CLA

*Civil Liberties Australia Inc. A04043*
*Box 3080 Weston Creek ACT 2611*
*Email: secretary[at]cla.asn.au*

30 April 2021

Grant Donaldson SC
Independent National Security Legislation Monitor
3-5 National Cct, BARTON ACT 2600

Via email: INSLM@inslm.gov.au

Dear Mr Donaldson

**RE: INSLM REVIEW OF THE OPERATION OF SECTION 22 OF THE NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004 (CTH) AS IT APPLIES IN THE 'ALAN JOHNS' MATTER (A PSEUDONYM)**

Thank you for your letter regarding your decision to conduct an 'own initiative' review into the above matter, also known as the Witness J case. Civil Liberties Australia (CLA) has been very concerned about the conduct of the 'Alan Johns' matter. We are similarly concerned about other cases where 'national security' has been claimed as a reason to conduct secret trials, suppress information and deny due process to accused individuals.

Secret trials – with a closed court and reporting restrictions at the dictate of government – are the hallmarks of oppressive and undemocratic regimes. In Australia, where restrictions are requested, the reasons should be presented to open court, the court should ensure that any restrictions it grants are as limited as possible, and the court's decisions should be challengeable. The final decision should always be at the discretion of the judge or judges in charge of the case. It should never be up to the Executive, or the Parliament, to decide how judicial matters are managed and/or decided.

CLA does not believe there should ever be trials in Australia that are wholly secret as happened in the 'Alan Johns' case. Your predecessor as Independent National Security Legislation Monitor (INSLM) said before a Senate Estimates Committee that the conduct of the 'Alan Johns' case was probably unprecedented and that he "would not like to see it repeated". We agree. The outcome of your review should be to ensure that such a process is indeed never repeated.

In relation to section 22 and to the questions you have posed:

CLA is strongly of the view that orders which have the effect of prohibiting disclosure that a person has been charged with an offence, convicted or sentenced should never be made. It appears that this is exactly what happened in the case of 'Alan Johns'. The fact that he had been charged and convicted – indeed that he even existed – only came to light by accident through an unrelated process. And even after his existence was acknowledged, no reasons of any magistrate or judge for the orders have ever been published. This is appalling. Australia should never be a country of secret prisoners.

Such orders should not be permissible even where they have been requested by, and consented to by, the parties. The public interest in justice that is – and is seen to be – open, transparent and impartial is too important to be waived. The public interest, Australia's democracy, and our fundamental rights and liberties are traduced if trials and imprisonments are not open, transparent and impartial.

We are also very sceptical of how willing any purported consent of the accused person can be under these circumstances given the immense power disparity between the parties and the significant pressure the prosecution is able to bring to bear. As the former INSLM told Senate Estimates, it is "unsurprising that almost any accused would agree to orders of that sort".

**We recommend the Act be amended to remove the secrecy powers.** If the Act continues to allow for such orders to be made, their scope should be much more limited than was the case in the 'Alan Johns' matter. Further. we recommend that at the very least the measures you raise should be implemented.

- There should be provision for a 'contradictor' when orders, such as those made in the 'Alan Johns' matter, are proposed. The contradictor should be fully independent and it should be their role to (a) advocate for the public interest in open and transparent justice, (b) advocate for the human rights of the accused, and (c) ensure that any consent offered by the accused is not secured through pressure or inducements.
- The trial judge should publish reasons for any such orders and also publish sentencing remarks in accordance with normal practice. The Attorney-General may make submissions to the trial judge about disclosure of national security information in those publications but the submissions should be advisory only.
- Any such orders should be appealable.
- In the event that such orders are made, they should be reviewed periodically with the assumption that they will become null and void unless a court is convinced that they continue to be required. The contradictor should again be involved in this process to challenge any request that the orders be renewed. Review should be at no longer than three-year intervals.

CLA recommends that these changes be effected by legislative change. Given Australia's experience in areas of national security, we are far from convinced that the interests of open justice – or of the human rights of accused people – is ever adequately protected through delegated responsibility, regulation or operational manuals.

Finally, we urge you to consider how section 22 – including any changes that may come about as a result of this review – impacts on the longer-term welfare of prisoners who are subject to such orders. The then-ACT Justice and Corrections Minister, Shane Rattenbury, was apparently unaware of the existence of 'Alan Johns' despite the fact that he was being held in an ACT correctional facility. CLA is of the view that such a circumstance makes it impossible for a responsible minister to meet his/her statutory obligations to ensure prisoner welfare, ensure access to the prisoner by independent monitors, and ensure compliance with obligations under the Optional Protocol to the Convention Against Torture (OPCAT) which Australia has signed and ratified.

Yours sincerely

Dr Kristine Klugman OAM
President CLA

*Note: Civil Liberties Australia is a non-party-political organisation.*