

4 December 2023

National Security Information Act must have sufficient regard to open justice

The Law Council welcomes the tabling of the review by the fourth Independent National Security Legislation Monitor (the INSLM), Mr Grant Donaldson SC, on the operation and effectiveness of the *National Security Information Act (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act).

“Mechanisms must be available to the courts to protect the confidentiality of national security information in the course of federal proceedings,” Law Council of Australia President, Mr Luke Murphy said.

“However, we have long argued that the approach adopted in the NSI Act amounts to an unacceptable restriction on the right to a fair and public hearing and the principle of open justice, in favour of the protection of information that may be relevant to national security.”

The implementation of the INSLM’s practical and measured recommendations will go a long way to restoring the balance between protecting national security information, rights to fair trial and the principle of open justice.

“The potentially onerous operation of the NSI Act should be confined to a much narrower and more precisely defined class of national security information,” Mr Murphy said. “For this reason, the Law Council supports the INSLM’s recommended amendments to the definition of national security information in the NSI Act.

“In addition, the Law Council strongly endorses the INSLM’s recommendation to exclude from the scope of the NSI Act disclosures of information by a defendant to their legal representatives.”

The Law Council is also supportive of the INSLM’s recommendations to amend the NSI Act in order to enhance open justice, for example, introducing new obligations on the Attorney-General to conduct regular reviews of material that has been kept secret by reason of the NSI Act, to determine if secrecy is no longer required.

Other aspects of the INSLM’s report particularly welcomed by the Law Council include:

- recommendations directed to restoring principled discretion by judges rather than the potentially inflexible operation of mandatory directions in the NSI Act, about how courts are to deal with and decide certain matters;
- the need to repeal subsection 31(8) of the NSI Act—that imposes a requirement for the court to give greatest weight to the risk of national security when ruling on the Attorney-General’s non-disclosure certificate, at the expense of the rights of the accused and the principle of open justice;
- calling for reform to secrecy offences under the NSI Act, for example, specifying intention requirements in relation to prejudice of national security caused by an unauthorised disclosure, and addressing the unwelcome possibility under the current framework that lawyers may be prosecuted for simply doing their job; and

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.

Media Release



- recommendations aimed at enhancing the efficiency of proceedings where the NSI Act is invoked, by addressing practical difficulties that may slow down and unnecessarily complicate the conduct of NSI Act matters.

“We also have grave concerns regarding the use of closed court evidence, for example special court orders under the NSI Act,” Mr Murphy said.

On the use of special court orders, the INSLM found that ‘on the only occasion that an Australian court has ordered that it can receive and rely upon evidence that is not to be seen by a defendant, the reasons for doing so are unpublished and unknown by anyone other than the judge, a few AFP officers and counsel and solicitors for the AFP’ and concluded that ‘(o)ur justice system needs to be better than this’”

“The Law Council maintains that the NSI Act should be amended to clarify the permissible use of court-only evidence.

“Open justice is one of the primary attributes of a fair trial and, therefore, may often arise in the context of a restriction on rights of the accused. But it is also a systemic value underpinning the criminal justice system. It is a fundamental cornerstone rule of law that proceedings of courts shall be public except in exceptional circumstances because the public administration of justice promotes confidence in the integrity and independence of the courts.

“I would like to acknowledge the extensive contribution of Mr Grant Donaldson SC, and the INSLM’s office, in conducting this comprehensive review of the NSI Act, which required iterative consultation with a variety of government, security agencies and civil society stakeholders. Mr Donaldson’s term as INSLM has recently ended. The Law Council thanks him for his tireless commitment, outstanding contributions to law reform and constructive approach throughout his time as INSLM.”

Contact: Kristen Connell, P. 0400 054 227, E. kristen@talkforcemedia.com.au

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.