DPP

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Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

Attention Ms Jane Hearn
Inquiry Secretary

Dear Ms Hearn

Statutory Review of Counter Terrorism Legislation

As you are aware the Director and members of the Office appeared before the Parliamentary Joint Committee on Intelligence and Security on Tuesday 1 August 2006.

During that hearing the Director took a question on notice from Mr Anthony Byrne MP. The relevant discussion appears at page 34 of the Hansard record. The Director is currently overseas and I have provided this response in his absence.

The question from Mr Byrne MP was raised in the context of discussion of the Mallah Case. Mr Zaky Mallah had applied for and was denied an Australian passport in mid-2002. He subsequently unsuccessfully sought a review of the decision by the Minister for Foreign Affairs. As a result of the passport refusal, Mr Mallah developed animosity towards the Australian government, especially against the Australian Security Intelligence Organisation (ASIO) and the Department of Foreign Affairs and Trade (DFAT). Mr Mallah later acquired a weapon and approximately 100 rounds of ammunition which were located during the execution of a search warrant on his home. Mr Mallah subsequently made threats to kill officers of ASIO and DFAT in the course of a siege which he told to an undercover police operative that he had planned. The 'plan' involved the surveillance of either an ASIO or DFAT building, after which he would make an entry armed with a weapon, hold its occupants hostage and shoot some of them. He stated that he expected the police to be called and would request them to enter and record his message on a video camera.

Mr Mallah faced trial on one charge for the acquisition of a weapon and 100 live rounds of ammunition in preparation for or planning a terrorist act contrary to section 101.6(1) of the *Criminal Code Act 1995* (the Criminal Code), one charge of selling a 'martyrdom' video and other items in preparation for or planning a terrorist act contrary to section 101.6(1) of the

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Criminal Code, and one charge of threatening to cause harm to Commonwealth officers contrary to section 147.2 of the Criminal Code. Mr Mallah pleaded guilty to this last charge part way through his trial. He was ultimately acquitted by a jury of the two terrorism related charges.

Mr Byrne asked whether had Mr Mallah said the words "I support Hezbollah" in the event of carrying out his act, he would have been prosecuted for the offence of providing support to a terrorist organisation contrary to section 102.7 of the Criminal Code. The offence under section 102.7 requires the prosecution to establish to the requisite standard that a person provided support or resources to an organisation; the support or resources would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation (that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act); and the person knows or is reckless as to whether the organisation is a terrorist organisation.

Had Mr Mallah said those words and successfully executed his planned attack on a government building, he could appropriately be charged with terrorism offences, including the offence of engaging in a terrorist act contrary to section 101.1(1) which carries a penalty of life imprisonment. In my opinion the offence under section 102.7 of providing support to a terrorist organisation would not apply to those words alone in the circumstances of Mr Mallah's case. Even if the words "I support Hezbollah" are taken to fall within the term 'support', in the circumstances of the case posed, such words would not help that organisation (Hezbollah) engage directly or indirectly in preparing, planning, assisting in or fostering the doing of a terrorist act as required under that provision.

Had Mr Mallah said words to the same effect prior to the execution of his planned attack on a government building, he could appropriately be charged with the offence of preparing or planning a terrorist act contrary to section 101.6(1). In my opinion the offence under section 102.7 of providing support to a terrorist organisation would not apply to these words alone in the circumstances of Mr Mallah's case. As noted above, even if those words are taken to fall within the term 'support', his 'support' would not help Hezbollah engage directly or indirectly in preparing, planning, assisting in or fostering the doing of a terrorist act as required under that provision.

Another area raised during the course of the hearing, though no question was taken on notice, was that of the use of a public interest monitor or advocate in criminal trials. The relevant discussion appears at pages 35 and 36 of the Hansard record. Mr Duncan Kerr MP stated that he would appreciate any subsequent thoughts that the Director may have on this issue. The Director does not have any further submission on this issue. However, for information I provide a copy of a ruling received during the recent prosecution of Lodhi before the NSW Supreme Court. There were several weeks of pre-trial applications in the Lodhi matter. Some of these applications focussed on how to deal with material which was said to contain information which could compromise Australia's national security. The *National Security Act Information (Civil and Criminal Proceedings) Act 2004* (NSI Act) was applied to the proceedings.

An application was brought on behalf of the accused to have Special Counsel appointed for limited purposes in pre-trial proceedings and also in the trial, should that prove necessary. This application was opposed by the Attorney- General.

His Honour Whealy J. noted that this was the first time that such an application had been made in Australia and hence his Honour considered comparable appointments that had been made previously in the UK.

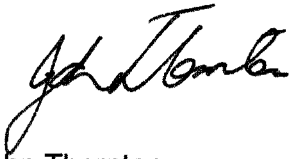
In brief, his Honour held that:

- The role of Special Counsel is to represent the interests of the accused person in relation to the issue of disclosure.
- The appointment of special counsel was not inconsistent with the objects of the NSI Act and in the circumstances such appointment promoted the objects of the Act and fitted in with the legislative scheme;
- The Court had the power to make such an order but should only do so if satisfied that *"no other course will adequately meet the overriding requirements of fairness to the defendant"*;
- The application was however premature and the appointment of special counsel was at that stage in proceedings not appropriate.

No Special Counsel was ultimately appointed. I have attached the relevant judgement of his Honour Whealy J.

I trust that the above is of assistance.

Yours sincerely,



John Thornton
A/g Director of Public Prosecutions

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
CRIMINAL LIST

WHEALY J

TUESDAY 21 February 2006

2005/1094 - Faheem Khalid LODHI

JUDGMENT - On application for appointment of special counsel.

1 **HIS HONOUR:** This is an application brought on behalf of the accused. Mr Boulten SC, who appears for the accused, applied to have special counsel appointed for limited purposes in the pre-trial procedures and, if necessary, during the trial itself.

2 The application has been opposed by the Attorney-General.

3 The application arises in the following circumstances: on 8 February 2006 I was given three large folders of documents. These documents are, as I understand it, the unredacted documents that had been the subject of detailed examination by the learned Magistrate at committal stage. They have not been seen, in their unedited form, by the defence or, for that matter, by the prosecution. The Attorney-General has apparently taken the view that only he, his legal representatives, and I should have access to the unredacted documents. I have been specifically invited to inspect those documents to assist in, and expedite the arguments that are scheduled for the week commencing 6 March 2006.

4 The three folders of documents were produced to the Magistrate's court in answer to a subpoena that was issued at the time on behalf of the accused.

5 I have also been provided with a schedule, which identifies various bases on which claims for public interest immunity were and are advanced on behalf of the edited material. In addition, the material in the folders I have been given identifies with considerable precision the claims made for public immunity in relation to each redacted document.

6 The **National Security Information (Criminal and Civil Proceedings) Act 2004** ("**NSI Act**") has an impact on these materials. Under that legislation there arises a scheme to protect information from disclosure during proceedings for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security. The operation of the Act comes into effect when the prosecutor, in a particular proceeding, notifies the Court and the parties that a particular case falls within the provision of the legislation. Such notice was given in the present proceedings. The **NSI Act** requires that a party must notify the Attorney-General at any stage of a criminal proceeding where that party expects to introduce information that relates to, or the disclosure of which may affect, national security. On receiving advice that the Attorney-General has been so notified, the Court must order that the proceedings be adjourned until the Attorney-General gives a copy of a certificate to the Court under sub-s 26(4) or gives advice to the Court that a decision has been made not to give a certificate.

7 A certificate from the Attorney-General may indicate that disclosure is to be made and, if so in what form. Alternatively, it may indicate that no disclosure is to be made. Any certificates that have been issued must be considered at a closed hearing of the trial or pre-trial court. The Attorney-General may intervene in the proceedings and take part in the closed hearing. The Court is given a discretion to determine issues in relation to the certificates and must make one of the orders contemplated by sub-ss

2(4) and (5) of s 31. Appeal rights are conferred by the legislation and in circumstances where the national security information remains protected until the appellate process has been concluded.

8 In fact, the Attorney-General has to date issued three groups of certificates. There were three issued on 9 December 2005 and one on 12 December 2005. Three further certificates were issued on 27 January 2006.

9 The certificate issued on 12 December 2005 is the certificate that relates to the three folders that were given to me. As a consequence, it will be necessary on 6 March 2006 to hold a closed court hearing. I shall for convenience refer to this as a s 31 hearing. The other certificates I have mentioned relate to material other than the documents in the three folders.

10 Finally, two subpoenas were issued on behalf of the accused in recent times. These were issued with leave of the court and were made returnable on Monday 13 February 2006. One was addressed to ASIO, the other to the Australian Federal Police. There has been some helpful discussion between the parties in relation to these subpoenas and this has led to an amended schedule being prepared which will now require have a narrower range of documents to be produced or, at the least, will identify with greater precision the documents required. Mr Howe who has appeared on behalf of the Attorney-General, argued that paragraph 2 of each of the subpoenas should be set aside. On 14 February 2006 I declined to set aside the portions of the subpoenas under attack. Those subpoenas will, it is hoped, be answered on 6 March 2006. It may well be that there will be a need for further submissions from the Attorney-General in relation to some of the documents to be produced, including perhaps a claim to prevent disclosure based on national security.

11 The whole of the forgoing indicates that on 6 March 2006, and probably for at least most of the week following, there will be a degree of vigorous debate about disclosure and access in relation to a considerable body of

documentation. The principal issue will be one of public interest immunity, as that concept is known to the common law. There will also be a need to consider the requirements of the **NSI Act** including whether, having regard to the Attorney-General's certificates, there would be a risk of prejudice to national security if the information were disclosed in contravention of the certificates; and whether any order to be made would have a substantial adverse effect on the defendant's right to receive a fair hearing including in particular on the conduct of his defence. There may well be a host of other matters that will arise for consideration in relation to the contemplated s 31 hearings.

Special counsel

12 This rather complicated set of circumstances is the background against which an application has been made for the appointment of special counsel. This is the first time such an application has been made, so far as I am aware, in Australia. Certainly, it does not appear that, to date, special counsel has been appointed in this country.

13 It appears that, in the United Kingdom, statutory power was given to appoint special counsel in proceedings under the **Special Immigration Appeals Commission Act 1997**. Provision was made in that legislation for independent counsel because impugned decisions were often based on material in the hands of the executive and such material was unseen by the supervising court. Similar provision was made by the provisions of the **Northern Ireland Act 1998** in relation to national security certificates issued under s 42 of the **Fair Employment (Northern Ireland) Act 1976**. Similar provision was again made in a variety of other legislation relating to terrorism and allied matters in Northern Ireland. The issue of the appointment of special counsel has been examined by the House of Lords in **R v H; R v C** (2004) 2 AC 134, 150-51 per Lord Bingham. At para 21 his Lordship said: -

"...The courts have recognised the potential value of a special advocate even in situations for which no statutory provision is made. Thus the Court of Appeal invited the appointment of a special advocate when hearing an appeal against a decision of the Special Immigration Appeals Commission in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, paragraphs 31-32, and in *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 paragraph 34, the House recognised that this procedure might be appropriate if it were necessary to examine very sensitive material on an application for judicial review by a member or former member of a security service."

And para 22 his Lordship said:

"There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII matters, a defendant in an ordinary criminal trial, as distinct from proceedings of the kind just considered. But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to co-operate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a

> course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. In the Republic of Ireland, whose legal system is, in many respects, not unlike that of England and Wales, a principled but pragmatic approach has been adopted to questions of disclosure and it does not appear that provision has been made for the appointment of special counsel: see *Director of Public Prosecutions v Special Criminal Court* [1999] I IR 60."

14 At page 155 para 36 Lord Bingham discussed the issue of derogation from "the golden rule of full disclosure". His Lordship had earlier said (at para 14):

> "Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence....The golden rule is that full disclosure of such material should be made."

15 Later his Lordship (at para 18) discussed the circumstances in which material held by the prosecution, tending to undermine the prosecution or assist the defence, could not be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. At para 36 his Lordship said:

> "When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:
>
> (1) What is the material, which the prosecution seek to withhold? This must be considered by the court in detail.
>
> (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review."

16 Something of the unusual nature of special counsel can be seen from the remarks of Lord Woolf CJ in **M v The Secretary of State** (2004) 2 All ER 863-868:

> "[13] In this situation individuals who appeal to SIAC are undoubtedly under a grave disadvantage. So far as it is possible this disadvantage should be avoided or, if it cannot be avoided, minimised. However, the unfairness involved can be necessary because of the interests of national security. The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness, which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to SIAC as to why the statutory requirements have not been complied with. In other words he can look after the interests of the appellant, in so far as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant.

Submissions of counsel

17 Mr Boulten SC has argued that the Supreme Court of New South Wales has sufficient power under its inherent powers to appoint a special counsel (**Grassby v R** (1989) 168 CLR 1, 16 per Dawson J). Mr Howe did not take issue with the proposition that the Court possesses a very broad range of judicial powers.

18 Mr Boulten SC identified four matters, which he submitted demonstrated an exceptional situation warranting the appointment of special counsel. First, he identified the situation that none of the defence lawyers possessed a security clearance as referred to in s 29(3) of the **NSI Act**. This meant that the situation might well arise that the defence lawyers and the defendant himself will be excluded from the hearing in circumstances where sensitive information would be disclosed and the disclosure likely to prejudice national security. This would be so even though the defendant and any legal representative would be given the opportunity to make a submission to the court about the argument that the information should not be disclosed (s 29(4)). A corollary to this position was the proposition that the court itself will not, or at least may not, have a good understanding of the way in which a particular piece of information might bear on the defence case. (**R v Francis** (2004) 145 A Crim R 233 at 237 para 23). Mr Boulten SC argued that this was especially likely to be so in the present case.

19 The third matter relied upon was that, in this pre-trial hearing, the prosecution did not have access to many of the documents that will or may be examined. For example, the Crown did not have access to the unredacted three folders of material. It was argued that, in those unusual circumstances, neither the prosecutor nor the defence would have the material or know what it was. Importantly, Mr Boulten said, was the fact that, as a consequence the prosecutor would not have the capacity to fulfil his duty of disclosure to the defence because he simply did not have the material itself. Conversely, the Attorney-General was under no duty to disclose at all. This posed a difference between the procedures in the United Kingdom and those available in Australia. Mr Boulten suggested that this may be one of the reasons why the English authorities spoke about "exceptionality".

20 The final matter relied on by Mr Boulten SC was the fact that the trial itself could be said, in one sense, to relate to national security. It is the type of trial which more readily throws up issues of national security whereas in

other trials (for example, **Francis'** case) such issues arose only indirectly. Given the definition of "national security" under the National Security Information legislation, a claim for non-disclosure could be expected to be a very broad ranging claim where some degree to careful consideration might be required in determining whether to disclose or not to disclose the information.

21 Mr Howe argued that the scheme of the **National Security Information Act**, and ss 29 and 31 in particular, did not allow for the appointment of a special counsel during, or for the purposes of, a hearing under sub-ss 25(3), 27(3) or 28(3). (Again for convenience I will refer to each of these as a s 31 hearing). Mr Howe developed this argument in a number of ways but essentially his point was that the nature of the role of a special counsel meant that he/she could not be considered as a "legal representative of the defendant" within the meaning of s 29(2)(e) and (3).

22 Secondly, Mr Howe argued that even if a power existed to appoint a special counsel during, or for the purposes of, a s 31 hearing, that power ought not at least for the time being be exercised. Again Mr Howe developed this argument but in essence he maintained that it was simply premature at this stage to contemplate the making of such an order. Counsel suggested that the Court would need to be much more familiar with the material to be considered; would have to have the benefit of an affidavit or affidavits dealing with the material; would need a proper outline of the Crown case and defence case; and would need to hear submissions and consider the documents in detail before coming to the issue as to whether special counsel was needed in order to prevent an abuse of the court's process.

23 Thirdly, Mr Howe argued that disclosure of certificated material to a special counsel in these proceedings ought occur only following the making of a disclosure order under s 31. It should not occur before disclosure had been ordered.

24 In the course of his argument, Mr Howe referred to the general principles, which apply when a claim for public interest immunity in relation to documents is raised. Those principles may be briefly stated. Production and disclosure of documents will not be required, even though those documents be relevant and otherwise admissible, if it would be injurious to the public interest to disclose them: **Sankey v Whitlam** (1978) 142 CLR 1 at 38 per Gibbs ACJ. Put another way, the relevant question (where a subpoena is involved) is:

> "Would the public interest be best served and least injured...by compelling or by refusing to compel disclosure to the court of the information and to the documents sought by the subpoena." (**Alister v The Queen** (1984) 154 CLR 404 at 453, per Brennan J).

25 In both **Sankey** and **Alister**, it was recognised that the Court is required to consider two conflicting aspects of the public interest, those being harm done by the production of the documents against the fair and efficient administration of justice: see **Alister** page 412 per Gibbs CJ. It is open to the Court itself to inspect the documents in order to make the necessary evaluation (**Alister**, pages 416, 431, 453) although inspection may not be required when the documents form a well recognised category where public interest immunity has been held to exist (**The Commonwealth v Northern Land Council** (1993) 176 CLR 605 at 617, 620).

26 Mr Boulten SC made a number of submissions in reply to the arguments advanced on behalf of the Attorney-General. Senior counsel did not put in issue the scope of the principles to be applied in the case of a public interest immunity claim but made the point that the concept of the appointment of a special counsel was one which had not been considered in Australia, (or for that matter in the United Kingdom) when **Sankey's** case and **Alister** were decided. Mr Boulten took issue with the proposition that the **NSI Act**, in some way excluded the appointment of a special counsel. Indeed, he argued that the legislation was quite consistent with such an appointment. Moreover, he argued that the role of a special

counsel, although it presented some differences, fell within the ordinary meaning of the words "any legal representative of the defendant" appearing in s 29 of the legislation. He referred in particular to a paper published by Peter Carter QC to the Criminal Bar Association in London on 7 February 2006. This document gave some considerable detail as to the role of special counsel.

27 Mr Boulten SC also argued that a fundamental matter which had been ignored by the Attorney-General's arguments was that the court's power to control the conduct of the proceedings was specifically preserved by s 19 of the National Security Information legislation. Finally, Mr Boulten took issue with the arguments which suggested that the appointment of special counsel at this stage was premature. Senior counsel accepted that, in some respects, this was so; but he maintained that the position was still clear enough that special counsel would be required when the court came to the s 31 hearing on 6 March 2006.

Resolution of the issues

1. Is the NSI Act consistent with the appointment of special counsel?

28 In my view the provisions of the **NSI Act** are not inconsistent with the appointment of special counsel. Moreover, I am of the opinion that the language of s 29(2) is sufficiently wide to allow a person appointed as special counsel to take part in a s 31 hearing.

29 First, this is because, on any view of it, a person appointed as special counsel may properly be said to fall within the ambit of the expression "any legal representative of the defendant". As Mr Carter QC's paper makes clear, special counsel is appointed to act for the accused in criminal proceedings. True it is he takes his instructions from defence counsel and solicitors and not, in most cases, from the defendant himself. It is also true that, in the event that special counsel is shown material of a secret nature,

it will be his obligation not to disclose that to the defence lawyers and of course, he will be obliged not to disclose any such material to the accused. There are, it must be conceded, a range of ethical and practical considerations of the kind touched upon by Lord Bingham in **R v H**; **R v C** at para 22. The role of special counsel, however, is to represent the interests of an accused person in relation to the issue of disclosure. It does not and need not go further. Special counsel may have a role to play on appeal but again it is a limited role and relates to a grievance arising from an unsuccessful disclosure submission. In all these circumstances, it could not be said other than that special counsel is representing the accused albeit on a limited and special basis. The very fact of appointment of special counsel carries with it the need to promote, in the interests of justice, the protection of a criminal defendant's right to a fair trial (Lord Bingham again in **R v H**; **R v C** at para 22).

30 Secondly, I agree with Mr Boulten's submissions that appointment of special counsel is quite consistent with the Act. Indeed, it furthers its purpose. The **NSI Act** does not curtail the powers of the court save to the extent that this is done expressly or by implication. This is made clear by s 19(1): -

> "The power of a court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise."

31 Moreover, the object of the Act (s 3) is to prevent the disclosure of information in federal criminal proceedings..."where the disclosure is likely to prejudice to national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice".

32 In many respects therefore it can be seen that the appointment of special counsel mirrors one of the objects of the legislation.

33 One particular argument advanced forcefully by Mr Howe was to this effect: the purpose of a closed hearing is to enable a court to determine whether (and in what form) certificated information may be disclosed in, or for the purposes of, the proceedings. For this reason, disclosure to a special counsel in the course of a closed hearing would pre-empt the very purpose and intended outcome of a closed hearing. I cannot agree with this submission.

34 The closed court hearing requirements of ss 29(2) and (3) of the **NSI Act** reflect the stated object of the Act in s 3. Although s 29 excludes persons from the court in certain circumstances, it does not do so in the case of any legal representative of the defendant who has been given a relevant security clearance. In the same way it does not exclude any court official who has been given a security clearance. However, this potential exclusion arises only in the case of a legal representative or a court official where the contemplated disclosure of information would be "likely to prejudice national security". (See also definition of this phrase in s 17). It follows that a disclosure made to a legal representative of the defendant who is security cleared would not be likely to prejudice national security, except perhaps in the most unusual of circumstances.

35 Far from pre-empting the appropriate function under s 31, it seems to me that the overall object of the Act and the particular object of s 29 would be appropriately fulfilled in the contemplated circumstances if special counsel were present during disclosure but that the other members of the legal team (who had no security clearances) were excluded. As I have said, the role of special counsel in a s 31 hearing would be confined to argument about disclosure and would not extend to the question as to how evidence should be presented during the trial.

36 Mr Howe also argued that ss 26(8), 29(3), 29(5) and 32(1) demonstrated that the term "legal representative" was intended to mean a person engaged by the defendant, in a conventional sense, to act in the proceedings. This, in my view, is to read too much into these provisions

and not enough into the plain language of ss 29(2) and (3) themselves. Section 26(8) does not in terms take the matter any further. In many instances, the situation at the time of the issue of the certificate would not involve special counsel as he/she may not have been appointed at that time. If it did, however, extend in its requirements to special counsel, that would not appear to raise any problem. Section 29(5) may extend to special counsel. That it should do so, again, promotes the object of the Act in relation to matters where other counsel for the defence, who are not security cleared, may not have access to the record. This, as was argued, allows special counsel the opportunity to prepare submissions for an appeal in respect of the trial judge's ruling where appropriate. This would be an important function for special counsel and again would plainly fit in well with the scheme of the legislation and its purpose. Exactly the same reasoning applies to s 32(1) consideration.

37 In summary, none of these provisions, either considered in isolation or collectively, support the Attorney-General's proposition. Importantly, as I have said, they do not detract from the need to give the expression "any legal representative of the defendant", its full and natural meaning. It may be true, as Mr Howe argued, that the legislation might have mentioned "special counsel" in s 29(2) but I do not consider that the absence of that expression requires the section to be read down.

38 In deciding the first question I have posed, I have not found it necessary to analyse in detail the various cases which have been referred to during argument. These include decisions in the United Kingdom and the one decision from Hong Kong (**PV v The Director of Immigration**, Hartmann J HCAL 45/2004). The first group of cases, cited in **R v McKeown** (2004) NICA 41) were, as Mr Howe submitted, informed or influenced by the jurisprudence of the European Court of Human Rights. This does not seem to me to take the situation in Australia in any particular direction. More importantly, counsel argued that the **McKeown** case might be distinguished on the basis that it concerned material in the hands of the prosecution which, subject to public interest immunity, otherwise attracted

a prosecutorial disclosure. Again, that is not the situation in the present matter where the prosecutor has not been given access to the material that is likely to be discussed during the s 31 hearing.

39 The second group of cases (which included the Hong Kong case I mentioned above and also **M v Secretary of State** (supra), **Secretary of State v Rehman** (supra) and **Regina (Roberts) v The Parole Board & Anor** (2005) 3 WLR 152) was sought to be distinguished by Mr Howe on the basis that each concerned administrative law proceedings, in the course of which the Court/Tribunal received into evidence secret material (ie, not seen by the applicant) which formed part of the substantive case against the applicant. Mr Howe argued that was unlikely to happen in the present case. While I agree with Mr Howe that those distinctions can be made, it nevertheless remains the case that this group of decisions demonstrates first that a statutory basis is not required for the appointment of special counsel and that, secondly, the role of special counsel is slowly but surely moving outside the criminal sphere into the civil area as well. A case such as **R(Roberts) v Parole Board** indicates that, in some situations, even the appointment of special counsel will not be enough to save a suggested procedure from resulting in unfairness, abuse of process *and a denial of natural justice.*

40 Finally, Mr Howe submitted that the case relied upon by the applicant which is most directly on point was the House of Lords decision in **R v H**; **R v C**. The appointment of special counsel was declined in that case at appellate level. Mr Howe sought in any event, to distinguish this case from the present. First, he noted that the judge at first instance ruled that the public immunity claim hearing was to be conducted ex-parte; the judge ordered that the assessment of the subject material take place in closed court in the absence of the defendant and his legal representatives. Secondly, even against that background, the House of Lords held that the appointment of a special counsel was not warranted. Mr Howe is correct in both of these points. In my view, however, neither point of distinction carries the day. As to the first, there is some considerable force in Mr

Boulten's reply namely that, in England, there is retained the principle of orality to a greater extent than in Australia. This means, in practical terms, in that jurisdiction virtuality all submissions are advanced orally rather than in writing. In Australia the process of dealing with a public interest immunity claim is normally conducted in open court. However, the Attorney-General achieves the same level of secrecy by providing the court with confidential affidavits and confidential submissions. This means that, in practice, the procedure in Australia is in some respects as much an ex-parte hearing as it is in England.

41 As to the second point of distinction it was indeed the prosecution who sought to withhold material in its hands on the grounds of a public interest immunity claim. In the present matter, the prosecution has not seen the material, at least to a large degree, and is deprived of its duty of disclosure. No such duty rests on the Attorney-General in respect of the material which he urges should not be disclosed.

42 For these reasons I consider that the first question should be answered favourably to the accused.

2. Is the application for appointment of special counsel premature or otherwise undesirable at this stage?

43 Mr Boulten SC, with customary candour, acknowledged that there was some force in the proposition that it may be premature at this stage to order the appointment of special counsel. In fairness to the arguments advanced on behalf of the accused, it must be said that the argument concerning special counsel was brought on at an early stage at the request of the Court. Mr Boulten, however, suggested that an order might nevertheless be made at this stage because the parameters of dispute were fairly well identified; and because, in the 6 March 2006 hearing, it is unlikely that the prosecution or the defence will be able to give much assistance to the court in reaching a view as to whether any particular

material in the documents weakens the prosecution case or, on the other hand, strengthens the defence case.

44 There is undoubtedly some substance in Mr Boulten's submissions. I have come to the view, however, that it is not appropriate at this stage to make the orders sought. Indeed, it is fair to say that, as argument pans out during the March hearing, it may become clearer whether the services of special counsel are required or not. It seems to me that prior to making any decisions, the court should receive the affidavits or other material on which the Attorney-General will rely to support the public interest immunity on matters of national security. In addition, the Court will need to examine for itself with some care, no doubt aided by the submissions of counsel, whether the material in question possesses sufficient materiality, in the relevant sense, so as to override the claim of privilege and thereby lead to disclosure. Further, the Court will need to have perhaps greater assistance than it has so far from the prosecution and the defence in relation to aspects of both the Crown and defence case. Of course, the defence is under no obligation to reveal the nature of the defence case but it may be that the March hearings will be an occasion when some greater degree of particularity will be supplied. In saying this, I am not intending to be in any way critical of either the prosecution or the defence. The Court has been concerned with a considerable number of pre-trial issues to date and it has not been possible, at a practical level, to devote attention to identifying the issues in the trial.

45 In summary, I accept the submissions of Mr Howe that it is inappropriate at this stage to make an order appointing special counsel. I believe, for the reasons I have given, that the Court has power to do so and that it should do so but only if the Court is satisfied that no other course will adequately meet the overriding requirements of fairness to the defendant (**R v McKeown** (supra) at (43).

46 I would wish to make a recommendation to the parties however. It may be that the parties, after discussion, will see fit not to act on my

recommendation. That will be a matter for the parties. Nonetheless, I make the following recommendations: -

1. That the Attorney-General select a senior counsel who is considered appropriate to act as special counsel in the proceedings, if required so to act.

2. That the Attorney-General notify the defence of the identity of the special counsel so selected.

3. That, if thought appropriate, arrangements be made between the lawyers for the defence and the nominated special counsel so that an appropriate briefing in relation to issues likely to arise at the trial, especially those attaching to the defence case, be placed before special counsel.

4. That the person nominated as special counsel be asked to make himself or herself available towards the end of the week commencing Monday 6 March 2006 so that he/she may be invited to inspect a possibly limited amount of material, if it is the decision of the Court at that stage that special counsel be invited to assist the trial judge in relation to ensuring fairness for the defendant.

47 I should make it clear that nothing in the forgoing indicates that I have reached a decision as to whether special counsel should be appointed to deal with disclosure issues. That will depend upon the progress and outcome of the initial stages of the closed court hearing to take place in early March 2006. The recommendations I have made, however, are a recognition of the practical problems of delay and the like which can arise if some preparation is not made at this stage for what might be a possible outcome.

48 The application for appointment of a special counsel is adjourned to 6 March 2006.

I CERTIFY THAT THIS AND THE 18 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT/SUMMARY HEREIN OF THE HONOURABLE JUSTICE ANTHONY WHEALY

Beverley Dalley
Associate

Date 21 February 2006