Australian Government
Attorney-General's Department

National Security Information (Criminal and Civil Proceedings) Act 2004

Practitioners' Guide

Issued by authority of the Attorney-General,
the Hon. Robert McClelland MP

June 2008

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1. Purpose of the Practitioners' Guide

The purpose of this paper is to provide a step-by-step guide[1] to the procedures set out in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act) for the disclosure of national security information (NSI)[2] in federal criminal proceedings and civil proceedings conducted in a Commonwealth, State or Territory court.

The Practitioners' Guide is divided into five parts. Part 2 provides background on the development of the NSI Act and related instruments. Part 3 outlines the scope of the NSI Act. Parts 4 and 5 explain the substantive provisions of the NSI Act as they apply to federal criminal and civil proceedings. The appendices to the Guide are intended to act as quick reference tools to further assist with the practical application of the NSI Act.

[1] This document is a guide only, designed to assist practitioners. Reference should always be made to the legislation and any relevant case law.

[2] The term 'national security information' (NSI) is used for convenience in this Guide to describe information which may invoke the procedures and offences contained in the NSI Act.

2. Background to the NSI Act

In 2004, the Australian Law Reform Commission (the ALRC) conducted a detailed review of mechanisms which existed to protect NSI in court proceedings. The ALRC concluded that, consistent with Australia's increasing concerns over international terrorism and national security, 'Courts, tribunals and government agencies need clearer and more refined procedures to ensure the proper handling of… sensitive material.'[3] In its report *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98), the ALRC made 80 recommendations for reform, including the enactment of an 'NSI Procedures Act' to deal specifically with the protection of classified and sensitive information used in court, tribunal and other proceedings.

The *National Security Information (Criminal Proceedings) Act 2004* was passed on 8 December 2004, its main provisions commencing on 11 January 2005. The NSI Act was amended to extend its protections to civil proceedings by the *National Security Information Legislation Amendment Act 2005*, which commenced on 3 August 2005. The *National Security Information (Criminal and Civil Proceedings) Regulations 2005* (the NSI Regulations), which prescribe requirements for the storage, handling and destruction of information under the NSI Act, also commenced on 11 January 2005. The NSI Regulations incorporate the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings* (the NSI Requirements), which further specify how and where NSI must be accessed, stored and otherwise handled and address a range of physical security matters.

To date, the NSI Act has been invoked in federal criminal cases involving 28 defendants. It has also been invoked in civil proceedings relating to the making of a control order under the *Criminal Code Act*.

Public interest immunity

Prior to the NSI Act, the common law doctrine of public interest immunity (PII) was the main mechanism by which the Commonwealth could seek to protect NSI from disclosure during court proceedings. PII allows a court to exclude evidence which, if admitted, would be injurious to the public interest.

[3] Weisbrot, David (ALRC President), quoted on the *Australian Law Reform Commission Website*, 'ALRC media release: justice system must adapt to meet terror challenges', <http://www.alrc.gov.au/media/2004/mr2306.html>, accessed: 12/01/07.

There are a number of difficulties associated with reliance upon PII to protect NSI. Where a PII claim is successful, a case may be unable to proceed due to a lack of admissible evidence or because withholding the information from a defendant may prevent them from mounting a full defence and receiving a fair trial.[4] Alternatively, a court may rule against a claim for PII and order the disclosure of NSI in open court, in which case there is a risk of adverse consequences for Australia's national security. The Commonwealth may then be faced with a difficult choice between discontinuing the prosecution or risking prejudice to national security from the disclosure of the information. At a practical level, PII also has the disadvantage that confidentiality and security sensitive issues may arise unexpectedly, even after an inappropriate disclosure has occurred, and claims for PII will therefore often fall to be determined at very short notice, to the inconvenience of both the Court and the parties. Additionally, PII does not protect information from disclosure prior to the making of a court order. Further, PII does not allow for summaries or stipulations of fact to be substituted.

Section 130 of the *Evidence Act 1995* (Cth) is the statutory equivalent of PII.[5] It operates in much the same way as the common law principle and accordingly suffers much the same difficulties in relation to the use of NSI in court proceedings. In addition to the problems outlined above, section 130 does not apply to all jurisdictions, and its application is limited to the trial stage of a proceeding.

The NSI Act, NSI Regulations and NSI Requirements overcome these difficulties by providing a comprehensive regulatory framework for the disclosure, storage and handling of all NSI involved in federal criminal proceedings or civil proceedings, whether in documentary or oral form. The NSI Act applies from the pre-hearing stages through to completion of appellate proceedings, thereby enabling the parties to identify and bring forward any NSI issues as early as practicable. It is important to note that the NSI Act, consistent with ALRC recommendations, neither excludes nor impedes a court's power to uphold claims for PII, to make orders under section 130 of the *Evidence Act 1995* or to make other protective orders such as closure of court and non-publication orders.[6]

[4] For example, see *R v Lappas and Dowling* [2001] ACTSC 115.

[5] Section 130 provides that in instances where 'the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document,' the court may exclude the information from evidence.

[6] *Criminal Code Act 1995*, section 93.2, and *Crimes Act 1914*, section 85B provide for the conduct of 'in-camera' proceedings and prescribe restrictions on the disclosure of information 'expedient in the interest of the Commonwealth' or 'in the interest of the security or defence of the Commonwealth'. However, sections 23 and 38C of the NSI Act are, themselves, a source of power to make protective orders (for example, witness screening and pseudonyms).

Comparative legislation in the US, UK and Canada

In developing its legislative regime for the protection of NSI in court proceedings, careful consideration was given to the statutory approaches taken in the United States, Canada and the United Kingdom.

United States and Canada

Statutory procedures for the protection of NSI have operated in the US and Canada for more than 20 years. The US *Classified Information Procedures Act* (the US CIPA) was introduced in 1980 in response to the problem of 'greymail', whereby defendants threatened to reveal classified information unless prosecutions were dropped or curtailed.[7] In Canada, provisions dealing with the use of NSI in court proceedings are contained in the *Canada Evidence Act* (R.S., 1985, c. C-5).[8]

Both the US and Canadian Acts place an obligation on criminal defendants to notify the Government if they expect to adduce NSI as evidence.[9] These Acts also require that the nature and admissibility of such evidence be determined in closed hearings.[10]

Under the US CIPA, if a court determines that certain NSI is admissible, the US Government may seek orders allowing a redacted version, a summary or an admission of relevant facts to be adduced in place of the original information.[11]

In Canada, the first step is for the Attorney-General to decide whether the NSI may be disclosed. This decision may then be challenged before a court, and if the NSI is found to be admissible the court may authorise the replacement of the NSI with a summary or a written admission of facts.[12]

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[7] Manget, Frederic F, 'Intelligence and the Rise of Judicial Intervention' http:www.cia.gov/csi/studies/96unclass/manget.htm at p 4.
[8] Department of Justice, Canada Website, <http://laws.justice.gc.ca/en/showtdm/cs/C-5>, accessed: 09/04/2008.
[9] *Classified Information Procedures Act*, 18 USC Appendix 3, section 5; *Canada Evidence Act*, section 38.01.
[10] *Classified Information Procedures Act*, 18 USC Appendix 3, section 6; *Canada Evidence Act*, section 38.11.
[11] *Classified Information Procedures Act*, 18 USC Appendix 3, section 4.
[12] *Canada Evidence Act*, section 38.06(2). For information on how US and Canadian Acts operate see: Salgado, R P, 'Government Secrets, Fair Trials, and the Classified Information Procedures Act', *Yale Law Journal*, December 1988; Pilchen, S M, 'Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel', *American Criminal Law Review*, Winter 1994; (Major) Maher, C M, 'The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information', *Military Law Review*, Spring 1988; Tamanaha, B Z, 'A Critical Review of the Classified Information Procedures Act', *American Journal of Criminal Law*, Summer 1986; Jarvis, J, 'Protecting the Nation's National Security: The Classified Information Procedures Act', *Thurgood Marshall Law Review*, Spring 1995.

In the event that a court refuses to allow a summary or admission of relevant facts to be substituted for the NSI, the Attorney-General may issue a certificate prohibiting disclosure of the information.

United Kingdom

Unlike the US and Canada, the UK does not have a single piece of legislation which deals comprehensively with the use of NSI in court proceedings. The public interest immunity principle is codified in the *Criminal Procedures and Investigation Act 1996,* while other procedures relating to the protection of NSI in criminal proceedings may be found in the *Official Secrets Act 1920*. Some of these procedures have been incorporated into the NSI Act.[13]

Constitutionality of the NSI Act

In *R v Faheem Khalid Lodhi,*[14] Part 3[15] of the NSI Act was challenged on constitutional grounds. In an intervention by media groups it was argued that procedures set out in Part 3 were unconstitutional because they breached the implied freedom of political communication. It was also argued that the NSI Act required State and Territory Supreme Courts to exercise Commonwealth judicial power in a manner inconsistent with their character.

The Honourable Justice Whealy in the Supreme Court of New South Wales rejected these arguments and upheld the constitutional validity of the NSI Act. His Honour, notwithstanding the enactment of Part 3, held that questions as to the admissibility of evidence must still be determined in the ordinary way by the trial judge.[16] His Honour observed that the Court's ordinary powers to restrict access to hearings and exclude evidence[17] have not been criticised on constitutional grounds. He was also satisfied that the Court retains unfettered control over the trial to ensure the accused is not tried unfairly.

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[13] For example, restrictions on court reporting: *Criminal Procedures and Investigation Act 1996* (UK) section 37; NSI Act, subsections 29(5) and 38I(5).
[14] unreported, NSWSC, 7 February 2006.
[15] Part 3 contains the NSI Act provisions on pre-trial conferences, non-disclosure certificates, notification procedures and closed hearings in the context of federal criminal proceedings.
[16] *R v Faheem Khalid Lodhi* (NSWSC 21 February 2006) Whealy J at 93.
[17] These powers are found in the *Crimes Act 1914,* section 85B and the *Criminal Code Act 1995*, section 93.2.

On 20 December 2007 the New South Wales Court of Criminal Appeal rejected an appeal by Mr Lodhi against his conviction and sentence which argued, in part, that subsection 31(8) of the NSI Act is unconstitutional.[18]

[18] *Faheem Khalid Lodhi v Regina* [2007] NSWCCA 360; see p 25 below. Mr Lodhi has applied for special leave to appeal the NSW Court of Criminal Appeal decision in the High Court.

3. Object and scope of the NSI Act

Subsection 3(1) of the NSI Act provides that '[t]he object of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.'

The meaning of 'national security' is central to the operation of the NSI Act, Regulations and Requirements.[19] The term is defined in section 8 of the NSI Act as 'Australia's defence, security, international relations or law enforcement interests.'[20] Section 8 is based on the definition in the Commonwealth Protective Security Manual. However, 'law enforcement interests' was added to the definition to ensure that law enforcement information which is connected to national security, including intelligence collection methods and technologies, is not excluded from protection under the NSI Act. In the *Lodhi* case, media groups argued that the definition was too broad, requiring the court to make decisions about policy issues which fall outside the scope of proper judicial consideration. However, Justice Whealy rejected this argument on the basis that courts consider a similar range of matters in public interest immunity claims.[21]

Whether the provisions of the NSI Act apply to particular information in a court proceeding depends on the relationship of the information to national security. There is no single definition of 'national security information' in the NSI Act. Rather, the provisions of the NSI Act operate by reference to information in two different categories:

- information which relates to national security or the disclosure of which may affect national security, and
- information, the disclosure of which is likely to prejudice national security.

The requirement in section 24 of the NSI Act to notify the Attorney-General of a potential disclosure of information is an example of a provision that applies to information which relates to national security or the disclosure of which may affect national security. On the

[19] Supplementary Explanatory Memorandum to the *National Security Information (Criminal Proceedings) Bill 2004* p 1.
[20]The terms 'international relations' and 'law enforcement interests' are defined in sections 10 and 11 of the NSI Act. 'Security' is defined in section 9, by reference to section 4 of the *Australian Security Intelligence Organisation Act 1979.* Each of these sections is extracted in full in Appendix 1 – Defining national security information.
[21] *Regina v Lodhi* [2006] NSWSC 571 (7 February 2006).

other hand, the Attorney-General may only issue a certificate under section 26 limiting the disclosure of information if he or she considers the disclosure of the information is likely to prejudice national security.

A disclosure of information is 'likely to prejudice national security' if there is 'a real, and not merely a remote, possibility that the disclosure will prejudice national security' (see section 17). For the purposes of the NSI Act, 'information' means information of any kind, whether true or false, whether in material form or not and whether it is in the public domain or not. Information includes an opinion and a report of a conversation.[22]

[22] 'Information' is defined in section 7 of the NSI Act, by reference to section 90.1(1) of the *Criminal Code Act 1995*.

4. Management of Information in Federal Criminal Proceedings

Step 1 – Invoke the NSI Act

Section 6 of the NSI Act sets out two conditions which must be satisfied before the NSI Act is invoked in a criminal proceeding:

(1) the proceeding must be a 'federal criminal proceeding', and

(2) the prosecutor must notify the court and the defendant in writing that the NSI Act applies.

The proceeding must be a 'federal criminal proceeding'

A 'federal criminal proceeding' is defined in section 14 of the NSI Act as a criminal proceeding in any court exercising federal jurisdiction (where any of the offences concerned are against a law of the Commonwealth), or a court proceeding involving the *Extradition Act 1988*.[23] Subsection 13(2) provides that a criminal proceeding includes all stages of the trial process, as well as any interlocutory steps taken or appellate proceedings.

The NSI Act does not extend to proceedings in military or other tribunals, because regimes already exist in those forums for the protection of NSI.

The prosecutor must notify the court & defendant in writing

Subsection 6(1) of the NSI Act requires the prosecutor to 'trigger' the operation of the NSI Act in criminal proceedings. This is done by assessing the brief of evidence and notifying the court and the defendant in writing if it is thought that the NSI Act should apply to the case. If the prosecution provides this notification after the proceeding has commenced, the NSI Act will only apply to those parts of the proceeding that occur after the notification has been given.[24] The court cannot invoke the NSI Act independently.

Optional Step 1A – Conduct a pre-trial conference

Section 21 of the NSI Act gives parties the option to apply to the court for a pre-trial conference to consider issues relating to NSI.[25] The court must

[23] To date, the NSI Act has largely been invoked in criminal matters involving terrorism offences. However, it could also be invoked in prosecutions for other criminal offences (for example, federal people-trafficking offences or espionage offences).
[24] NSI Act, subsection 6(2).
[25] NSI Act, subsection 21(1).

conduct the conference as soon as possible after the application is made.[26] Pre-trial conferences are advantageous because they can assist with the expeditious and early resolution of issues relating to NSI, as well as make the court aware of any expected disclosures of NSI. In the *Lappas* case[27] the Honourable Justice Gray commented that the early detection and management of NSI is important, because it allows the court and the parties more flexibility to deal with disclosure issues.

Pre-trial conferences were conducted in the *Thomas,*[28] *Ul-Haque*[29] and *Lodhi*[30] cases. In practice, NSI issues are often dealt with as part of the general case management process.

Optional Step 1B – Agree to section 22 arrangements

At any time during a federal criminal proceeding, the prosecutor and defendant may agree to an arrangement about the disclosure of NSI in the proceeding.[31] The court has a broad discretion to make orders it considers appropriate to give effect to the arrangement.[32] 'Section 22 arrangements' have become common practice in most cases, particularly where parties are willing to negotiate to protect the information appropriately. Subsection 22(2) is itself a source of power for the court to give effect to arrangements agreed between the parties and the court does not require any other power to give effect to a section 22 order.[33]

When a section 22 arrangement is in place in relation to the storage, handling, destruction, access and preparation of NSI, the requirements set out in the NSI Regulations and the NSI Requirements do not apply. Section 22 arrangements are useful because they can alleviate the need for the parties to fully adhere to detailed procedures set out in the NSI Regulations and NSI Requirements document.[34]

It is important to keep in mind that whether a pre-trial conference is held or section 22 arrangements are entered into can have implications at the sentencing stage of a criminal proceeding. This is because the court has discretion to take into account the cooperation (or otherwise) of a

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[26] NSI Act, subsection 21(2).
[27] *R v Lappas and Dowling* [2001] ACTSC 115.
[28] *DPP v Joseph Terrence Thomas* [2006] VSC 18.
[29] *R v Izhar Ul-Haque* (NSWSC, 8 February 2006) (Bell J).
[30] *R v Faheem Khalid Lodhi* (NSWSC 21 February 2006) (Whealy J).
[31] NSI Act, subsection 22(1).
[32] NSI Act, subsection 22(2).
[33] For example, the court's inherent jurisdiction or under section 85B of the *Crimes Act 1914* and section 93.2 of the *Criminal Code Act 1995*.
[34] The NSI Act does not expressly state that section 22 has this effect. However, this was the interpretation favoured by Whealy J in *R v Lodhi* (2006) 163 A Crim R 448 at 64 and 84.

convicted person during the pre-trial negotiations regarding the possible disclosure of NSI.[35]

Section 22 arrangements commonly address the following matters:

- information which the parties are permitted to disclose and when
- restrictions on the handling, publication, copying and destruction of NSI
- arrangements for the declassification of NSI
- the procedure for the granting particular individuals access to NSI
- the handling and return of NSI at the conclusion of access
- procedures for closing the court to the public in certain circumstances
- procedures to prevent the identification of certain witnesses
- procedures to prevent the publication of certain evidence, and
- the handling and return of Commonwealth property, such as secure equipment.

[35] Section 16A of the *Crimes Act 1914*. This is consistent with ALRC recommendations. Note however changes to non-parole period sentencing for all terrorism offences – see section 19AG of the *Crimes Act 1914*.

Step 2 – Notify the Attorney-General

Expected disclosure of NSI

Section 24 of the NSI Act provides that if the prosecutor or defendant knows or believes that NSI will be disclosed during a proceeding,[36] he or she must:

- notify the Attorney-General as soon as practicable,[37] using the prescribed form,[38] and
- advise the court, the other party and any relevant witnesses in writing that the Attorney-General has been notified of an expected disclosure and provide them with a description of the information.[39]

Subsection 24(4) states that the court must then adjourn the proceeding until the Attorney-General:

- provides a non-disclosure certificate to the court under subsection 26(4), or
- advises the court under subsection 26(7) that no such certificate will be provided.[40]

Where the NSI concerned is the subject of an existing certificate under either section 26 or section 28, or a section 22 arrangement and related court orders under section 31, notification under these provisions may not be necessary.

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[36] Note that under subsection 24(1)(c), the mere presence of a particular witness during a proceeding can constitute a disclosure of information which relates to or may affect national security.
[37] Subsection 24(1) – this includes information that may be introduced through a document or a witness' answer to a question, as well as information that may be disclosed by the mere presence of a witness.
[38] Form 1 'Notice of expected disclosure in federal criminal proceedings of information relating to, or affecting, national security' in Schedule 1 to the NSI Regulations.
[39] NSI Act, subsection 24(3).
[40] Step 3 provides further information about section 26 certificates and advice.

Expected disclosure of information by a witness

Section 25 provides that if a witness is asked a question in the course of giving evidence and the prosecutor or defendant knows or believes that in answering the question the witness may disclose NSI, the relevant party must advise the court of that knowledge or belief. When the situation arises, section 25 provides for the following procedure:

- Once the prosecutor or the defendant has advised the court of his or her belief, the proceedings must be adjourned and a closed hearing held.
- At the hearing, the witness must provide the court with a written answer to the question and the court must show the answer to the prosecutor.
- If the prosecutor knows or believes that information in the answer is NSI, he or she must advise the court of that belief and notify the Attorney-General in writing as soon as practicable.
- The proceeding must then be adjourned until the Attorney-General issues a non-disclosure certificate under subsection 26(4), or advises the court that a certificate will not be issued.

Relevant offences

The offences for breaches of sections 24 and 25 are set out in sections 40, 41 and 42. All offences are punishable by up to two years imprisonment.

Step 3 –Issue a section 26 or 28 certificate[41]

Once the Attorney-General has been notified of an expected disclosure of information which relates to or may affect national security, the Attorney-General may:

(1) issue a criminal non-disclosure certificate (section 26)

(2) issue a criminal witness exclusion certificate (section 28), or

(3) advise that he/she will not issue a certificate (sections 26(7), 28(10)).

Issue a criminal non-disclosure certificate

Criminal non-disclosure certificates are used to protect information likely to prejudice national security from being disclosed during a federal criminal proceeding. The Attorney-General may issue a criminal non-disclosure certificate if he or she:

- has been notified under section 24 or subsection 25(6) of an expected disclosure of information or expects that a party to the proceeding or a witness will disclose information, and
- considers that disclosure of the information would be likely to prejudice national security.[42]

The Attorney-General must give each potential discloser[43] a copy of the certificate, describing the information and stating that it must not be disclosed except in permitted circumstances.[44] If the information would be disclosed in a document,[45] the Attorney-General may also provide a

[41] As part of its recommendations on proposed national security procedures legislation, the ALRC suggested giving the court discretion to excuse the prosecution, in part or in whole, from any obligation it would otherwise have been under to disclose NSI, subject to certain prescribed safeguards, including, for example, that the information is not exculpatory of, or likely to reasonably assist, the accused. The criminal non-disclosure or witness exclusion certificate provides the power to provisionally prevent the disclosure of information pending judicial determination. The prosecutor is not bound by these non-disclosure obligations where he or she discloses the information in the course of his or her duties in relation to the proceeding (see the permitted circumstances exception in paragraph 16(a)). The Attorney-General can vary the non-disclosure obligation by withdrawing a certificate (in accordance with the *Acts Interpretation Act 1901* (Cth)) and issue another certificate which may mandate variant (broader or more confined) non-disclosure obligations.
[42] NSI Act, subsection 26(1).
[43] The term 'potential discloser' is defined in the NSI Act, subsection 26(8).
[44] The term 'permitted circumstances' is defined in the NSI Act, section 16.
[45] NSI Act, section 7 defines the term 'document' by reference to the *Evidence Act 1995.* The *Evidence Act* provides that a document is: (a) anything on which there is writing; (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; (d) a map, plan, drawing or photograph.

copy of the document with the information deleted, with or without a summary of the information or a statement of the facts that the information would, or would be likely to, prove.[46] If the information would be disclosed other than in a document,[47] the Attorney-General may choose to provide a written summary of the information or a written statement of the facts that the information would, or would be likely to, prove.[48] The Attorney-General must give the court a copy of the certificate, along with copies of any other documents provided to each potential discloser.[49]

Issue a criminal witness exclusion certificate

The Attorney-General may issue a witness exclusion certificate if he or she:

- has been notified under section 24, or for any reason expects, that a person whom the prosecutor or defendant intends to call as a witness may disclose information by his or her mere presence, and
- considers that disclosure of the information would be likely to prejudice national security.[50]

The Attorney-General must provide a copy of the witness exclusion certificate to the court and may provide a copy of the certificate to the prosecutor or defendant. Reasons as to why information should not be disclosed are discussed at length during the closed hearing process (see Step 4) and the court is required to publish reasons for its decision.[51] In addition, the certificate and its accompanying documentation must be sufficiently descriptive to enable the court to make an informed decision in relation to the handling of the NSI.

Advise that a certificate will not be issued

If the Attorney-General forms the view that a non-disclosure certificate or a witness exclusion certificate ought not be issued, the Attorney-General must advise the court and the prosecutor or defendant, as the case requires, in writing of his or her decision (subsections 26(7) and 28(10)). This enables the proceeding to continue in the usual course without unwarranted delay.

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[46] NSI Act, subsection 26(2).
[47] The most common example of non-documentary information is the oral evidence provided by a witness.
[48] NSI Act, subsection 26(3).
[49] NSI Act, subsection 26(4).
[50] NSI Act, subsection 28(1).
[51] This requirement and the reporting responsibilities under section 47 of the NSI Act broadly mirror ALRC recommendations.

To date, there have been a number of cases in which the Attorney-General has declined to issue a non-disclosure certificate or a witness exclusion certificate, as the court had already made orders under section 22 of the NSI Act, which protected that information adequately. However, in those cases, the Attorney-General expressly reserved his position in relation to the need to reconsider whether the disclosure of any matters identified in the notices would be likely to prejudice national security in the event that the orders made by the Court were varied or terminated. There may be a range of other considerations, in addition to the existence of section 22 orders, that are relevant to the Attorney-General's decision on whether or not to issue a non-disclosure certificate or a witness exclusion certificate.

Duration of certificates

A certificate ceases to have effect when the Attorney-General revokes it or the court makes an order in relation to the use of the information under section 31 and that order becomes final.[52] A criminal non-disclosure certificate will serve as conclusive evidence that the disclosure of the information in the proceeding is likely to prejudice national security in the pre-trial phase of criminal proceedings until the court rules on the validity of the certificate following a section 31 closed hearing.

Relevant offences

It is an offence under the NSI Act to disclose information or to call a witness contrary to an Attorney-General's criminal non-disclosure certificate or witness exclusion certificate under sections 43 and 44, respectively.

Step 4 – Adjourn proceeding and hold a closed hearing

The giving of a criminal non-disclosure or a witness exclusion certificate to the court triggers the need for the court to hold a closed hearing to decide whether to make an order under section 31 in relation to the disclosure of information or the calling of a witness. Where a certificate has been issued, the court will determine whether it will maintain, modify or remove the restriction on disclosure of information or the calling of witnesses.

If the certificate is received before the substantive proceeding, the closed hearing must be conducted before the substantive proceeding commences.[53] If the certificate is given to the court after the proceeding

[52] NSI Act, subsections 26(5) and 28(4).
[53] NSI Act, paragraphs 27(3)(a) and 28(5)(a).

begins, the court must adjourn the proceeding in order to hold a closed hearing.[54]

If the Attorney-General revokes the certificate while the proceeding is adjourned or during the course of a closed hearing, the court must end the adjournment or the hearing.[55]

NSI Act closed hearings (section 29)

A closed hearing for the purpose of the NSI Act is not interchangeable with the usual closed court or 'in-camera proceeding'. Closure does not apply to the substantive proceedings and is strictly conducted for the limited purpose of addressing two matters:

(1) whether to allow a witness to be called, and

(2) whether information potentially prejudicial to national security may be disclosed and, if so, in what form.

Closed hearing requirements do not prevent a defendant from being heard on issues relating to the non-disclosure of information or more generally, from participating in the substantive hearing. The closed hearing is solely concerned with contested issues of disclosure preliminary to, but outside of, matters to be adjudicated (including the relevance and admissibility of NSI) in the substantive proceeding.

The exclusionary provisions under the UK, Canadian and US regimes are broader in ambit than the closed hearing provisions under the NSI Act to the extent that the prescribed closure of the proceedings in these jurisdictions applies to the substantive hearing as opposed to a more confined 'voir dire' segment of the trial.

The NSI Act enables defence counsel and court staff who do not have security clearances to be excluded from a closed hearing held pursuant to section 29 if disclosure of information to them would be likely to prejudice national security. In contrast, court procedure laws governing in-camera hearings generally provide only for the exclusion of members of the public.[56]

In the *Lodhi* case,[57] Justice Whealy expressly recognised the limited discretion the closed hearing provisions confer – relating only to the

[54] Or alternatively, continue an adjournment under subsections 24(4) or 25(7).
[55] NSI Act, subsections 27(4) and 28(8).
[56] For example, section 93.2 of the *Criminal Code Act 1995*, section 85B of the *Crimes Act 1914*, subsection 17(4) of the *Federal Court of Australia Act 1976*, section 16 of the *Witness Protection Act 1995* (NSW), section 18 of the *Supreme Court Act 1986* (Vic).
[57] *R v Faheem Khalid Lodhi* (NSWSC 21 February 2006).

identification and disclosure of material that may be later adduced in the proceeding. His Honour acknowledged that, even in respect of that part of the proceeding where there is a discretion to exclude evidence, the defendant and his representative must be afforded an opportunity to make submissions to the court.[58] His Honour observed that:

> [q]uestions as to the admissibility of the evidence and the manner of giving the evidence remain for the determination of the trial judge in the ordinary way. These procedures would normally be carried out in open court and being about a situation where the only evidence properly placed before the jury is evidence that is properly admissible and not otherwise subject to exclusion.[59]

In February 2006, Mr Lodhi lodged an appeal in the New South Wales Court of Criminal Appeal challenging, amongst other things, an order requiring closed hearings made by Justice Whealy. The appellant argued that His Honour had misapplied the statutory tests regarding closure of the court. Counsel on behalf of the Attorney-General submitted that His Honour's reasons for ordering closure of the court were appropriate. The Court unanimously rejected Mr Lodhi's appeal, affirming that it was proper for both non-publication and closed court orders to be made.[60]

Closed hearing requirements

<u>Persons who may be present at closed hearings – section 29</u>

Subsection 29(2) provides that only the following persons can be present at a closed hearing:

- the magistrate, judge or judges comprising the court
- court officials (subject to the court's discretion)
- the prosecutor
- the defendant (subject to the court's discretion)
- any legal representative of the defendant (subject to the court's discretion)[61]

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[58] This is consistent with ALRC recommendations.
[59] *R v Faheem Khalid Lodhi* (NSWSC 21 February 2006) (Whealy J) at 96.
[60] *Lodhi v R* [2006] NSWCCA 101 (4 April 2006).
[61] This may include 'special counsel' (see decision of Whealy J in *Faheem Khalid Lodhi*) (unreported 2005/1094 re application for appointment of special counsel).

- the Attorney-General and his or her legal representative if the Attorney-General exercises his or her right to intervene in the closed hearing under section 30, and
- any witnesses permitted by the court.

The NSI Act seeks to strike an appropriate balance between protecting national security and not unduly interfering with court procedures. Accordingly, the court has a discretion to exclude the defendant, non-security cleared legal representatives of the defendant and non-security cleared court officials from the closed hearing where the court considers that the information would be disclosed to the person and that its disclosure would be likely to prejudice national security.[62]

Given that the court retains a discretion to exclude court personnel who do not hold the requisite security clearance, it is preferable to identify and seek to have relevant persons security cleared early to prevent any unnecessary delays. This could include officers who may need to be present in closed court arrangements, including, judges' associates, tip staff, court reporters and corrections officers, as well as any staff likely to be involved in the handling and storage of any NSI.

If the Attorney-General or his or her legal representative argues in favour of excluding evidence or a witness from the proceeding, the parties and any legal representative must be afforded the opportunity to make submissions in response to such an argument.[63]

<u>Meaning of 'legal representative of the defendant' under subsection 29(2)</u>

Having regard to references to the term 'legal representative' in paragraphs 16(ac) and (ad) of the NSI Act, the term 'legal representative' is likely to be construed as a person acting under a lawyer/client relationship in relation to which fiduciary obligations are exercised. That is, a person admitted as a legal practitioner to a State or Territory court, whether or not she or he has an entitlement to practice.

[62] This is consistent with ALRC recommendations that disclosure of certain material be restricted to people who hold a security clearance at a specified level.
[63] Subsection 29(4).

Records of closed hearings – section 29

Subsection 29(5) states that a court conducting a closed hearing must make and keep a record of the hearing. The court must provide a copy of the proposed record to the prosecutor and the Attorney-General and his or her legal representatives.[64] If the prosecutor, the Attorney-General or his or her legal representatives consider that allowing access to the record may disclose information and the disclosure is likely to prejudice national security, they may request that the court vary the record so that it does not disclose NSI.

The court must make a decision on the request for variation to the record. If the court decides against variation, the prosecutor or the Attorney-General and his or her legal representatives may seek an order that the court delay making the record to allow an appeal to be lodged.

Once the record has been finalised, the court must make it available only to:

- an appeal court conducting a review of the closed hearing decision
- the prosecutor
- the Attorney-General and his or her legal representative if the Attorney-General has intervened in the proceeding under section 30, and
- any legal representative of the defendant with an appropriate security clearance (subsection 29(5)).

[64] Subsection 29(6).

Step 5 –Make section 31 orders in relation to disclosure

Criminal non-disclosure certificates

After holding a closed hearing under subsection 27(3) the court must make one of the following orders; which apply to any person to whom the certificate is given, any person to whom the contents of the certificate have been disclosed and any other specified person:

- that the information not be disclosed, whether in proceedings or otherwise, except in permitted circumstances
- that the information be disclosed in a particular form (that is, with redactions, with a summary of information or with a statement of facts), [65] or
- that the information be disclosed – effectively overturning the Attorney-General's certificate.

Witness exclusion certificate

After holding a closed hearing under subsection 28(5), the court must order:

- that the prosecutor or defendant must not call the person as a witness (paragraph 31(6)(a)), or
- that the prosecutor or defendant may call the person as a witness (paragraph 31(6)(b)).

Relevant factors

In deciding which section 31 orders are most appropriate, the court must consider:

- whether the disclosure of the information or presence of the witness would constitute a risk to national security, having regard to the Attorney-General's certificate (paragraph 31(7)(a))
- whether an order to prevent disclosure or calling of a witness would have a substantial adverse effect on the defendant's right to a fair hearing, including in particular on the conduct of his or her defence (paragraph 31(7)(b)), and
- any other matter the court considers relevant (paragraph 31(7)(c)).[66]

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[65] The redacted version of the document and/or accompanying summary of information may be admissible as evidence of the contents of the original document if the original document is admissible (subsection 31(3)).

When considering these matters, the court must give greatest weight to national security considerations (subsection 31(8)).

In *Lodhi,*[67] counsel for the defendant queried whether the court's discretion under section 31 was a true discretion. Justice Whealy rejected this assertion, observing that there were no grounds for the supposition that in an appropriate case, the court would not make orders that diverged from disclosure directives given by the Attorney-General's certificate. His Honour indicated he considered section 31 does provide a real discretion, and noted that:

(1) there is an absolute right for the defendant and his or her legal representative to be heard under subsection 29(4)

(2) the court must give due consideration to the substantial adverse effect of an order on the defendant's right to a fair trial, and

(3) the court is obligated to adhere to the object of the NSI Act, giving due regard to the administration of justice.

As His Honour observed, Part 3 of the NSI Act does not impinge 'in any fundamental way upon the ordinary process of the establishment of guilt or innocence by judge and jury… [t]he traditional protections given to an accused person are not put aside by the legislation.'[68]

On 5 and 6 November 2007 the New South Wales Court of Criminal Appeal considered an appeal by Mr Lodhi against his conviction and sentence.[69] One of the matters he raised was the constitutional validity of subsection 31(8) of the NSI Act which requires the Court to give greatest weight to the risk of prejudice to national security when considering whether to make a non-disclosure order. It was submitted that this direction, when considering an Attorney-General's certificate, was effectively an order as to how a case is to be decided.

In rejecting Mr Lodhi's appeal the Court held that subsection 31(8) merely gives the court guidance as to the comparative weight it should give one factor over another, and so does not unconstitutionally direct the

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[66] Allowing the court to consider 'any other matter [it] considers relevant' is compendious and provides support for a generous construction of the section as allowing the court to retain sufficient autonomy over its decision-making. This view is augmented by section 19(1) of the NSI Act which expressly provides that the NSI Act does not encroach on the inherent jurisdiction of the court and does not curtail its powers except to the extent this is done expressly by the NSI legislation or by necessary implication.

[67] *R v Faheem Khalid Lodhi* (NSWSC 21 February 2006) (Whealy J) at 108.

[68] *R v Faheem Khalid Lodhi* (NSWSC 21 February 2006) (Whealy J) at 85.

[69] *Faheem Khalid Lodhi v Regina* [2007] NSWCCA 360.

court how to exercise its jurisdiction or interfere with the integrity of the judicial balancing process.[70]

Consequences of a section 31 court order

Once a court has made an order under section 31, the prosecutor or the defendant may request an adjournment so that they may consider the terms of the order and lodge an appeal against it, or in the case of the prosecutor, withdraw the charge.[71] The court must grant an adjournment if such an application is made. Section 34 provides that an order made by the court under section 31 does not come into force until it ceases to be subject to appeal.[72] By enabling the Attorney-General's certificate to remain operative until any subsequent court order is final, section 34 prevents the disclosure of NSI under an order that is later successfully appealed. If the court considering the appeal upholds the decision of the judge, the prosecutor may make a decision to discontinue the prosecution.

Notably, a court order overturning the Attorney-General's certificate cannot form grounds for the re-trial of parts of the proceeding conducted before the order was made.[73] If the court orders that a redacted document or statement of facts be prepared, that abridged document or summary becomes admissible as evidence of the contents of the document.[74]

Reasons in support of a section 31 order

Section 32 of the NSI Act obliges a court to produce a written statement of reasons explaining the section 31 order. As with a record of an NSI Act closed hearing, the court must supply the prosecutor and the Attorney-General with a proposed statement of reasons before it can be finalised and disseminated.[75] The prosecutor or the Attorney-General may then apply to the court for a variation of the statement, where the proposed statement of reasons will disclose information likely to prejudice national security. The court is then obliged to make a decision on the variation sought. If the court does not agree to the requested variation, the prosecutor or the Attorney-General may appeal the decision under subsection 38(1). While the appeal is pending, the court must adhere to any request by the prosecutor or the Attorney-General to delay dissemination of the written statement.[76]

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[70] *Faheem Khalid Lodhi v Regina* [2007] NSWCCA 360 (20 December 2007) at 36-39. Mr Lodhi has applied for special leave to appeal the NSW Court of Criminal Appeal decision in the High Court.
[71] NSI Act, subsections 36(1), (2).
[72] This provision for appeal is consistent with ALRC recommendations.
[73] NSI Act, section 35.
[74] NSI Act, subsection 31(3).
[75] NSI Act, subsection 32(2).
[76] NSI Act, section 33.

Once finalised, the written statement of reasons must be provided to:

- the person who is the subject of the order (for example, the witness whose evidence in chief may disclose NSI)
- the prosecutor
- the defendant and his or her legal representative, and
- the Attorney-General and any legal representative of the Attorney-General if he or she is an intervener under section 30 (subsection 32(1)).

Relevant offences

Intentional contravention of the terms of an order under section 31 constitutes an offence under section 45 of the NSI Act and is punishable by up to two years imprisonment.

Step 6 – Issue security clearances

Protection of sensitive information through the security clearance process

The purpose of the security clearance process is to protect NSI relevant to a court case from unauthorised disclosure.

Security clearances have been used for a number of years by Federal, State and Territory agencies to ensure only eligible and suitable persons have access to sensitive or classified information.

The security clearance procedure is not unique to Australia. Defence counsel may be required to be security cleared in criminal cases in the US under the US CIPA legislation.[77] Security clearance of legal representatives in US matters involving NSI have been undertaken for many years and the process has been accepted by the US legal profession as being part of its obligations to properly represent clients. Further, recent US case law has determined that security clearances are the best mechanism to prevent unauthorised disclosure of classified information in the custody of the court.[78] A lack of security clearance may prevent – and will certainly delay – a US practitioner's access to classified information. In Canada, security cleared counsel appear before hearings conducted by the Security Intelligence Review Committee and are appointed from a

[77] Section 3 of that Act provides that: '[u]pon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States' – see ALRC Report 98 at 6.38.
[78] *US v Usama Bin Laden* 58F Supp 2d 113 (S D NY 1999).

panel of security cleared lawyers.[79] In the UK, the *Juries Act 1974* permits limited security checks of potential jurors in accordance with the Attorney-General's guidelines.

The security clearance process

Given that the court retains a discretion to exclude court personnel who are not security cleared as explained under the Closed Hearing Requirements section of this guide, it is prudent for the court to identify those officers that may need to be present in closed court arrangements (for example, judges' associates, tip staff, court reporters and corrections officers) as well as any staff who would be involved in the handling and storage of any classified information or NSI, and seek to have them cleared early on in the proceedings in order to prevent or reduce delays.

The security clearance process is an assessment of a person's eligibility and suitability to access NSI. Individuals complete an information package that is composed of a series of questionnaires. Information obtained through the questionnaires is used as the basis for conducting background checks and inquiries. An assessment is then made of the individual's eligibility and suitability to access security classified material. The level of clearance required depends on the highest level of classification of the NSI involved in the particular case. For example, if the highest level of classification is 'Secret' then security clearances at 'Secret' level will be required.

The security clearance process is the same as that undertaken by government officers including officers from the Commonwealth Director of Public Prosecutions (CDPP) and counsel acting for the CDPP and the Commonwealth.

Security clearances and legal aid guidelines

Special requirements apply to legal representatives who assist legally-aided clients in the conduct of criminal and civil matters relating to Australia's national security. Practitioners should consult the Commonwealth Legal Aid Guidelines, in particular Schedule 3, Part 1 – Guideline 7 (National Security) which came into operation on 4 July 2006 (Commonwealth Legal Aid Amendment Guidelines 2006 (No. 1) refers). The Commonwealth Legal Aid guidelines do not restrict a legally-assisted client's ability to nominate a preferred legal practitioner. In terms of security clearance procedures, legal aid practitioners should be aware that after the issue of a section 39 notice, further payments

[79] Australian Law Reform Commission (ALRC) Discussion Paper 67 – Protecting Classified and Security Sensitive Information paragraphs 6.37- 6.45.

pursuant to a grant of legal assistance are contingent upon the legal practitioner operating under the legal aid scheme being security cleared or having lodged an application for security clearance.

Security clearance provisions in the NSI Act

Security cleared defence representatives

The CDPP may contact defence representatives to invite them to seek a security clearance early to reduce or prevent possible delays later in proceedings should the requirement for a security clearance be identified.

Under section 39 of the NSI Act, the Secretary of the Attorney-General's Department may give written notice before or during a federal criminal proceeding to the defendant's legal representative or a person assisting the defendant's legal representative that an issue is likely to arise in the proceeding relating to a disclosure of information that is likely to prejudice national security.[80] Upon receipt of the Secretary's notice, the defendant's legal representative and his or her assistants may apply to the Secretary for a security clearance by the Attorney-General's Department. The security clearance process is conducted at arm's length from the agencies involved in prosecutions. Legal representatives can choose to obtain their security clearances from a number of providers of security vetting services. If a clearance is denied, the applicant may seek a review of the decision by the Administrative Appeals Tribunal.

The defendant may apply to the court for the proceeding to be deferred or adjourned pending receipt of a security clearance by his or her legal representative or to enable another legal representative to be security cleared.[81] In these circumstances, the court must defer or adjourn the proceeding, ensuring NSI Act provisions will not interfere with the defendant's right to be fairly and independently represented.

[80] To date, there have been no cases where a notice under section 39 has been issued by the Secretary of the Attorney-General's Department.
[81] NSI Act, subsection 39(3).

Uncleared defence representatives

If the defendant's legal representative does not apply for the security clearance within 14 days after the day on which the notice is received, or within such further period as the Secretary allows, the prosecutor may advise the court that the defendant's legal representative has not sought clearance. The court may then advise the defendant of the consequences of being represented by an uncleared legal representative and may recommend that the defendant engage a legal representative who has been given, or is prepared to seek, a security clearance.[82]

Uncleared legal representatives risk the possibility that they will not have access to NSI which is relevant to the proceedings against their client. For example, the NSI Act affords the court discretion to exclude participants from closed court hearings under subsection 29(3) if the court considers that disclosure of information would be likely to prejudice national security. In addition, section 46 provides that it is an offence to disclose NSI to an uncleared person except in limited circumstances, such as where the disclosure has been approved by the Secretary or the disclosure takes place in compliance with conditions approved by the Secretary (see generally subsection 46(c)), or under 'permitted circumstances'.

[82] NSI Act, subsection 39(5).

5. Management of Information in Civil Proceedings

The regime set up by the NSI Act for civil proceedings is substantially similar to that for criminal proceedings. A small number of key differences appear due to the nature of proceedings. For example, the NSI Act contains specific provisions to address situations in which the Attorney-General is a party to the civil proceeding.

When reading this part of the guidelines, it should be noted that where the Attorney-General is a party to the proceeding, any references to the Attorney-General means the alternative Minister appointed to perform functions under the NSI Act.[83]

To date the NSI Act has been invoked in one civil proceeding.

Step 1 – Invoke the NSI Act

The procedure for invoking the NSI Act in the civil regime provides for the Attorney-General (or where the Attorney-General is a party to the proceeding, another Minister) notifying the parties that the NSI Act applies.[84]

As in the case of federal criminal proceedings, there are two requirements in order for the NSI Act to apply to a civil proceeding (section 6A).

The proceeding must be a 'civil proceeding'

A 'civil proceeding' is defined in section 15A of the NSI Act as 'any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding'. This encompasses all stages of the civil process, including an ex parte application (before or after an originating process is filed), discovery, exchange, production, inspection or disclosure of intended evidence, appeal proceedings, interlocutory proceedings or other proceedings prescribed by regulation.[85] Civil proceedings are also likely to cover court-ordered mediation, but would be unlikely to extend to other forms of mediation and arbitration.

The provisions of the NSI Act do not extend to proceedings in administrative tribunals or military courts. This is because extant regimes cover the use of NSI in those forums, with provisions specifically tailored

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[83] NSI Act, subsections 6A(2) and 6A(4).

[84] This is consistent with ALRC recommendations. The ALRC recommended that the evidentiary onus of establishing that particular information triggers the provisions of the proposed *National Security Information Procedures Act* should rest with the party seeking to invoke those provisions, on the balance of probabilities.

[85] NSI Act, section 15A.

to deal with the types of NSI likely to arise; for example, sections 36 and 39A of the *Administrative Appeals Tribunal Act 1975.*

The Attorney-General must notify the parties and the court in writing that the NSI Act applies to the proceeding.

The person responsible for giving notice will depend upon whether the Attorney-General is a party to the civil proceeding. If the Attorney-General is not a party to the proceeding, he or she must give written notice to the parties and to the court that the NSI Act applies to the proceeding (subsection 6A(1)). Where the Attorney-General is a party to a civil proceeding, he or she must appoint another Minister to perform the functions of the Attorney-General under NSI Act provisions, including notification under subsection 6A(2).[86] These provisions naturally draw an immediate distinction between the criminal and civil regimes.

Similar to the criminal proceedings regime, where the NSI Act is invoked after the proceeding has commenced, the provisions of the NSI Act will only apply to the proceedings occurring after notification has been given.[87]

Optional Step 1A – Conduct a pre-trial conference

Before the substantive hearing in a civil proceeding commences, a party to the proceeding may apply to the court for a conference to consider issues relating to any disclosure in the proceeding of information that relates to, or may affect national security (subsection 38A(1)).

- The Attorney-General must be notified of the conference and the Attorney-General and any legal representative of the Attorney-General may attend (subsections 38A(2),(3)).
- The court must conduct the conference as soon as practicable after the application is made (subsection 38A(4)).
- The conference may include consideration of whether a party is likely to be required to give notice of a potential disclosure of NSI under section 38D and whether the parties wish to enter into an arrangement about disclosure (see Optional Step 1B below).

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[86] Provision for the appointment of a substitute Minister is unnecessary in criminal proceedings as the Attorney-General will not be a party to such proceedings.
[87] NSI Act, subsection 6A(5).

Optional Step 1B – Agree to section 38B arrangements

Parallelling section 22 and its function in the criminal proceedings regime, section 38B of the NSI Act allows the Attorney-General, together with the parties, to agree to an arrangement about disclosure of NSI at any time during a civil proceeding. The court may then make such orders as it considers appropriate to give effect to the arrangement. A successful section 38B arrangement and associated orders provide an alternative basis for the handling of NSI, minimising procedural requirements associated with protecting information through the operation of the NSI Act, Regulations and Requirements. Subsection 38B(2) is, itself, a source of power for the court to give effect to arrangements agreed between the parties and the court does not require any other power (eg inherent jurisdiction) to give effect to a section 38B order.

Step 2 – Notify the Attorney-General

Expected disclosure of information relating to, or the disclosure of which may affect, national security (section 38D)

If a party knows or believes that he or she will disclose information or call a witness whose testimony may relate to or affect national security, the party must:

- notify the Attorney-General in writing of this knowledge or belief (subsection 38D(1))
- notify the Attorney-General using the prescribed form[88] (subsection 38D(3)), and
- advise in writing, the court, the other party to the proceeding and any relevant witnesses of their notification of an expected disclosure and provide each with a description of the information in question (subsection 38D(4)).

Upon receiving advice of such notification, the court must adjourn the proceeding until the Attorney-General either issues a civil non-disclosure certificate to the court under subsection 38F(5) or gives advice in writing to the court under subsection 38F(7) that he or she will not give a certificate.

Where the NSI concerned is the subject of an existing certificate under either section 38F or section 38H, or a section 38B arrangement and

[88] The disclosing party must notify the Attorney-General using the prescribed Form 2: 'Notice of expected disclosure in a civil proceeding of information relating to or affecting national security' in Schedule 1 to the NSI Regulations.

related court orders under section 38L, notification under these provisions may not be necessary.

Expected disclosure of information by witness answering question (section 38E)

Where a party to a proceeding knows or believes that a witness' testimony involves information that relates to or may affect national security, that party must advise the court.[89]

Once advised, the court must:

- order that the witness provide to the court a written answer to the question
- adjourn the proceeding upon receiving the written answer unless the information disclosed by the written answer is the subject of an existing civil non-disclosure certificate given to the court under section 38F or is the subject of a court order under sections 38B or 38L
- provide a copy of the written answer to the Attorney-General if the proceeding is adjourned, and
- continue the adjournment of the proceeding until a civil non-disclosure certificate is issued under subsection 38F(5) or advice given under subsection 38F(7) that no such certificate will be issued.

Relevant offences

Under sections 46A, 46B and 46C, the NSI Act makes it an offence to disclose NSI or call a witness who will disclose NSI after the Attorney-General has been notified under sections 38D or 38E and before the Attorney-General has advised whether he or she will issue a certificate. These offences are punishable by up to two years imprisonment.

Step 3 –Issue a section 38 certificate

The Attorney-General may do one of three things:

(1) issue a civil non-disclosure certificate (subsection 38F(2))

(2) issue a civil witness exclusion certificate (subsection 38H(2)), or

(3) advise that he or she will not issue a certificate (subsections 38F(7) and 38H(9)).

[89] NSI Act, subsections 38E(1) and (2).

Issue a civil non-disclosure certificate (subsection 38F(2))

The Attorney-General may issue a civil non-disclosure certificate if:

- the Attorney-General has been notified, or for any reason expects, that a party to a civil proceeding or another person will disclose information in the proceeding; or considers that a written answer given by a witness under section 38E will disclose information, and
- the Attorney-General considers that the disclosure is likely to prejudice national security.

Section 38F uses the terms 'potential discloser' and 'permitted circumstances'. The term 'potential discloser' is defined in subsection 38F(9). This Definition will necessarily change on a case-by-case basis. For example, some cases may not result in the calling of any witnesses who will disclose NSI. The term 'permitted circumstances' is defined in section 16 of the NSI Act. Permitted circumstances under the civil NSI regime are far broader than those in the criminal NSI regime. In the civil regime, permitted circumstances extend to disclosures where a party or his or her legal representative has been security-cleared and discloses the information in the proceeding or in the course of their duties in relation to the proceeding.[90]

Documentary evidence which may disclose NSI

Where the NSI concerned is in the form of a document, the Attorney-General may give each potential discloser a redacted or summarised version of the document together with a civil non-disclosure certificate which describes the information and states whether NSI may be disclosed, and if so, how.[91] The certificate may prohibit use of the document (except in permitted circumstances), or provide a redacted version of the NSI. The redacted version may be a copy of the document with text deleted, with or without a summary of the information that has been deleted, or a statement of facts that the information in the document would, or would be likely to, prove.

Non-documentary evidence which may disclose NSI

Non-documentary evidence which may disclose NSI is most commonly oral evidence. In this case, the Attorney-General may give the potential discloser a written summary of the information or a written statement of the facts that the information would, or would be likely to, prove. The non-disclosure certificate must also describe the information and state

[90] NSI Act, subsections 16(aa) and (ac).
[91] NSI Act, subsection 38F(2).

whether NSI may be disclosed, and if so, how.[92] As with documentary evidence, a certificate may be used to prohibit disclosure of the document (except in permitted circumstances) or to provide a redacted version of the NSI. It may also be used to disclose a summary or statement of the NSI.

The Attorney-General must provide the court with a copy of the civil non-disclosure certificate, the source document and a copy of the redacted document and, if applicable, the summary or statement of NSI.[93] This ensures that the court has at its disposal the source documents for reference during any closed hearing and before making an order on disclosure issues under section 38L.

Issue a civil witness exclusion certificate (section 38H)

The Attorney-General may issue a civil witness exclusion certificate if (subsection 38H(1)):

- the Attorney-General has been notified, or for any reason expects, that a person a party intends to call as a witness may disclose information by his or her mere presence, and
- the Attorney-General considers that the disclosure is likely to prejudice national security.

The Attorney-General must provide the civil witness exclusion certificate to the party seeking to call the witness in question and that party's legal representative. A copy must also be provided to the court. A certificate may be issued at the same time as notification (invoking the NSI Act) is given under section 6A.

Advise that he or she will not issue a certificate (subsections 38F(7) and 38H(9))

If the Attorney-General decides not to issue a civil non-disclosure certificate, he or she must advise each potential discloser and the court of this decision to allow the proceeding to continue in the usual course.[94]

[92] NSI Act, subsection 38F(3).
[93] NSI Act, subsection 38F(5).
[94] NSI Act, subsections 38F(7) and 38H(9).

Duration of certificates

Civil non-disclosure and witness exclusion certificates will cease to have effect from the time an order is made by the court in relation to the NSI covered by the certificate, and that order becomes final. The certificate will also cease to have effect if revoked by the Attorney-General.[95]

Relevant offences

It is an offence under sections 46D and 46E to disclose information or call a witness contrary to a civil non-disclosure certificate or witness exclusion certificate. A maximum penalty of two years imprisonment applies.

Step 4 – Adjourn proceeding and hold a closed hearing

The procedures for civil NSI closed hearings broadly mirror those in place for criminal NSI closed hearings. Receipt of a non-disclosure certificate triggers the requirement for the court to hold a closed hearing. The court must decide whether to make an order under section 38L in relation to the disclosure of NSI.[96]

If the Attorney-General issues a civil non-disclosure certificate or witness exclusion certificate prior to the substantive trial of a matter, the court must conduct a closed hearing before that trial occurs.[97] Where the certificate is issued after the substantive trial has commenced, the court must adjourn the proceeding to consider the possible disclosure of NSI.[98] If the Attorney-General revokes the certificate or an order is made under section 38B while the proceeding is adjourned and/or during the course of the closed hearing, the court must end the adjournment or hearing.[99]

Closed hearing requirements

Persons who may be present at closed hearings – section 38I

Subsection 38I(2) states that only the following people can be present at a closed hearing:

- the magistrate, judge or judges comprising the court
- court officials (subject to the court's discretion)
- the parties to the proceeding (subject to the court's discretion)

[95] NSI Act, subsections 38F(6) and 38H(5).
[96] NSI Act, subsections 38G(1) and 38H(6).
[97] NSI Act, paragraphs 38G(1)(a) and 38H(6)(a).
[98] NSI Act, paragraphs 38G(1)(b) or (c), 38H(6)(b).
[99] NSI Act, subsections 38G(2), 38H(8).

- the parties' legal representatives (subject to the court's discretion)
- the Attorney-General and his or her legal representative if the Attorney-General exercises his or her right to intervene in the closed hearing under s 38K, and
- any witnesses allowed by the court.

The court has a discretion to exclude non-security cleared parties, their non-security cleared legal representatives and non-security cleared court officials from the closed hearing where the court considers that the relevant information would be disclosed to the person and the disclosure would be likely to prejudice national security.[100]

If the Attorney-General or his or her legal representative argues in favour of excluding evidence or a witness from the proceeding, the parties and any legal representative must be afforded the opportunity to make submissions in response to such an argument.[101]

A party retains the option of being represented by an uncleared legal representative, consistent with ALRC recommendations. However the court has discretion to order, under section 38I, that specified material not be disclosed to that legal representative unless he or she holds a security clearance at the appropriate level. In this case the party concerned has the option of retaining a legal representative who holds the requisite security clearance.

For further discussion of security clearances and legal representatives, please refer to pages 27-30 and 41-42 of these guidelines.

<u>Records of closed hearings – subsections 38I(5)-(7)</u>

Subsection 38I(5) states that a court conducting a closed hearing must make and keep a record of the hearing. The court must provide a copy of the proposed record to the Attorney-General and his or her legal representatives. If the Attorney-General or his or her legal representative considers that allowing access to the proposed record may disclose information and the disclosure is likely to prejudice national security, the Attorney-General or his or her legal representative may request variation of the record to avoid disclosure of NSI.

The court must make a decision on the request for variation to the record. If the court decides against variation, the prosecutor or the Attorney-General and his or her legal representatives may seek an order that the court delay making the record to allow an appeal to be lodged.

[100] NSI Act, subsection 38I(3).
[101] NSI Act, subsection 38I(4). Note this approach accords with ALRC recommendations.

The Attorney-General may appeal a decision made under section 38I in relation to the variation of the record.[102]

Once finalised, the court must only make the record available to:

- a court hearing or reviewing an appeal against the closed hearing decision, and
- the Attorney-General and his or her legal representative if the Attorney-General has intervened in the proceedings under section 38K, and
- a security-cleared unrepresented party or security-cleared representative of a party.

Step 5 – Make section 38 orders in relation to disclosure

After holding a closed hearing under subsection 38G(1), the court may make one of the following orders:

(1) that the information not be disclosed[103]

(2) that the information be disclosed in redacted form or with a statement or summary of the information,[104] or

(3) that the information be disclosed.[105]

An order will apply to any person to whom the certificate is given, any person to whom the contents of the certificate are disclosed and any specified person.

After holding a closed hearing under subsection 38H(6) the court must order that the relevant party:

(1) must not call the person as a witness in the civil proceeding (paragraph 38L(6)(a)), or

(2) may call the person as a witness in the civil proceeding (paragraph 38L(6)(b)).

[102] NSI Act, subsection 38Q(1).
[103] NSI Act, paragraphs 38L(2)(a)-(c).
[104] NSI Act, paragraphs 38L(2)(d)-(f). The redacted version of the document and/or accompanying summary of information may be admissible as evidence of the contents of the original document if the original document is admissible (subsection 31(3)).
[105] NSI Act, subsections 38L(5).

Factors to be considered by the court in making an order under section 38L

In deciding which section 38L orders are most appropriate, the court must take into consideration:

- whether the disclosure of the information or presence of the witness would be a risk of prejudice to national security, having regard to the certificate (paragraph 38L(7)(a))
- whether such an order would have a substantial adverse effect on the substantive proceeding (paragraph 38L(7)(b)), and
- any other relevant matter (paragraph 38L(7)(c)).

The court must give the greatest weight to national security considerations (s 38L(8)).

The court retains its inherent power to stay the proceeding where it believes that the NSI Act procedures prejudice the trial such that the due administration of justice is not achievable even after making an order under section 38L.[106]

Reasons in support of a section 38L order

Section 38M of the NSI Act requires a court to produce a written statement of reasons explaining the section 38L order.[107]

Again, in parallel to the criminal proceedings regime, the court must give a copy of the proposed statement of reasons to the Attorney-General (or his or her legal representatives if intervention under section 38K has occurred), before finalising and disseminating such a statement.[108] The Attorney-General may then apply to the court for a variation of the statement where he or she considers the proposed statement of reasons is likely to prejudice national security.[109] The court is then obliged to make a decision on the variation sought. If the court does not agree to any requested variation, the Attorney-General may appeal the decision under section 38S. While the appeal is pending, the court must adhere to any request by the Attorney-General to delay dissemination of the written statement.[110]

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[106] NSI Act, subsections 19(3), 19(4) and 19(5).
[107] The content of the statement of reasons is not specifically prescribed by the NSI Act, but should set out the basis for the Court's decision to admit, exclude or redact information which is the subject of the order or its reason(s) for excluding a particular witness.
[108] NSI Act, subsection 38M(2).
[109] NSI Act, subsection 38M(3).
[110] NSI Act, section 38N.

Once finalised, the written statement of reasons must be provided to the person who is the subject of the order (for example, the witness whose evidence in chief may disclose NSI), the parties to the proceeding, their legal representatives and the Attorney-General where he or she has intervened.[111]

Provision for appeal

Subsection 38R(1) allows a party to a civil proceeding or the Attorney-General to appeal a section 38L order.

Relevant offences

An intentional disclosure of the terms of a section 38L order constitutes an offence under section 45 of the NSI Act.

Step 6 – Issue security clearances

NSI Act civil security clearance provisions

The purpose and intention behind the civil NSI provisions relating to security clearances mirror the criminal provisions. Further discussion of policy and the purposes of security clearances can be found at page 27-28 of these guidelines.

Section 39A of the NSI Act provides that before or during a civil proceeding, the Secretary of the Attorney-General's Department may provide written notice that issues relating to disclosure of NSI are likely to arise.[112] Upon receipt of this written notice, a party, his or her legal representative and any assistants may apply to the Secretary for a security clearance at the appropriate level.

A party to a proceeding may apply to the court for the proceeding to be deferred or adjourned pending receipt of a security clearance by the party or his or her legal representative or to enable another legal representative to be security cleared.[113] In these circumstances, the court must defer or adjourn the proceeding, ensuring NSI Act provisions will not interfere with the defendant's right to be fairly and independently represented. The security clearance process is conducted at arm's length and legal representatives can choose to obtain their security clearances from a number of providers of security vetting services. If a clearance is denied, the applicant may seek a review of the decision by the Administrative Appeals Tribunal.

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[111] NSI Act, subsection 38M(1).
[112] To date, there have been no cases where a section 39A notice has been issued.
[113] NSI Act, subsection 39A(3).

If the party or legal representative does not apply for, or does not receive, the security clearance, the Secretary may advise the court that either the clearance has not been sought or not been given.[114] The court may then advise the party of the consequences of not being security cleared or being represented by an uncleared legal representative and may recommend that the party seek a security clearance or engage a legal representative who has been given, or is prepared to seek, a security clearance. Uncleared legal representatives risk the possibility that they will not have access to NSI which is relevant to the proceedings against their client.

Security clearances and legal aid implications

In recognition of the additional financial burden involved in engaging a security-cleared legal representative to attend a closed hearing, a self-represented litigant involved in a civil matter who is refused a security clearance at the appropriate level would be eligible to apply for financial assistance under the Special Circumstances Scheme. If approved, this would provide financial assistance for the legal costs associated with engaging a security-cleared legal representative to attend the closed hearing and any related appeal. The opportunity for such unrepresented parties to access financial assistance in order to retain a security-cleared lawyer is an important component of the scheme.[115]

The legal aid guideline that took effect on 4 July 2006 provides that payments may be made for work completed by a legal representative up to the point that a section 39A notice is issued under the NSI Act requiring a party's legal representative to obtain a security clearance. Payment will not be permitted for work completed after the issuing of the notice unless the legal representative meets the requirements of the notice (see pages 28-29 for further detail).

[114] NSI Act, subsection 39A(6).
[115] This is consistent with ALRC recommendations - see Submission 6, p 4 cited in Legal and Constitutional Committee Paper, Provisions of the National Security Information Legislation Amendment Bill 2005 May 2005 pp 28-29.

6. Appendices

Appendix 1 – Defining national security information

1

National Security is defined in s 8 of the NSI Act to mean Australia's defence, security, international relations or law enforcement interests.

Australia's defence – There is no elaboration of the definition of defence in the NSI Act.

Security – Section 9 of the NSI Act provides that the term security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). The definition of security is contained in s 4 of the ASIO Act:

security means:

(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

(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).

International Relations means political, military and economic relations with foreign governments and international organisations (s 10).

Law Enforcement Interests includes interests in the: avoidance of disruption to national and international efforts relating to law enforcement, criminal intelligence and investigation, foreign and security intelligence; protection of technologies and methods for the collection, analysis and security of intelligence information; protection and safety of informants and their associates; ensuring that intelligence and law enforcement agencies are not discouraged from providing information to national governments and their agencies (s 11).

2

Information is defined in s 90.1 of the Criminal Code. Section 7 of the NSI Act supplements the definition in s 90.1 of the Criminal Code by stating that material will be 'information' for the purposes of the NSI Act whether or not it is in the public domain.

information means information of any kind, whether true or false and whether in a material form or not, and includes:

(a) an opinion; and

(b) a report of a conversation.

likely to prejudice national security is defined in s 17 in the context of the disclosure of national security information.

likely to prejudice national security: a disclosure of national security information is **likely to prejudice national security** if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security.

disclose in the context of information disclosed in criminal or civil proceedings is defined in s 7.

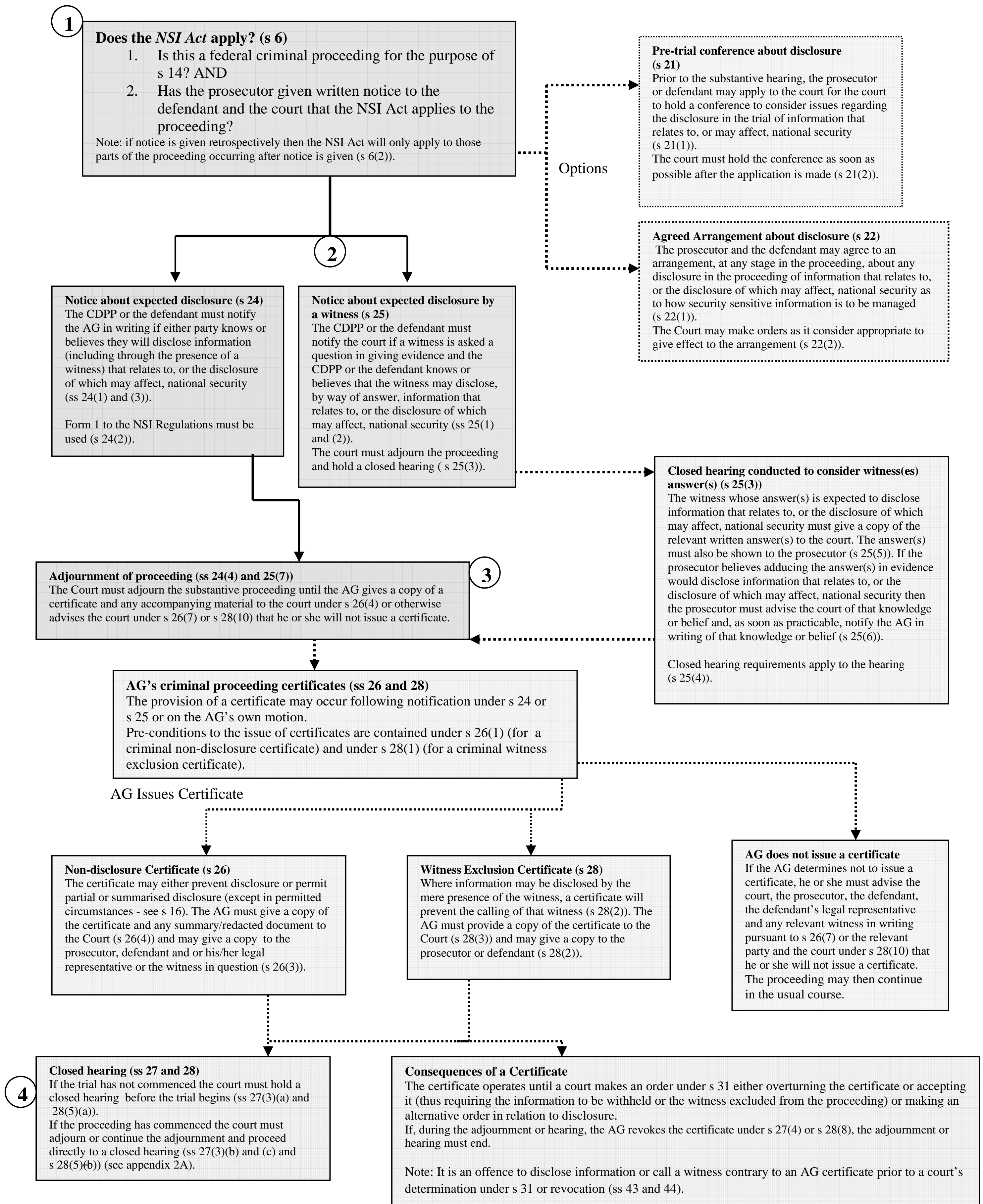
Disclose information in a criminal proceeding or a civil proceeding means:

(a) give the information in evidence in the proceeding; or

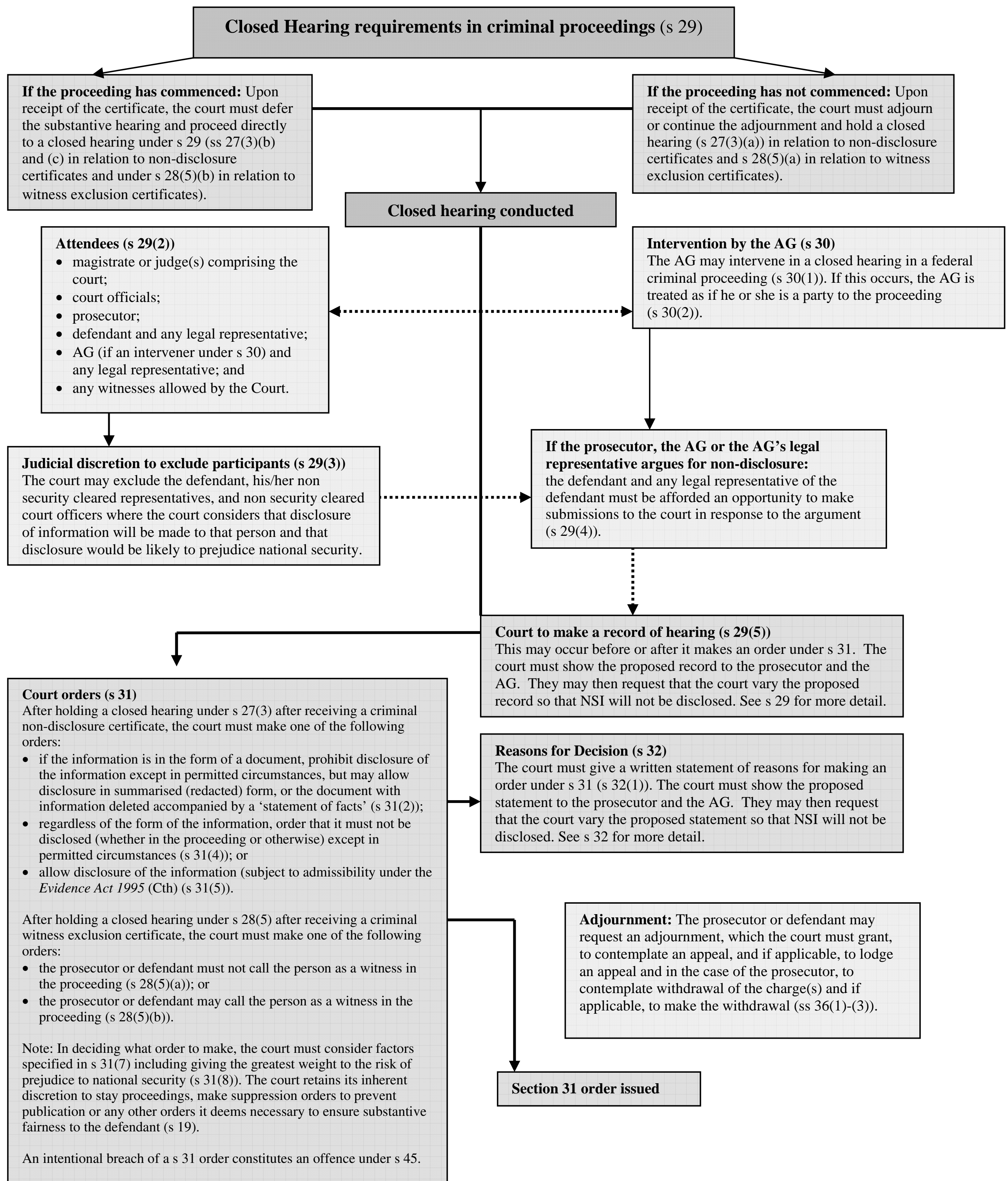
(b) otherwise disclose the information to the court conducting the proceeding or to any person for the purposes of the proceeding;

whether orally or by giving, or disclosing the contents of, a document.

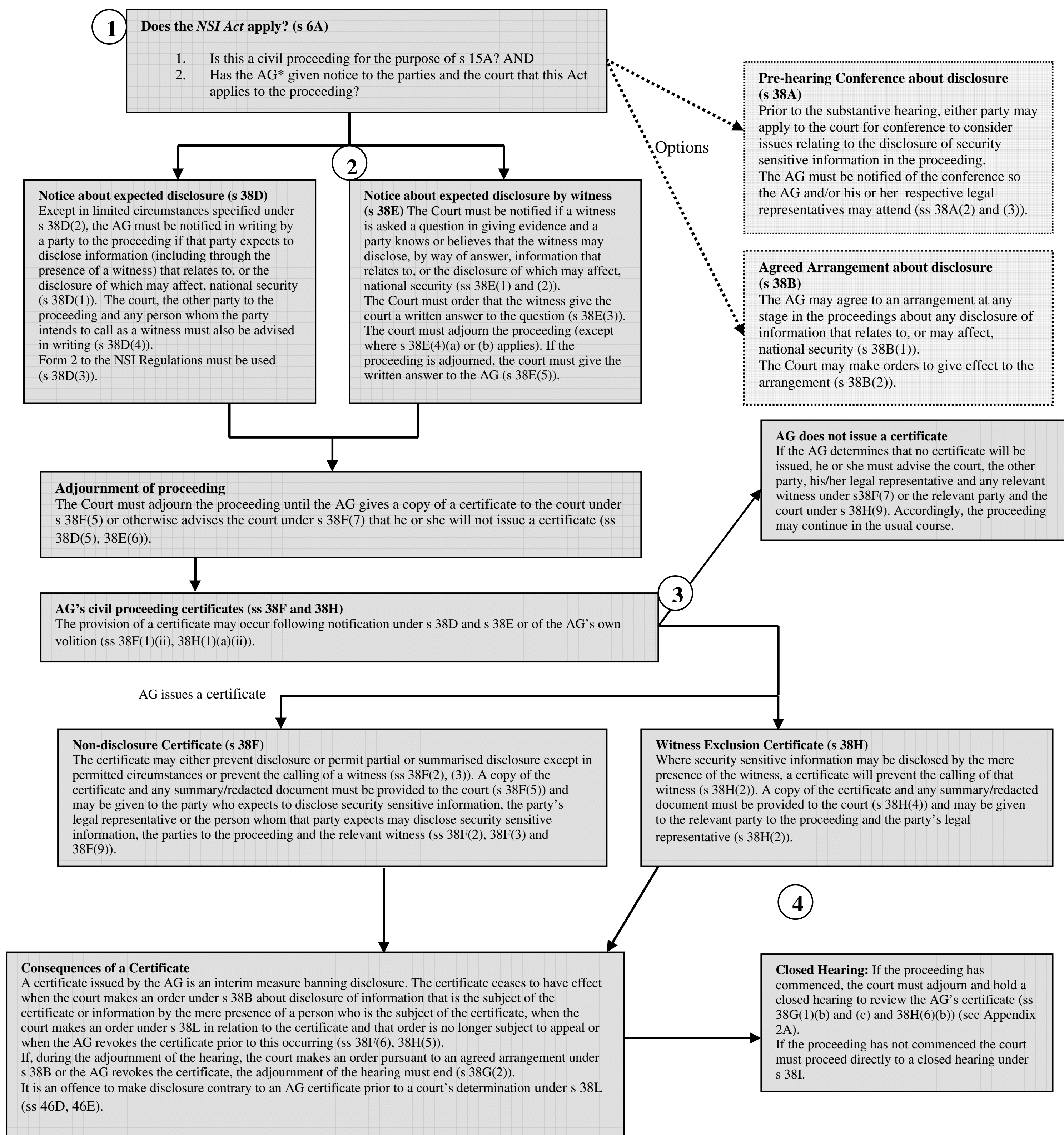
Appendix 2 – Procedures applicable in federal criminal proceedings



Appendix 2A – Closed hearings & court orders



Appendix 3 – Procedures applicable in civil proceedings



* A reference to AG in Appendix 3 and Appendix 3A includes reference to an alternative Minister appointed by the AG under s 6A(3), or a different Minister appointed by the AG under s 6A(4).