defence may be in the position of having to disclose witness names well in advance of the trial which would foreshadow elements of Mr Collaery's defence to the Commonwealth. The undertaking requested was that no actions would be taken by the Attorney-General or any other Commonwealth person that would interfere with the defence's legal professional privilege, and that neither the CDPP or the AFP would be given the names of the witnesses who were the subject of any section 22 orders.

On that issue, while not providing the requested undertaking, the letter accepted the need for the defendant to maintain confidentiality and legal professional privilege over witness identities and communications. Confirmation was given that privilege would not be waived by disclosures made to comply with security requirements or enable secure communications, and the letter advised that the Attorney-General and the AGS agreed not to disclose the identity of proposed witnesses to the CDPP or the Australian Federal Police. It would also be appropriate to extend that protection against disclosure to the intelligence agencies.

The AGS also suggested that it may be possible to establish protections for witness identities even where disclosures were being made to witnesses requiring section 22 orders, and that they were open to exploring ways in which witness identities could be protected, such as using a confidential annexure to section 22 orders containing the names of the potential witnesses, which would not be provided to the CDPP, and issuing non-disclosure directions to any Commonwealth

⁵⁸ NSI Regulation Sch 1, Form 1.

⁵⁹ Letter from Gilbert + Tobin to AGS dated 21 December 2020.

personnel who became aware of those identities through, for example, escorting potential witnesses to secure rooms for meetings.

The AGS response was a welcome recognition of the difficulty that the national security context adds to the defence engaging with witnesses in preparation for a criminal trial, and an acknowledgement of the need for the defendant to maintain confidentiality in relation to witness discussions and identities. The steps proposed by the AGS in the letter should be further explored, and reforms to the NSI Act should be made which include the suggested protections.

On that basis, consideration should be given to amending the NSI Act to enable the use of “confidential” section 22 orders, where the names of the individuals receiving the information are not made known to the CDPP. Consideration should also be given to providing statutory protection for the defendant in relation to witness identities, by prohibiting the Attorney-General or their legal representatives from disclosing potential witness names to the CDPP or the AFP.

While those amendments would ensure confidentiality from the CDPP, it remains a matter of concern that the lawyers acting for the Attorney-General in the section 31 proceedings and the criminal trial, would have that information, as would the judge, who could be presiding at the criminal trial.

In particular, there are some concerns about permeability between the Attorney-General, the intelligence agencies, the AFP, and the CDPP, and the lack of transparency to others about their actual or potential interactions or the source of instructions. To the outside observer, their interests do not normally diverge. Defendants need a guarantee that revealing the identity of a potential defence witness to the AGS will not result in that information being made available to either the CDPP or the intelligence agencies. That information needs an impervious ring-fence until the criminal trial.

A further option which could be considered would involve trying to contain the identities of potential witnesses to a separate area of the Attorney-General’s Department or the AGS, with appropriate information barriers to ensure that the lawyers acting for the Attorney-General are not made aware of the potential witnesses.

The notification requirements do have a real effect on the rights of the defendant to be able to prepare confidentially for their criminal trial, and the reforms necessary to deal with these issues in a practical but protective way need to be further considered. The AGS signalled a willingness in the Collaery case to engage further on these issues.

Recommendations

9.1 Consideration be given to options to amend the NSI Act to protect the confidentiality of potential witnesses for the defendant in their criminal trial, including:

- (a) amendments to the NSI Act to:
 - (i) provide for section 22 orders where the identities of the parties to whom disclosure was permitted is not made known to the CDPP;
 - (ii) to prohibit the Attorney-General or his or her legal representatives from disclosing the names of potential defence witnesses to the CDPP the AFP, or the intelligence agencies; and
 - (iii) to enable the Court to give directions to Commonwealth personnel in relation to the disclosure of the identities of potential defence witnesses;
- (b) requiring an ‘independent’ team within the AGS or the Attorney-General’s Department, separated by a formal information barrier from the team participating in

the NSI Act proceedings or the criminal trial, to whom section 24 notices can be given and with whom section 22 agreements can be made, with the names of the potential witnesses kept confidential to that team and the Court⁶⁰ and

- (c) giving the Court the express power to make a general order permitting the defendant's legal representatives to approach prospective witnesses and disclose national security information to those witnesses after obtaining a written undertaking from the witness that they are bound by the Court order. Copies of those undertakings should be provided to the 'independent' Attorney-General's Department team or office holder.

Issue 10: The NSI Act poses a number of practical barriers to the defendant's engagement with witnesses

There are also practical barriers for a defendant in engaging with witnesses even if authorised to exchange confidential information, where that engagement involves any disclosure or discussion of national security information. Given the restrictions requiring that any such discussion must take place in a secure place and manner, for witnesses in locations where there is no approved secure space (including outside Australia) the defence team is reliant on the Commonwealth to provide a venue for meetings with witnesses. Restrictions on taking any security classified document or national security information out of Australia would also have required any documents to be transported or made available overseas by the Commonwealth.⁶¹

In the letter to the AGS of 21 December 2020 the defence legal team raised this issue with the AGS, asking if the Commonwealth could provide secure channels for communications and document exchange with potential witnesses, including people overseas. The AGS advised in response that its ability to provide assistance depended on the location of the witness, the classification of the information, and factors relating to the identity of the witness including their nationality. The AGS advised that it was very unlikely that the Commonwealth could make overseas-based facilities accessible to a person who is not an Australian national with a security clearance. Within Australia, unescorted access could not be made available to audio-visual facilities and all discussions would be in the presence of a Commonwealth officer. The AGS offered to work with the defence to develop suitable arrangements, but the proposal was inappropriate given the privileged nature of the proposed communications, particularly in light of the Commonwealth's involvement through the Attorney-General in the prosecution and in the section 31 proceedings.⁶²

As the criminal trial did not proceed, it remains to be seen whether, in practice, any solution would have been found which enabled a private discussion to be had with witnesses, particularly witnesses based overseas, involving confidential information or documents, even if that witness was authorised for that purpose. If no solution was found, it is possible that such a witness could not be called.

Identifying the most appropriate way to address these issues is not straightforward. Inevitably, the Commonwealth will need to be involved in providing access to secure systems or venues and providing sensitive documents overseas, but each such involvement furthers the knowledge of

⁶⁰ The same independent team could be responsible for providing approvals and security clearances for the defendant's legal representatives, and for other procedural aspects of the NSI Act proceedings where the Defendant should not be required to disclose certain information to the CDPP or the Attorney-General.

⁶¹ See NSI Regulation 16.

⁶² Although the CDPP is independent from the Commonwealth government, the Attorney-General is more uniquely involved in the context of prosecutions for security-related offences. The CDPP may not prosecute an individual for an alleged secrecy offence until the Attorney-General has consented (*Intelligence Services Act 2001* (Cth) section 41A(3)). The Attorney-General can also invoke the power to decline to proceed further in such a prosecution, as shown when the Attorney-General discontinued the proceedings against Mr Collaery.

the Attorney-General of the activities of the defence in preparing for the criminal trial, and the people under consideration to give evidence.

It is difficult to identify appropriate statutory reforms to address these issues.

One option which could be considered is that the NSI Act include an obligation on the Attorney-General to provide the defendant with such assistance as the Commonwealth can reasonably provide to facilitate the defendant's legal team having confidential meetings with witnesses in secure locations, with authorised access to documents.

Again, it is suggested that the protections for the defendant would be enhanced if such assistance was provided through the separate office in the Attorney-General's Department proposed in the prior recommendation. That would allow the provision of the practical assistance, which would not be made known to the lawyers acting for the Attorney-General in the section 31 proceedings or to the CDPP.

Recommendation

10.1 The NSI Act should be amended to:

- (a) require the Attorney-General to provide assistance to the defendant, including access to venues and communication systems, where necessary to facilitate the defendant having confidential discussions with potential witnesses;
- (b) provide that such assistance be provided by a separate team in the Attorney-General's Department to the team participating in the NSI Act proceedings or the criminal trial.

Issue 11: The NSI Act should be amended to provide a more appropriate basis in a section 31 decision for the Court's decision regarding disclosure

In a section 31 hearing, the Court must decide whether national security information may be publicly disclosed in proceedings by applying the factors set out in subsection 31(7) and 31(8) of the NSI Act.

Section 31(7) suggests the task requires the balancing of a number of relevant factors, requiring the Court to consider the following matters:

- (a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:
 - (i) ... the information were disclosed in contravention of the certificate; or
 - (ii) ... the witness were called;
- (b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;
- (c) any other matter the Court considers relevant.

However subsection 31(8) then adds:

In making its decision, the Court must give greatest weight to the matter mentioned in paragraph 7(a).

The addition of subsection 31(8) in effect destroys the balancing approach promised by 31(7), by imposing an overarching requirement on the Court to give one of the factors listed, the risk of

prejudice to national security, “the greatest weight”. That weighting could be interpreted to mean that the case for disclosure based on other factors would need to be almost overwhelming to counter the “greatest weight” being given to the risk of prejudice to national security. It unfairly makes the task for any defendant seeking disclosure very much more difficult, and unreasonably minimises the importance of the open administration of justice, and a fair trial for the defendant.

The constraint of subsection 31(8) can also be seen as an inappropriate hobbling of the Court’s decision-making role, or an attempt to pre-determine the outcome of the Court’s hearing and process of consideration of the issues. If the legislature has seen fit, appropriately, to allow the Courts to make determinations in cases involving argument about the level of disclosure of national security information, the Courts should be empowered and trusted to carry out that task without being bound to give greater favour to one side of the argument.

In our view, if the NSI Act is to be retained, section 31(8) must be repealed.

There are also other notable issues with the approach taken in section 31(7).

First, any qualitative assessment of the factors listed in 31(7) is skewed by the unqualified use of the broad term ‘risk of prejudice to national security’, without any guidance to the Court on either:

- (a) the level of the risk; and
- (b) the significance of the prejudice which could result.

The current open-ended use of the term ‘risk’ could be read as meaning that even an extremely low risk of prejudice would be sufficient, and the unqualified reference to “prejudice” as meaning that any adverse effect from a disclosure, even if minimal or transient, would warrant a non-disclosure outcome. The NSI Act should be amended to make it clear that a low level of risk, or a minor adverse effect, is an insufficient basis on which to restrict disclosure.

That position is not addressed by the definition of ‘likely to prejudice national security’ in section 17, as a real and not merely a remote possibility that something will prejudice national security. Mossop J found, in our view correctly, that ‘whether there would be a risk of prejudice’ to national security is a lower threshold than the expression defined in section 17 ‘likely to prejudice national security’, though suggested the practical difference is negligible.⁶³ While there is no good reason for the threshold in section 31(7) to be lower than in section 17, there is a place for the Court to assess the possibility and likelihood of the risk, which would include considering how low the level of risk was, even if not as low as a ‘remote possibility’. We suggest the risk should be a ‘substantial risk’, given the significance of the decision being made by the Court.

Second, section 31(7) should be amended to require the Court to consider a range of other factors which are clearly relevant to the decision, rather than leaving the Court to determine if there are other relevant matters which it should take into account.

While further consideration should be given to the factors that should be included, consideration could be given to adding the following factors to section 31(7):

- (a) the degree of likelihood that the disclosure of the information would cause prejudice to national security;
- (b) the significance, nature, impact and duration of any prejudice to national security caused by disclosure;

⁶³ *R v Collaery (No 7)* [2020] ACTSC 165 at [36].

- (c) whether the information relates to an issue of significant public interest;
- (d) the principle of open justice;
- (e) public confidence in the administration of justice;
- (f) whether some or all of the information is in the public domain; and
- (g) whether the information relates to recent or current matters.

It should then be a matter for the Court to consider the relevance and importance of each factor in undertaking the exercise required by section 31(7), having regard to the evidence.

The inclusion of the factor relating to the extent to which the information is already in the public domain might appear anomalous in a proceeding to determine what information may be disclosed. In Mr Collaery's case, however, there were extensive media reports of the allegations made by Mr Collaery, which remained publicly available online, and which were in part the subject of his charges.⁶⁴ The Commonwealth maintained a policy of "neither confirming nor denying" the reports, but the fact of the prosecution was understood to suggest that some national security information had been communicated.

In those circumstances, the Court should be able to take into account what information exists in the public arena, the status of that information in terms of the Commonwealth's position, and the risk of prejudice to national security from disclosures in that context.

Third, section 31(7) is worded to have the Court consider the disclosure of "the information", being the information subject to the Certificate, whereas as a matter of practice, as happened in the Collaery case, the Court is more likely to be considering the possible disclosure of a subset of that information.

In the Collaery proceedings, as noted above Mr Collaery sought the disclosure not of all of the information covered by the Certificate, but of a much narrower category of 'Identified Matters'. Mossop J noted that it was uncontroversial that some parts of the trial would not be conducted in public, and that:

*...even the defendant accepts that ... there is material in the Confidential Prosecution Brief the disclosure of which would create a risk of prejudice to national security and where the other matters referred to in section 31(7) would not lead to their public disclosure....*⁶⁵

In his reasons Mossop J properly considered the risk of prejudice of disclosure in relation to the matters Mr Collaery was seeking to have disclosed, comparing that to the scenario proposed under the Certificate.⁶⁶

Section 31(7)(a)(i) does not currently specify the 'information' which the Court is required to consider. It may be appropriate to clarify the provision to confirm the approach taken by Mossop J, namely that the Court apply its considerations to such proposed disclosure or limitations on disclosure as are put to it by the parties or as determined by the Court.

Recommendations

11.1 Repeal subsection 31(8) of the NSI Act.

⁶⁴ *R v Collaery* (No. 7) [2020] ACTSC 165 at [96].

⁶⁵ *R v Collaery* (No. 7) [2020] ACTSC 165 at [119] – [123].

⁶⁶ *R v Collaery* (No. 7) [2020] ACTSC 165 at [140]. His Honour also considered disclosure against a broader set of matters initially identified by the defendant.

11.2 Change the term 'risk of prejudice to national security' in section 31(7) to:

- (a) require a certain level of risk higher than a real and not remote risk, such as a 'significant' or 'substantial' risk;
- (b) qualify the level of prejudice that needs to be at risk, requiring for example, 'significant' prejudice, so that a minimal adverse impact on Australia's national security, such as a relatively minor international relations issue, is not sufficient; and
- (c) clarify the relationship between the meaning of 'likely to prejudice national security' in section 17 and 'risk of prejudice to national security' in section 31(7), by using the same term in each section, reflecting the amendments proposed above.

11.3 Amend section 31(7) of the NSI Act to require the Court to consider additional factors including the following:

- (a) the degree of likelihood that the disclosure of the information would cause prejudice to national security;
- (b) the significance, nature, impact and duration of any prejudice to national security caused by disclosure;
- (c) whether the information relates to an issue of significant public interest;
- (d) the principle of open justice;
- (e) public confidence in the administration of justice;
- (f) whether some or all of the information is in the public domain; and
- (g) whether the information relates to recent or current matters.

Issue 12: The NSI Act should promote the position of expert witnesses including independent experts to test the Attorney-General's evidence on risk of prejudice to national security

The Collaery proceedings were unusual in having as witnesses for the defendant three eminent experts with experience of Australia's national security issues at the highest levels, a former Minister, a former Chief of the Defence Force and a former Ambassador to the United States. Each contributed significant time and effort to their witness statements, and attended Court to give evidence and be cross-examined. Having evidence from these witnesses, particularly once they were provided with access to the confidential material, was critical to the defence case. It gave weight and legitimacy to the alternative view put by the defence about the risks to national security from disclosure.

It is inevitable that any evidence against the position taken by the Attorney-General on the issue of the risk of prejudice to national security will have to come from people outside government, or past government officials. Such witnesses will always have an inherent disadvantage to witnesses who are senior serving government officials, as however eminent and experienced, or however recent their experience, they will not have access to the same contemporaneous intelligence and security briefings as the Attorney-General's witnesses.

In the Collaery proceedings, the Commonwealth itself suggested that the three witnesses be given access to confidential material, which added value to their evidence. It is suggested that the NSI Act should be amended to recognise that step and enable a defendant to make an application to the Court for particular witnesses to be given that access.

The reality is that most defendants will not have access to the same calibre of experts as Mr Collaery, if they have access to any experts at all. Experts in national security willing to take up that role can also be difficult to find, or they may have conflicts or concerns about speaking against a position taken by the government of the day.

Yet it is essential for the proper functioning of the NSI Act and the administration of justice that the evidence relied on by the Attorney-General in the section 31 hearing on the key issue of national security and the risk of prejudice from disclosure, is properly, and ideally independently, tested.

The NSI Act should be amended to allow a Court appointed independent expert to give evidence to the Court on the national security issues. The person would have the experience and stature to enable them to assist the Court in evaluating the arguments made by the Commonwealth with respect to security risks. They would need to access all of the relevant national security evidence, including any court-only evidence.

That court-appointed witness would be in addition to any witnesses the defendant may wish to call. To ensure that the Court considers the need for such a witness, the NSI Act should be amended to allow the defendant to make an application to the Court for a court-appointed independent witness to be appointed. The parties could provide the Court with suggestions as to people who would be appropriate to fulfil that position.

Recommendations

12.1 The NSI Act be amended to provide that a defendant may make an application to the Court to have expert witnesses appearing for the defence given access to confidential material in the proceedings, subject to appropriate orders, for the purpose of their evidence.

12.2 The NSI Act be amended to include provisions:

- (a) allowing the Court to appoint an independent expert in national security to give evidence in a section 31 hearing; and
- (b) enabling the defendant to make an application to the Court to appoint such an independent expert witness.

8 Judgments

Issue 13: The NSI Act too severely limits the publication of judgments

Subsection 32(2) of the NSI Act requires the Court to provide its proposed written statement of reasons for making an order under section 31 to the prosecutor and the Attorney-General before the defendant and their legal representatives. After the Court provides the statement of reasons, the prosecutor and Attorney-General may request that the Court vary those reasons if they consider that they will disclose information that is likely to prejudice national security.⁶⁷

The Court should deliver its reasons to all parties simultaneously. It is both unnecessary and inappropriate in view of the strict protection of information afforded by the NSI Act, not to provide the defendant and the defence legal team with the proposed statement of reasons at the same time.

In the Collaery proceedings, the Commonwealth requested that sections of the Court's reasons be redacted and not publicly released. While accepting that the judgment was a matter for the

⁶⁷ NSI Act section 32(3).

Court, the defence team opposed the Attorney-General's section 32 application for variations to the Court of Appeal's judgment.

If a defendant is not in a position to argue the case regarding redactions on a section 32 application, noting that not all defendants will have the resources to do so, it should be open to the defendant to ask the Court to appoint an independent contradictor to assist the Court to test the variations sought by the Commonwealth, and for the Court to have the option to do so.

Any variation (including redaction) by the Court of its proposed statement of reasons prior to the making of final orders under section 31, and prior to any appeal, should be limited to information that was subject to a section 26 certificate. If there is no appeal or after all appeal avenues have been exhausted, the scope of any variation should be limited to the terms of the Court's orders under section 31.

If the Commonwealth considers that the reasons contain information outside a section 26 certificate which is likely to prejudice national security, it should give a new section 26 Certificate, triggering the corresponding process under the NSI Act including to allow the defendant to put on evidence in response.

In all cases, redactions and variations to reasons following an application by the Commonwealth should be as limited as possible. This is particularly important in relation to the critical aspects of the Court's reasoning, where considerations of the administration of justice should be given greater weight. Where variations are made, those variations should not alter meaning.⁶⁸

Recommendations

13.1 Repeal subsection 32(2) of the NSI Act.

13.2 Amend subsection 32(3) of the NSI Act so that it reads:

"If a statement recipient considers that giving publishing the proposed statement will disclose information and ~~the disclosure is likely to prejudice national security that is the subject of an order under section 31~~, the statement recipient may request that the Court vary the proposed statement so that the information will not be disclosed."

13.3 Insert a requirement into the NSI Act that a request under subsection 32(3) must be accompanied by submissions justifying the proposed variations.

13.4 Insert a requirement into the NSI Act that if the prosecutor or Attorney-General makes a request under subsection 32(3), and the defendant is not appearing or making submissions on the request, the Court may appoint a contradictor to make submissions in relation to the request.

13.5 Insert a requirement into the NSI Act that in considering any requested redactions or changes the Court will have regard to the risk of prejudice to national security (with that phrase being more appropriately defined and qualified, as recommended above), the interference with the administration of justice and the principle of open justice.

13.6 Section 38, which grants to the prosecutor and Attorney-General a right of appeal against any decision of the Court made under section 32, should be amended to grant a similar right to the defendant.

⁶⁸ *Collaery v The Queen (No 3)* [2021] ACTA 34 at [34].

Issue 14: Secret judgments and delayed access to suppressed material

The INSLM Report into the Alan Johns matter noted calls for the creation of a repository of material suppressed by the orders made under the NSI Act, and while foreshadowing consideration of that issue in this review of the NSI Act, considered it 'sensible' that there should be such a repository, administered by the Attorney-General, of suppressed material such as judgments, transcripts and evidence.⁶⁹

This submission strongly supports the proposal of a central repository where material suppressed under the NSI Act including judgments, transcripts and evidence are retained.

Such a repository preserves the material for future access, at a time when the national security concerns may have changed or diminished. Given the risk to national security in relation to a specific matter may diminish over time, the considerable public interest in NSI Act cases and the fundamental importance of open justice and the administration of justice, judgments and other material held in the repository should be reviewed after a certain period of time, and then periodically reviewed, to consider whether that material might be published. Consideration will need to be given to the timing and process of such reviews and the persons and/or agencies who should be involved in decisions about whether confidential material may be published. At a minimum, the defendant should be permitted to make submissions if they wish. Consideration could also be given to providing access to appropriately cleared persons for future reference in policy or statutory reform processes.

The view expressed by the INSLM in the Report into the Alan Johns matter,⁷⁰ that there should be a set time after which all such material should be published unless the Attorney-General persuades the court that such publication is likely to prejudice national security, would be an effective mechanism to ensure that suppression was not continued without cause and that proposal is supported. This would be consistent with the regular review of classified information encouraged by the Attorney-General's Department for continuing sensitivity.⁷¹

The issue of access to that material in the course of a proceeding is more problematic. While there is a value in that material being made available to a Court handling NSI proceedings, it would be unfair to the defendant if judges were to have sole access to prior cases which could, as well as assisting them, also have an influence on their views in ways that the defence could not see or address on. It is suggested that if a past case in the repository appeared to have direct relevance to the facts or law in an NSI proceedings, the Court could on its own motion, or on the application of any party, decide that the suppressed judgment or other material be made available in some form, to all parties.

Recommendations

- 14.1** There should be a central repository maintained by the Attorney-General's Department of any judgments, transcripts or evidence which have been suppressed under the NSI.
- 14.2** Access to the material in the repository may be permitted where the material has relevance to the facts or legal issues in an NSI proceeding, either on the Court's own motion or on application by one of the parties and approved by the Court, provided all parties are permitted access.
- 14.3** There should be a periodic review of any suppressed judgments and related material as to their continuing sensitivity, to consider whether confidential material may be published.

⁶⁹ At [196].

⁷⁰ At [188].

⁷¹ Attorney-General's Department, Protective Security and Policy Framework at [32].

- 14.4** A period of time should be set, such as 20 years, after which suppressed material will be published unless the Attorney-General persuades the court that such publication is likely to prejudice national security. The defendant should be permitted to make submissions if they wish.

9 Practical barriers, legal costs, and legal funding

Issue 15: The NSI Act and NSI Regulation impose practical burdens on defendants which increase legal costs and create barriers to effective legal representation

The restrictions and obligations imposed by the Certificate, the various section 22 orders, the NSI Regulation and the NSI Act with respect to document protection created significant additional burdens in managing Mr Collaery's matter, in addition to the document handling requirements under section 22 orders and under the NSI Regulation attracting the serious criminal consequences for any breach noted above.⁷²

The interaction of the document handling provisions of the Regulation and any court orders is also an issue. It is also suggested that it is not clear why Regulation 7A, which provides that the relevant part of the NSI Regulation does not apply if there is an inconsistency between that Part and a court order made under section 19(1A) of the NSI Act, should be limited to court orders made under that section, nor why it should be limited to orders made on the application of the Attorney-General.

In practice, the document handling requirements add significant practical difficulty to managing the conduct of the matter and require substantial additional time and resources. By way of example, these practical requirements include:

- documents containing confidential information could only be discussed in person in rooms that had been approved by the Commonwealth. For the Collaery case, this included rooms at Gilbert + Tobin, and rooms at counsel chambers in Sydney and Canberra. Every discussion about confidential information required in person meetings, in an approved location;
- confidential documents needed to be stored and handled in locations pre-approved by the Commonwealth, in a locked safe provided by the Commonwealth, and only accessed in the absence of electronic devices other than Commonwealth equipment;
- documents containing confidential information had to be drafted on Commonwealth laptop computers, in an approved location, and printed on a Commonwealth provided printer;
- documents containing confidential information provided by the Commonwealth could not be copied;
- documents had to be filed with the Court in a particular manner;
- a secure register needed to be maintained recording each time confidential material was handled;
- transporting documents required them to be double bagged in approved bags and carried in an approved locked container;

⁷² Six months imprisonment under Regulation 45A, and 2 years imprisonment for a breach of a section 22 order, or another offence under Part 5 of the NSI Act in the event of a disclosure breach.

- no document containing confidential information could be transmitted electronically except by using equipment supplied by the Commonwealth;⁷³
- documents containing confidential information may not be taken out of Australia without the permission of the Commonwealth;⁷⁴ and
- Mr Collaery was not permitted to store any national security information nor permitted to handle such material unless in the presence of his lawyers.

These burdens were further complicated by:

- the location of the legal team, who were spread across Sydney, Canberra and Brisbane, with Mr Collaery in Canberra. For the legal team to share drafts of documents across these locations they had to be either hand delivered (by an approved member of the legal team) or sent by approved courier at a cost of around \$1,000 for a delivery from Sydney to Canberra;
- obtaining instructions or discussions about confidential documents required in person meetings in secure rooms. This required additional travel so that Mr Collaery, the Gilbert + Tobin lawyers and/or counsel could meet regarding the proceedings;
- delays in the clearance of secure rooms for new counsel and for witness meetings and the need for some structural or technical changes to be made to some meeting spaces;
- there was no cleared room at the Court, where documents could be reviewed, or confidential information could be discussed by or between the legal teams;
- the equipment provided was generally out of date and technical assistance was repeatedly required; and
- there was no clear process or protocol regarding engaging with potential witnesses overseas, or obtaining access overseas to documents containing confidential information.

The loss of the ordinary efficiencies that come from use of email, the internet, and telephone and video meetings was profound. Repeated travel and in person meetings were required to obtain instructions and manage the case. The inability to use the internet in the courtroom meant that all material had to be printed. If the need arose for an additional confidential document to be provided in court, an approved person had to return to a secure location, to connect to a secure printer from the secure laptop, print the document, and transport it back to Court.

All of these issues were further exacerbated by the COVID-19 pandemic and the restrictions on travel and building access during the proceedings.

It is understood that most of these requirements are necessary and appropriate given the classification of the material in issue. The position at a practical level could be improved however to minimise the impact of the restrictions, and enhance the support provided to practitioners, particularly in the context of court hearings.

These practical demands added a significant burden for the defendant and the defence legal team, in that managing the matter required far more time, and hence far more expense, than would otherwise have been the case.

⁷³ NSI Regulation r 11.

⁷⁴ NSI Regulation r 16.

For most defendants the legal costs involved in trying to use the processes of the NSI Act to challenge a certificate would be prohibitive, in part (although not solely) because of the additional restrictions on the handling of national security information and documents.

For this reason, consideration should be given to introducing and making available a scheme, along the lines of other legal funding schemes operated by the Attorney General's Department, enabling defendants involved in NSI Act proceedings to apply for funding for the legal costs associated with the NSI Act proceedings.

Recommendations

- 15.1** The NSI Regulation should be amended to provide that where an NSI hearing is contested, the Commonwealth should:
- (a) make secure premises available for the use of defendants and their legal teams if requested, in locations needed for witness meetings or other confidential discussions, which are not accessible to the lawyers for the Attorney-General or the CDPP; and
 - (b) make secure means of communication available for the use of defendants and their legal teams.
- 15.2** The Commonwealth should make an arrangement with the Court conducting an NSI hearing to obtain and provide an approved secure room in the Court building with a printer and a safe which can be used by a defendant and their legal representatives during hearings for the storage, review and discussion of national security information.
- 15.3** The NSI Act should be amended to provide that Commonwealth funding should be made available to defendants in proceedings under the NSI Act for reasonable legal fees and disbursements under a specific scheme. Such funding should include:
- (a) the reasonable costs of a defendant for their engagement in proceedings under the NSI Act;
 - (b) any increase in the costs of defending underlying proceedings caused by the invocation of the NSI Act in those proceedings;
 - (c) disbursements required as a result of the NSI Act proceedings, including the modification of workspaces, secure courier costs, and travel for in person meetings or to file documents.
- 15.4** To clarify the interaction of court orders providing for the handling of documents (including section 22 orders) and the Regulation, Regulation 7A should be amended to delete (c), so that the orders prevail whether or not they were made on an application by the Attorney-General or his representative.
- 15.5** The Commonwealth should work with the Courts to provide dedicated Registry infrastructure to handle the filing and storage of national security information and develop a practice note. The Practitioner's Guide dated June 2008 should be amended to include information about Court process and procedure.

Issue 16: There is no set process or procedure for handling and storage of the defendant's privileged documents and of Court documents after the conclusion of the proceedings

The NSI Regulation provides that within 28 days of the conclusion of the proceedings, an authorised recipient with custody or control of a security classified document must give the

document to a representative of the Attorney-General for it to be destroyed by them⁷⁵ and Commonwealth property relating to security classified documents, such as the Commonwealth secure computers, must be returned.⁷⁶

Neither the NSI Act nor the NSI Regulation provide any mechanism by which a defendant can retain access to any of their work product, case documents, or privileged records that contain national security information which they and their legal team have created during the proceeding. In the Collaery case, the Commonwealth has offered to make secure storage available, which it is understood would enable ongoing access to the defence legal team if required.

Nevertheless to ensure protection of such material is available and properly secured, the NSI Act and Regulation should provide for how any confidential and privileged legal documents the defendant wishes not to be destroyed will be stored, and should set out Commonwealth obligations in relation to the storage and protection of those documents.

The NSI Regulation should clearly specify that neither the Commonwealth nor the CDPP should be permitted to access that material, and provide a mechanism by which the defendant can access those documents, including if necessary for future legal proceedings or other matters.

Similarly, the NSI Act and Regulation do not provide for how court documents will be stored, protected and accessed following the conclusion of the court proceedings.

Recommendations

- 16.1** The NSI Regulation should be amended to ensure that at the conclusion of any NSI proceedings, dedicated offsite secure storage facilities are available to the defence legal team, for the perpetual storage of any privileged material or material containing national security information created by the defence legal team in the course of the proceedings, with ongoing access by the defence legal team to that material.
- 16.2** The NSI Regulation should also provide for secure ongoing storage of any documents containing national security information created by the Court which the Court sought to have retained at the conclusion of the NSI proceedings.

10 Annual reports required by the NSI Act

Issue 17: The Attorney-General's reporting obligations under section 47 of the NSI Act are insufficient

Under section 47 of the NSI Act, the Attorney-General must table an annual report that details the operation of particular provisions of the NSI Act. In the INSLM Report into the Alan Johns Matter, it was recommended that section 47 be amended to add certain matters into the annual report in relation to section 22 orders.

Recommendations

- 17.1** We support the INSLM's recommendation that section 47 of the NSI Act be amended to require the Attorney-General to publish additional information in the Annual Report under the NSI Act.
- 17.2** We propose that section 47 of the NSI Act also be amended to require the Attorney-General to identify in the annual report:

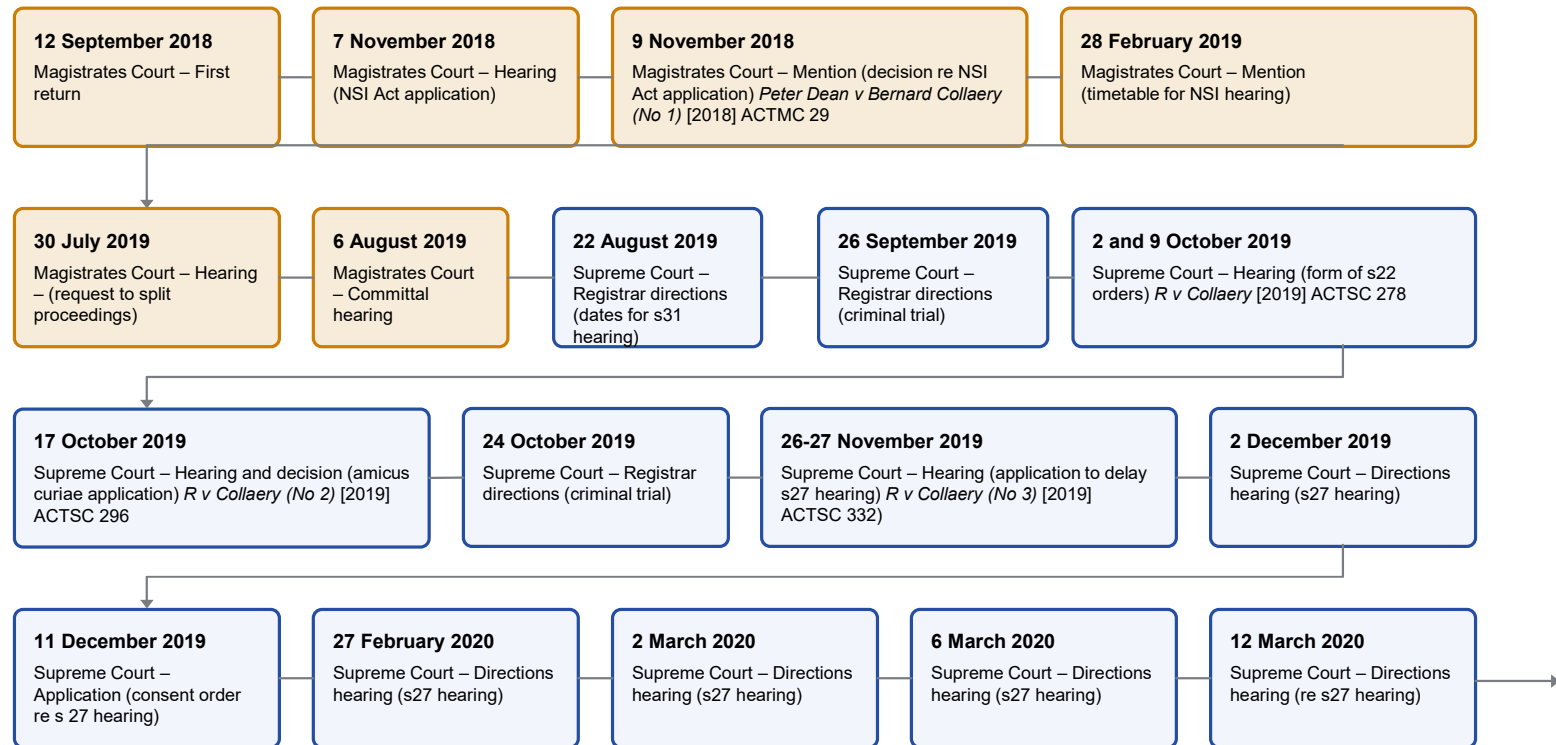
⁷⁵ NSI Regulation r 17.

⁷⁶ NSI Regulation r 18.

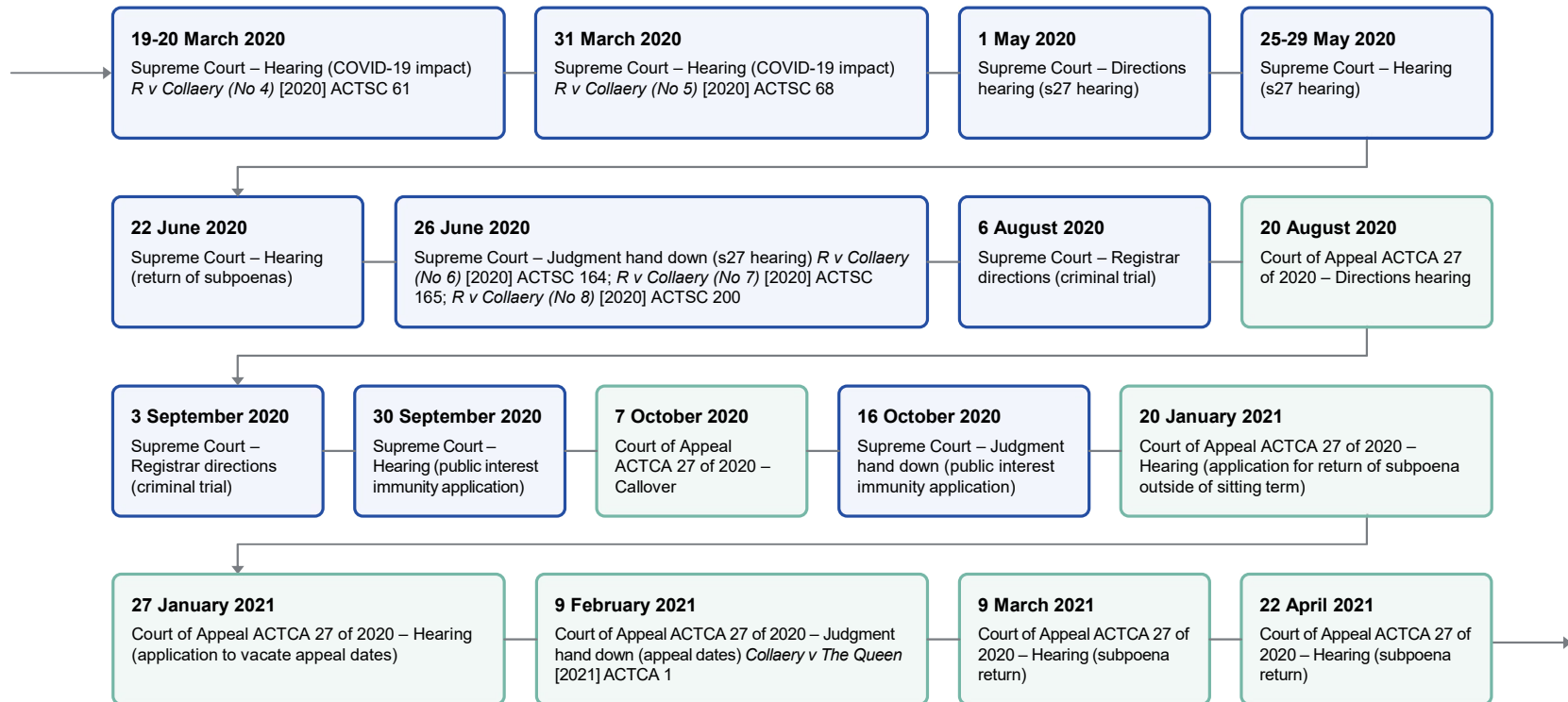
- (a) any judgments issued in that year in proceedings subject to the NSI Act;
- (b) whether any of those judgments were varied under section 32 of the NSI Act or, if that matter cannot be detailed because of orders of a court, the number of judgments that were varied under section 32 of the NSI Act; and
- (c) a listing of all judgments under NSI Act for that year and previous years that are restricted from publication or have only been published in a redacted form, showing the number of years since they were delivered.

Annexure A

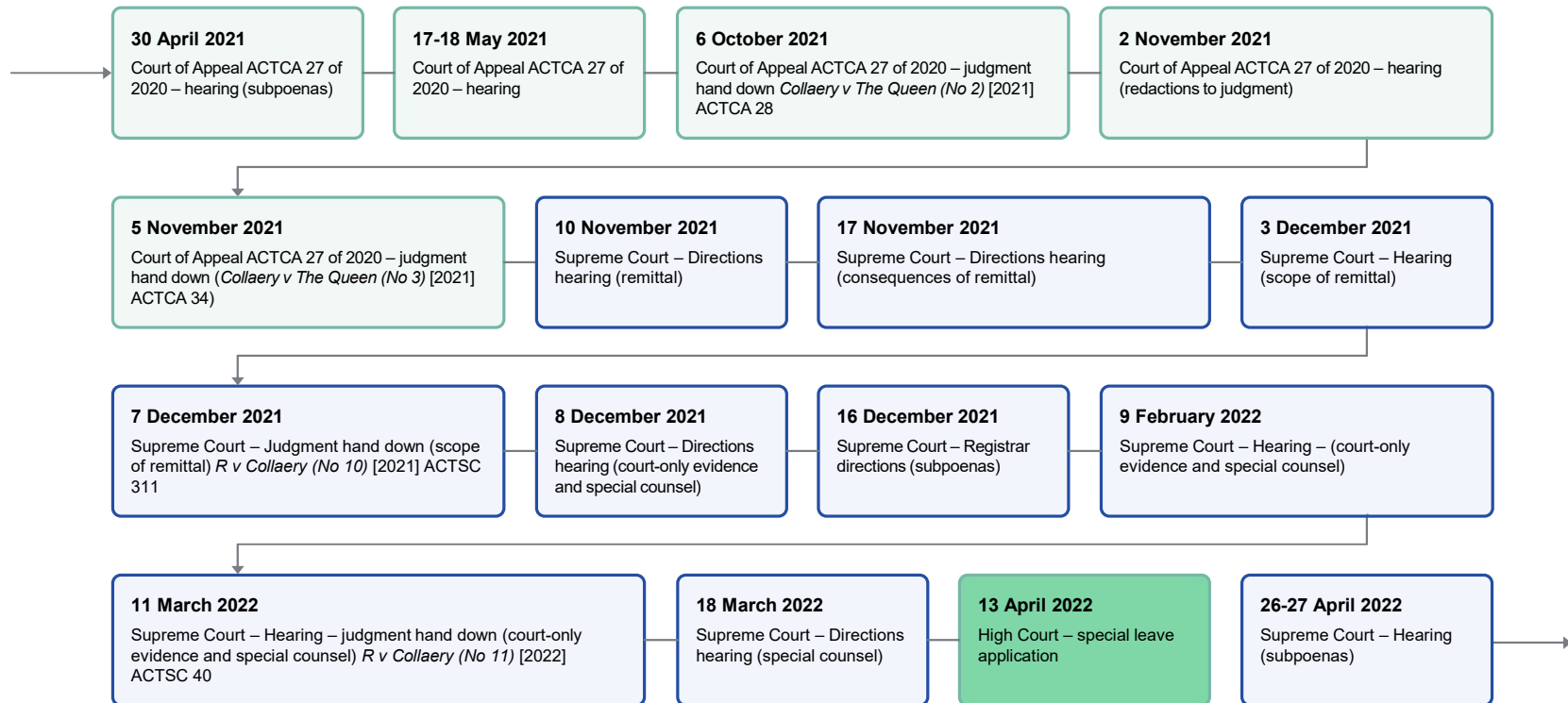
Timeline of Court Dates



Timeline of Court Dates



Timeline of Court Dates



Timeline of Court Dates

