PROTECTING STATE SECRETS: JURISDICTIONAL DIFFERENCES AND CURRENT DEVELOPMENTS

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Public interest immunity and state secrets privilege can be raised by the government to resist the production or access to information to prevent harm to the national interest. The doctrine of public interest immunity (PII) developed in the English common law and has been applied in other common law jurisdictions in both criminal and civil proceedings. The doctrine has been described as a "mechanism for handling disclosure of

sensitive information."[1] Applications for PII depart from open justice and notions of procedural fairness because the party seeking the information is prevented from seeing and testing the evidence in support of the PII claim. The PII process involves a judge viewing secret evidence to assess whether the public interest in disclosure outweighs the public interest in maintaining secrecy. If a PII claim is upheld then the information is not disclosed. PII is a product of the common law, but now finds itself, in certain situations, regulated by legislation.[2] Some legislative models give the protection of national security greater weight than common law values, such as individual rights and open justice.[3] In the United States of America (U.S.), a different approach is taken to the disclosure of information in civil proceedings that could harm national security. This approach allows the government to invoke state secrets privilege to prevent access to information that could harm national security.[4] A legislative model applies to criminal trials in the United States.[5]

This Paper considers different jurisdictional approaches to the protection of information where its disclosure could be injurious to the public interest, in particular where its disclosure could harm national security. Recently, the United States, the United Kingdom (U.K.), and Australia considered significant legal changes to this area of the law. Major change in Australian

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[1] SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, Cm. 8194, at App. B (U.K.), http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2011/green-paper.pdf.

[2] *See* Evidence Act 1995 (Cth) § 130 (Austl.); National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth); *see also* Criminal Procedure and Investigations Act 1996, ch. 25 (U.K.); Canada Evidence Act R.S.C. 1985, ch. C-5, § 38 (Can.).

[3] National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), §§ 31(8), 38L(8) (Austl.) (setting forth the Australian approach in respect to the protection of national security information in federal criminal proceedings and civil proceedings).

[4] United States v. Reynolds, 345 U.S. 1 (1953).

[5] Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16 (2006); *see also* Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 (2006).

criminal trials, after one state's appellate court ruled that the current method for making PII claims is flawed, is now unlikely due to recent legislation that generally confirms the current practice for making PII claims.[6] However, there could be change to the Australian statutory scheme for information affecting national security for Federal criminal trials and civil proceedings,[7] because the need for this legislation has recently been questioned due to litigants' avoidance of its complex procedure.[8] In the United Kingdom, Parliament has agreed to a radical new system for hearing civil cases where information is likely to harm national security.[9] This new system would utilize closed hearings, open only to the government and the court. In 2012, the United States also considered mammoth changes to the protection of national security information by the introduction of a bill that provides a procedure for determining whether state secrets privilege protects information in civil proceedings.[10] This Paper aims to do four things: (1) describe the common law doctrine of PII; (2) explain the Australian legal position and developments; (3) consider the United Kingdom's position, particularly the use of special advocates and "closed court procedures;" and, finally, (4) constrast the United States' position. This Paper seeks to make some comparisons with the procedure for protecting state secrets in different jurisdictions in order to ask whether transparency and accountability are better served by one particular model rather than another.

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[6] Att'y Gen. (NSW) v. Lipton [2011] N.S.W.C.C.A. 247 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2011/247.html. The Director of Public Prosecutions Amendment (Disclosures) Act 2012 (N.S.W.) (Austl.) commenced on 1 January 2013. It overrules *Lipto*n. This Act applies to state prosecutions and would not apply to prosecutions for Commonwealth offenses, such as terrorism. *Lipton* was a criminal trial for a state criminal offense.

[7] National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth).

[8] INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, ANNUAL REPORT 16 DEC. 2011, 2012, at ch. IX (Austl.), http://www.dpmc.gov.au/publications/INSLM/index.cfm.

[9] Justice and Security Bill, 2012-13, H.L. Bill [27] (U.K.). This bill was introduced on May 28, 2012, and consideration of the House of Commons amendments took place in the House of Lords on 26 March 2013. The Bill is waiting Royal Assent.

[10] State Secrets Protection Bill, H.R. 5956, 112th Cong. (2d Sess. 2012).

I. THE DOCTRINE OF PUBLIC INTEREST IMMUNITY

PII is a doctrine of substantive law and not merely a rule of evidence.[11] The PII procedure was devised by the common law in the exercise of its inherent power to regulate its own procedures.[12] PII usually arises when documents have been subpoenaed.[13] PII can also be raised as an objection to the admissibility of documentary or testimonial evidence in the trial. PII protects disclosure of information when it is in the public interest for the information not to be disclosed (that is, it is likely to be injurious to the public interest to disclose the information). A PII claim could be made when certain types of information—such as cabinet documents—could, if disclosed, prejudice the functioning of the government.[14] Other examples are documents that could reveal the identity of police informers. If the identity of an informer were to be disclosed in a court of law, sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime.[15] Disclosure of documents, which contain confidential police methodology, could also harm the proper conduct of future law enforcement.[16] Finally, another public

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[11] Jacobsen v. Rogers (1995) 182 C.L.R. 572, 588 (Austl.).

[12] Al Rawi v. Sec. Serv., [2011] U.K.S.C. 34, ¶ 20 (appeal taken from Eng.) (Lord Dyson).

[13] PII can also be raised in relation to civil procedures, such as discovery and interrogatories, and in pretrial criminal procedures, such as search warrants.

[14] *See, e.g.*, Sankey v. Whitlam (1978) 142 C.L.R. 1 (Austl.); Commonwealth v. N. Land Council (1993) 176 C.L.R. 604 (Austl.); New South Wales v. Pub. Transp. Ticketing Corp. [2011] N.S.W.C.A. 60 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/60.html (providing examples of Australian authorities).

[15] *See, e.g.*, D. v. Nat'l Soc'y for the Prevention of Cruelty to Children, [1978] A.C. 171 (H.L.) 218, 232, 241 (appeal taken from Eng.); Cain v. Glass (No 2) (1985) 3 N.S.W.L.R. 230, 232, 233, 247 (Austl.); Att'y Gen. (NSW) v. Stuart (1994) 75 A. Crim. R. 8 (Austl.); Att'y Gen. (NSW) v. Smith (1996) 86 A. Crim. R. 308 (Austl.); Gardiner v. The Queen (2006) 162 A. Crim. R. 233 (Austl.); Australian Competition & Consumer Comm'n v. Prysmian Cavi E Sistemi Energia S.R.L. [2011] F.C.A. 938 (Austl.), *available at* http://www.austlii.edu.au/au/cases/cth/FCA/2011/938.html (providing examples of English and Australian authorities).

[16] Young v. Quin (1985) 4 F.C.R. 483, 494 (Beaumont, J.) (Austl.); S. v. New South Wales (No 3) [2009] N.S.W.C.A. 248, ¶ 7 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCA/2009/248.html; N.S.W. Comm'r of Police v. Nationwide News Pty Ltd. (2007) 70 N.S.W.L.R. 643, 648, ¶ 35 (Austl.).

interest is information that could harm national security—for example, documents held by the government security service.[17]

The House of Lords held in *Duncan v. Cammell, Laird & Co.*[18] that a ministerial certificate, which contained a document or official secret, should be exempt from disclosure and should be accepted without question. This approach was overturned in 1968 in *Conway v. Rimmer*,[19] which advocated a balancing test to determine whether there should be disclosure. The High Court of Australia followed *Conway v. Rimmer* in the case of *Sankey v. Whitlam*.[20]

The court conducts a balancing exercise by inspecting the information to determine whether the information should be disclosed. The court can view the information to conduct the balancing exercise. The public interest in disclosure is based on the need for the litigant to have the information for the administration of justice. This public interest is weighed against the public interest in nondisclosure. The public interest in nondisclosure is the reason for the secrecy. The court needs to know the harm that could be occasioned if disclosure of the information were made and must assess the gravity of the risk to the public interest that would be caused by disclosure against the risk that would be caused by the denial of the evidence to the litigant seeking the information. The balancing exercise is explained by the High Court of Australia in *Sankey v. Whitlam* as:

> The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However[,] the public interest has two aspects

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[17] Alister v. The Queen (1984) 154 C.L.R. 404 (Austl.). This case concerned the trial of three men for conspiracy to murder and of two for attempted murder. *Id.* A subpoena was issued on the Australian Security Intelligence Organization to produce documents relating to information provided by an informant who was also a principal prosecution witness in the trial. *Id.* The organization objected to production on the ground of national security. *Id.* The High Court found that the documents should have been inspected by the trial judge and special weight should have been given to the fact that the documents may have supported the defense of an accused. *Id.*

[18] [1942] A.C. 624 (U.K.).

[19] [1968] A.C. 910 (U.K.).

[20] (1978) 142 C.L.R. 1 (Austl.).

which may conflict. These were described by Lord Reid in *Conway v. Rimmer* (43), as follows:

> "There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words[,] whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v. Rimmer* (43), "the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it". In such cases once the court has decided that "to order production of the document in evidence would put the interest of the state in jeopardy," it must decline to order production.[21]

II. PUBLIC INTEREST IMMUNITY CLAIMS IN AUSTRALIA

A. General Australian Law

The law governing PII in Australia is generally regulated by the Evidence Act,[22] which imposes an onus on the party seeking to have the court exercise its discretion to prevent disclosure of

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[21] *Sankey*, 142 C.L.R. at 39 (Gibbs, A.C.J.) (Austl.).

[22] *See* Evidence Act 1995 (Cth); Evidence Act 1995 (N.S.W.); Evidence Act 2001 (Tas.); Evidence Act 2004 (N.I.); Evidence Act 2008 (Vict.); Evidence Act 2011 (Austl. Cap. Terr.); Evidence (National Uniform Legislation) Act 2011 (NT) (providing uniform evidence legislation, which has been passed in most Australian states and territories). The common law of evidence applies to the other parts of Australia, that is Queensland, Western Australia and South Australia.

document(s),[23] to demonstrate that the document(s) relate to a "matter of state,"[24] and that the balancing test favors nonproduction. It has been held that the legal test in this statute reflects the common law position.[25] A claim of PII requires a court to conduct a balancing exercise to determine whether, in all the circumstances of the case, the public interest in protecting the confidentiality of information outweighs the countervailing public interest in the public availability of that information for the administration of justice.[26] The former Chief Justice of New South Wales (N.S.W.), Chief Justice Spigelman, explained the balancing exercise as:

> In the determination of a claim of public interest immunity, a trial judge is called upon to weigh essentially incommensurable factors: the significance of the information to the issues in the trial, against the public harm from disclosure. Where this occurs in the course of the administration of justice, judicial officers have relevant experience for the conduct of the balancing exercise. Specifically, they not only understand, but have a duty to consider and assess, the significance of the information to the particular legal proceedings. Where the public interest to be balanced involves the legislative or accountability functions of a House of Parliament, the courts should be very reluctant to undertake any such balancing. This does not involve a constitutional function appropriate to be undertaken by

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[23] Such acts not only prevent the disclosure of documents but also the adduction of evidence. In some circumstances though, Australian common law continues to be applied. *Compare* Evidence Act 1995 (Cth) § 131A (Austl.), *with* Derbas v. The Queen [2012] N.S.W.C.C.A. 14, ¶ 8 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2012/14.html; *compare* New South Wales v. Pub. Transp. Ticketing Corp. [2011] N.S.W.C.A. 60, ¶ 32 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/60.html, *with* Att'y Gen. (N.S.W.) v. Lipton [2012] N.S.W.C.C.A. 156, ¶ 34 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2012/156.html.

[24] *See* Evidence Act 1995 (Cth) § 130(4) (Austl.); Evidence Act 1995 (N.S.W.); Evidence Act 2001 (Tas.); Evidence Act 2004 (N.I.); Evidence Act 2008 (Vict.); Evidence Act 2011 (Austl. Cap. Terr.); Evidence (National Uniform Legislation) Act 2011 (NT).

[25] *Derbas*, [2012] N.S.W.C.C.A. at 14, ¶ 6; *Pub. Trans. Ticketing Corp.* [2011] N.S.W.C.A. at 60, ¶ 42.

[26] *See* Evidence Act 1995 (Cth) § 130(1) (Austl.); Evidence Act 1995 (N.S.W.) § 130(1); Evidence Act 2001 (Tas.) § 130(1); Evidence Act 2004 (N.I.) § 130(1); Evidence Act 2008 (Vict.) § 130(1); Evidence Act 2011 (Austl. Cap. Terr.) § 130(1); Evidence (National Uniform Legislation) Act 2011 (NT) § 130(1).

> judicial officers. This is not only because judges do not have relevant experience, a proposition which may be equally true of other public interests which they are called upon to weigh. It is because the Court should respect the role of a House of Parliament in determining for itself what it requires and the significance or weight to be given to particular information. As the Supreme Court of the United States has said, there are issues which a court should not determine because of "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government": *Baker v Carr* [1962] USSC 48; 369 US 186 (1962) at 217.[27]

The public interest (and the threat that disclosure poses to that interest) must be balanced against the competing public interest of whether the administration of justice would be frustrated if such documents were withheld. This requires consideration of section 130(5) of the Evidence Act. A court can apply section 130 on its own motion and can inform itself of anything it thinks fit.

A court has the power to make nonpublication orders to protect the public interest.[28] Protective orders could be nonpublication orders, closed court orders, and/or pseudonym orders.[29] Section 130(5)(d) of the *Evidence Act* refers to the court taking into account the effect of disclosure of the information and "the means available to limit its publication."[30] The means to limit publication are based on the power of the court to order nonpublication of the evidence. Disclosure of the information must

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[27] Egan v. Chadwick [1999] N.S.W.C.A. 176, ¶ 52 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCA/1999/176.html.

[28] Chapman v. Luminis Pty Ltd. (2000) 100 F.C.R. 229 (Austl.); Att'y Gen. (NSW) v. Smith (1996) 86 A. Crim. R. 308 (Austl.); N.S.W. Comm'r of Police v. Nationwide News Pty Ltd. (2007) 70 N.S.W.L.R. 643 (Austl.); and S. v. New South Wales (No 3) [2009] N.S.W.C.A. 248 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWCA/2009/248.html.

[29] Note that any nonpublication or suppression orders in New South Wales would now also be regulated by the Court Suppression and Non-publication Orders Act 2010 (N.S.W.) (Austl.). Pseudonym orders were unsuccessfully sought on PII grounds in R v. Hawi (No 2) [2011] N.S.W.S.C. 1648 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1648.html.

[30] *See* Evidence Act 1995 (Cth) § 130(5)(d) (Austl.); Evidence Act 1995 (N.S.W.) § 130(5)(d); Evidence Act 2001 (Tas.) § 130(5)(d); Evidence Act 2004 (N.I.) § 130(5)(d); Evidence Act 2008 (Vict.) § 130(5)(d); Evidence Act 2011 (Austl. Cap. Terr.) § 130(5)(d); Evidence (National Uniform Legislation) Act 2011 (NT) § 130(5) (d).

be against the public interest and, "the test of necessity requires at least that there be identified some substantial detriment or risk of detriment to the administration of justice that would, in a significant way, be alleviated by suppression of the information."[31] In *New South Wales Commissioner of Police v. Nationwide News Pty Ltd.,* the N.S.W. Court of Appeal made nonpublication orders relating to the trial transcript that made reference to confidential police methodology in undercover work.[32] The orders were to prevent the disclosure of information that would be harmful to the public interest; however, the plaintiff (a former undercover operative) could adduce evidence about police undercover method to prove her claim for damages sustained in the course of her employment as a police officer.[33]

B. Procedure in Australian PII Claims

Usually, the Australian procedure for determining a claim is that the government department that has been required to produce information intervenes in the proceedings and applies to the court for an order that they be immune from producing particular document(s) on the ground of PII. Or, an objection is made to evidence during the trial on the basis of PII. A claim of PII may be made by any person, including a person who is not party to the proceedings.[34] In practice, usually the trial judge determines the claim, as they are in the best position to determine the relevance of the information.[35]

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[31] Att'y Gen. (NSW) v. Nationwide News Pty Ltd. (2007) 178 A. Crim. R. 301, ¶ 39 (Hodgson, J.A., with Hislop & Latham, JJ., agreeing) (Austl.). In this case, the government failed in its claim for nonpublication orders with respect to a police technique. The technique had lost its secrecy, most notably from its description in a High Court case, *Tofilau v. The Queen* (2007) 231 C.L.R. 396 (Austl.).

[32] *Nationwide News Pty Ltd.*, 70 N.S.W.L.R. 643.

[33] *Id.* ¶ 2; *see also* McCausland v. New South Wales [2010] N.S.W.S.C. 1562 (Austl.), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1562.html (wherein a PII claim was made over the police car-chase pursuit policy).

[34] Att'y Gen. (NSW) v. Stuart (1994) 75 A. Crim. R. 8, 29 (Smart, J.) (Austl.).

[35] Note that in Canada the trial judge does not determine the PII claim. The Canadian model is not discussed in this paper, but, unusually, it bifurcates PII claims for non-disclosure on national security grounds between the trial judge and a specialized security court. This was the subject of criticism in the Canadian Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. *See Air India Flight 182: A Canadian Tragedy: Volume 3 The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions*, MINISTER OF

The PII claim is supported by an affidavit by a senior government minister. This affidavit usually contains information which, if disclosed, would itself be injurious to the public interest. Therefore, courts use confidential affidavits.[36] This means that only the party (and its lawyers) who make the PII claim, and the judge, can read the confidential affidavit. *National Crime Authority v. Gould* explained the reasoning for using confidential evidence:

> [That the affidavit supporting the immunity claim had] not been made available to the defence. In my view this would not be an available reason for refusing to consider the affidavit. The affidavit may, itself, contain material, which if disclosed could adversely affect public interest. The very reasons advanced in the affidavit for the non-disclosure of the materials sought in the subpoena may themselves indicate facts the disclosure of which in a public forum might well be inimical to the proper and efficient conduct of the operations of the NCA. . . . Of course they may not; in which case, the court may well think it appropriate to make the contents available to the defence for the argument of the question of immunity. Such considerations cannot, of course, arise unless the Court has regard to the contents of the affidavit in the first place.[37]

There is no right to cross-examine a deponent of an affidavit who provides evidence in support of a PII claim. In *Attorney General for New South Wales v. Stuart,* it was said:

> There is, of course, no *right* to cross-examine such a deponent upon his affidavit, and leave to permit such a cross-examination is granted only very rarely; more usually, the party claiming immunity will be requested by the judge instead to produce further evidence which overcomes any

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PUBLIC WORKS AND GOVERNMENT SERVICES 13, 160-65 (2010) (Can.), http://publications.gc.ca/collections/collection_2010/bcp-pco/CP32-89-2-2010-3-eng.pdf; *see also* R v. Ahmad, [2011] S.C.C. 6 (CanLII); Kent Roach, *"Constitutional Chicken": National Security Confidentiality and Terrorism Prosecutions after* R. v. Ahmad, 54 S.C.L.R (2d) 357, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887964.

[36] R v. Meissner (1994) 76 A. Crim. R. 81, 84-85 (Austl.); R v. Yooyen (1991) 57 A. Crim. R 226, 233 (Austl.).

[37] (1989) 23 F.C.R. 191, 198 (Austl.) (Foster, J.).

> defect in the claim which may be apparent on the face of evidence already produced.[38]

"It would be a very rare case indeed where the court would permit cross examination of a deponent or would allow countervailing evidence . . . ."[39] The parties, especially the party who seeks the information, are arguably put at a disadvantage by not being able to view the confidential evidence in a proceeding to determine whether PII attaches to the communication or document.

C. Australian Responses to National Security

In the aftermath of 9/11, Australia enacted legislation—the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI Act)—which specifically focused on the disclosure of national security information.[40] The object of the NSI Act is to prevent disclosure of information in both civil and criminal 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."[41] The likelihood of prejudice must be a "real, and not merely a remote, possibility that disclosure will prejudice national security."[42] The NSI Act sets out a complicated procedure[43] for dealing with the disclosure of information and applies, instead of section 130 of the Evidence Act, to criminal trials involving federal

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[38] (1994) 75 A. Crim. R. 8, 20-21 (Austl.) (Hunt, C.J. at CL).

[39] Young v. Quin (1985) 4 F.C.R. 483, 486 (Austl.).

[40] The legislation commenced on 11 January 2005 (for criminal proceedings) and was amended on 3 August 2005 (for civil proceedings): National Security Information (Criminal Proceedings) Act 2004 (Cth) (Austl.) and the National Security Information Legislation Amendment Act 2005 (Cth) (Austl.). It was the product of an enquiry by the AUSTRALIAN LAW REFORM COMMISSION, KEEPING SECRETS: THE PROTECTION OF CLASSIFIED AND SECURITY SENSITIVE INFORMATION, Report No. 98 (2004) (Austl.).

[41] National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) s 3(1) (Austl.) (setting out the object of the Act).

[42] *Id.* at s 17(1).

[43] The complicated nature is demonstrated by the Attorney-General issuing a Practitioners' Guide to the legislation in June 2008. *See* ATTORNEY GENERAL DEPARTMENT, NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004: PRACTITIONERS' GUIDE, 2008 (Austl.), http://www.ag.gov.au/Documents/Practitioners%20%20Guide%20to%20NSI%20Act%20-%20FINAL1.pdf.

crimes and all civil proceedings[44] if the information is likely to prejudice national security.[45] The first step under the NSI Act is that a party must notify the Federal Attorney-General if they know or believe that they or a witness will disclose information that relates to national security or may affect national security.[46] The Attorney-General then issues a certificate if the evidence is likely to be prejudicial to national security.[47] The judge then determines whether the information is to be disclosed in a closed hearing.[48] The parties can be prevented from attending this hearing.[49] The Attorney-General can require that the defendant's lawyer be ordered to leave the court if they do not have security clearance at the required level.[50] A judge, after the closed hearing, can uphold the claim for nondisclosure or it can order disclosure of the information. It could permit limited disclosure in the form of a redacted copy or summary as suggested by the Attorney-General, or as ordered by the court.[51]

D. Criticisms of the Australian Model for National Security

A startling feature of the NSI Act is the recasting of the balancing exercise so that "greatest weight"[52] is given the protection of national security rather than other interests, such as the right of the accused to have material that may assist their defense.

In *R v. Lodhi*,[53] the accused, on trial for terrorist offences, challenged the constitutional validity of the NSI Act on the basis that the legislation was incompatible with an exercise of federal judicial power.[54] The trial judge held that the legislation was

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[44] National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), §§ 6, 6A, 13, 14, 15A (Austl.).

[45] *See id.* at §§ 8-11. (defining national security as "Australia's defence, security, international relations or law enforcement interests").

[46] *Id.* §§ 24, 25, 38D, 38E.

[47] *Id.* §§ 26, 28 38F, 38H.

[48] *Id.* §§ 20B, 38AB.

[49] *Id.* §§ 29(3)(a), 38I(3)(a).

[50] *Id.* §§ 29(3)(b), 38I(3)(b).

[51] *Id.* §§ 31, 38L.

[52] *Id.* §§ 31(7)(a), (8), 38L(7)(a), (8).

[53] R v. Lodhi (2006) 163 A. Crim. R. 448.

[54] *See* Kable v. DPP (NSW) (1996) 189 C.L.R. 51 (Austl.) (arguing that the institutional integrity of the court is compromised by the legislation).

valid, as it did not usurp judicial power because a judge could still allow disclosure in the face of a Minister's certificate that disclosure of the information would harm national security.[55] This ruling was upheld on appeal, with the then–Chief Justice of New South Wales finding that, even though the legislation "tilted the balance," it was not invalid.[56] The Australian government has recently appointed an Independent Monitor to consider the national security legislation. The Monitor, noting *Lodhi*, reported that "[b]eing constitutional does not of itself provide favourable answers to questions about these qualities of the NSI Act."[57]

The NSI Act has been the subject of comment by the trial judge who heard Lodhi's case, and several others for terrorist offences,[58] because of the high obligations it places on lawyers and court staff to obtain national security clearances, to notify the Attorney-General of information that may affect national security, and that the failure to notify may expose the practitioner to imprisonment for up to two years.[59] The judge commented:

> It is quite a complicated piece of legislation. It may be respectfully observed that it gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial.
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> . . .This legislation poses a very significant challenge to the efficient running of a criminal trial.
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[55] R v. Lodhi (2006) 163 A. Crim. R. 448, 464 ¶ 81 (Austl.).

[56] Lodhi v. The Queen (2007) 179 A. Crim. R. 470, 487 ¶ 66-67 (Austl.).

[57] INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, ANNUAL REPORT 16 DECEMBER 2011, 2012, at ch. IX (Austl.), http://www.dpmc.gov.au/publications/INSLM/index.cfm.
Bret Walker SC was appointed the Independent National Security Legislation Monitor.

[58] R v. Elomar [2010] N.S.W.S.C. 10 (Austl.); *Lodhi*, (2007) 179 A. Crim. R. 470.

[59] Anthony Whealy, *Difficulty in Obtaining a Fair Trial in Terrorism Cases*, 81 A.L.J. 743, 748 (2007).

> . . . Delay and disturbance to the trial process is perhaps the most significant potential problem created by the legislation.[60]

The Independent Monitor reports that "the awful prospect of the NSI Act operating to its full extent in a contested way has had the effect of producing in nearly every such case agreements in place of contested adjudications."[61] So, rather than use the complex process under the NSI Act, the parties reach agreement about disclosure of national security information to bypass the Act. The report notes that prudent agreement may result in fair trial rights being compromised. It seems that those seeking national security information appear to accept the Attorney-General's certificate that disclosure will cause harm to national security. Further, the report highlights the problem of applications causing trials to "fragment and delay criminal process."[62] This is due to compulsory adjournments to notify the government and requiring security clearances of court staff and defense lawyers. The report notes that "it does not appear there has been departure from the standards required of a fair trial";[63] however, this is not due to the legislation. The report recommends that urgent examination be made as to whether the legislation is necessary or whether claims of PII may be used instead.[64]

E. Criticism of the Practice of Making Claims

The procedure in criminal proceedings (as opposed to civil cases) was strongly criticized by the N.S.W. Court of Criminal Appeal,[65] where it held that, in order for the prosecuting authority to oblige with their duty of disclosure, police are obliged to produce all relevant material to the prosecutor and then any PII claims are

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[60] *Id.* at 645-48; *See also* INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, ANNUAL REPORT, *supra* note 62.

[61] INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, ANNUAL REPORT, *supra* note 62.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] R v. Lipton [2011] N.S.W.C.C.A. 247 (Austl.) (McColl, J.A. with RS Hulme, J. and Hislop, J. agreeing). This decision affects the law in New South Wales. Also, note that it does not affect the operation of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth).

to be made by the prosecutor (as distinguished from the current practice of separate representation on behalf of the Commissioner for Police to claim PII).[66] It is noted that in the United Kingdom, the prosecutor is responsible for making PII applications.[67] In response to this decision, the N.S.W. Parliament quickly passed legislation to suspend the effect of the Court of Criminal Appeal's decision.[68] This same criticism could possibly be made in respect to criminal trials involving national security information and federal offenses (terrorism is a federal offense).

III. PUBLIC INTEREST IMMUNITY CLAIMS IN THE UNITED KINGDOM

Public interest immunity in English criminal trials is governed by statute, which imposes duties of disclosure on the prosecution.[69] In civil trials, PII is governed by the common law, which is the same test for PII in Australia. Namely, the court conducts a balancing exercise between the public interest in preventing harm by nondisclosure and the public interest in the administration of justice, which is served by disclosure.[70] In both English civil and criminal cases, the PII claim requires a hearing where the judge inspects the document (or considers the evidence the subject of objection) that is the subject of the claim and exercises independent judgment about the validity of the claim.[71]

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[66] *Id.* at ¶ 111-119. Note that in South Australia the prosecutor makes PII claims: ¶ 97.

[67] SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, Cm. 8194, at 7 (U.K.).

[68] Director of Public Prosecutions Amendment (Disclosures) Act 2011 No. 65 (N.S.W.) (Austl.). This legislation suspends the effect of *R v. Lipton* [2011] N.S.W.C.C.A. 247 (Austl.) until January 2013. Further, amendment by the Director of Public Prosecutions Amendment (Disclosures) Act No. 80 2012 (N.S.W.) (Austl.) commenced on 1 January 2013. This Act provides that law enforcement officers' duty to disclose to the prosecution all information that might be reasonably be expected to assist the prosecution or accused, does not require the disclosure to the prosecution of information or documents that are the subject of a PII claim, however a description of the sensitive material is required.

[69] Criminal Procedure and Investigations Act, 1996 (U.K.). *See also* Criminal Justice Act, 2003, ch. 44, pt. 5 (U.K.) (including disclosure obligations).

[70] Duncan v. Cammell, Laird & Co., [1942] A.C. 624 (U.K.); D v. Nat'l Soc'y for the Prevention of Cruelty to Children, [1978] A.C. 171, 218, 232, 241 (U.K.).

[71] *See* State Secrets Protection Act of 2009, H.R. 984, 111th Cong. (2009) (empowering the court to look at the document and assess the validity of the claim);

As stated above, one significant procedural difference between the United Kingdom and Australia is that the prosecution raises PII in criminal trials in relation to information held by the police (rather than separate representation by police, as is done in most criminal trials in Australia).[72] In Australian criminal trials,[73] it is usual for the particular government department to make the PII claim. For example, in terrorism prosecutions, the Commonwealth Director of Public Prosecutions prosecutes, and if documents are subpoenaed from a security intelligence organization or the police, then legal representation will be made separately by those bodies that claim PII.[74]

A. English Procedural Developments—Special Advocates

A procedure to address unfairness caused by the use of secret evidence is the appointment of special advocates. This procedure developed in immigration and detention cases.[75] Special advocates have also been appointed in PII cases to look at the documents that are the subject of the claim. This is "to enhance the PII process."[76] Special advocates are security-cleared lawyers who

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See also Jasminka Kalajdzic, *Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, US and English Civil Cases*, 41 OTTAWA L. REV. 289 (2011) (discussing the effects of this bill).

[72] *See* R v. Ward, [1993] 2 All E.R. 577 (U.K.); R v. Davis, [1993] All E.R. 643 (U.K.). In *Ward*, the Court of Appeal overturned a terrorism conviction because the prosecution did not have a PII issue determined before the court. 2 All E.R. 577.

[73] Except for South Australia, all of Australia's other states have adopted the practice of having separate legal representation on behalf of government departments to make PII claims during criminal trials. *Compare* R v. Lipton [2011] N.S.W.C.C.A. 247, ¶ 111 (Austl.) (McColl, J.A. with RS Hulme, J. & Hislop, J. agreeing) *with* R v. Andrews (2010) 107 S.A.S.R. 471 (S. Austl.), *and* R v. Solomon [2005] 92 S.A.S.R. 331 (S. Austl.) (making PII claims instead).

[74] *See, e.g.*, R v. Lodhi (2006) 163 A Crim R 448 (Austl.) (Whealy, J.); Lodhi v. The Queen (2007) 179 A Crim R 470 (Austl.) (dismissing the appeal).

[75] Sec'y of State for the Home Dep't v. Rehman, [2001] U.K.H.L. 47 (U.K.); Sec'y of State for the Home Dep't v. M, [2004] E.W.C.A. Civ. 324 (Eng); R (Roberts) v. Parole Brd., [2005] 2 A.C. 738 (U.K.); R (AHK) v. Sec'y of State for the Home Dep't, [2009] 1 W.L.R. 2049 (Eng.). Note that special advocates are used in control order cases. *See* Prevention of Terrorism Act, 2005, ch. 2, § 2 (U.K.).

[76] Al Rawi v. The Sec. Serv., [2011] 3 W.L.R. 388, 406 (Eng.) (Lord Dyson) (emphasis omitted); R v. H, [2004] 2 A.C. 134, 150-51 (U.K.) (Lord Bingham); Murungaru v. Sec'y of State for the Home Dep't, [2008] E.W.C.A. Civ. 1015 (Eng.).

represent the interest of the affected party. However, they do not take informed instructions from the affected party.[77]

It has been observed that "the best known example of our law's current struggles to accommodate security concerns within due process is the controversy surrounding the use of special advocates and closed material."[78] In the United Kingdom, the House of Lords has ruled in two major cases on their use—*MB*[79] and *AF*[80]—and the Grand Chamber of the European Court of Human Rights has also made a ruling about their use in *A v. United Kingdom*.[81] The procedure adopted is described by Tomkins as follows:

> [T]he basic model is the same. The Government, advised by the Security and Secret Intelligence Services, will divide its evidence and supporting material in a case into "open" and "closed" bundles. Material which the Government considers to be sensitive for reasons of national security is "closed material". Open material will be served on the other parties as normal. Closed material will not be served on the other parties, but will be served only on a "special advocate" and, where appropriate, shown also to the court. A special advocate is a lawyer with security clearance who is appointed from a list maintained by the Attorney General to act on behalf of a party in closed proceedings. Once appointed the special advocate will have two main functions. The first is to

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[77] *See* HOUSE OF COMMONS CONSTITUTIONAL AFFAIRS COMMITTEE, THE OPERATION OF THE SPECIAL IMMIGRATION APPEALS COMMISSION AND THE USE OF SPECIAL ADVOCATES, 2004-05, H.C. 323-I, at 23-24 (U.K.).

[78] *See* Adam Tomkins, *National Security and the Due Process of Law*, 64 CURRENT LEGAL PROBLEMS 215, 216 (2011).

[79] Sec'y of State for the Home Dep't v. MB, [2008] 1 A.C. 440 (U.K.). The House of Lords ruled that the use of a special advocate procedure to deal with material that was not made available to the person subject to the control order ensured procedural fairness. *Id.*

[80] Sec'y of State for the Home Dep't v. AF (No. 3), [2010] 2 A.C. 269 (U.K.). In this case, the House of Lords ruled that in proceedings for a control order, the person affected must be given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. *Id.* This is to ensure that control proceedings are compatible with COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, COUNCIL OF EUROPE TREATY SERIES, NO. 5, at 9-10 (2010) (which is incorporated into English law by The Human Rights Act 1988 (UK)). *See also*, Aileen Kavanagh, *Special Advocates, Control Orders and the Right to a Fair Trial*, 73 MOD. L. REV. 836 (2010).

[81] A v. United Kingdom, [2009] E.C.H.R. 301 (U.K.).

> test the Government's claim that the closed material really needs to be closed: thus, special advocates will seek to have as much of the closed material as possible disclosed as open evidence. The second function is to do what they can to protect the interests of the party on whose behalf they act.[82]

In Canada, the lack of special advocates was found to be unconstitutional[83] and resulted in a regime of special advocates.[84] The limits of special advocates have been observed and include not being able to communicate and take instructions from the person they were representing and not having the power to call witnesses.[85] To the author's knowledge, there has not been appointment of special advocate in an Australian criminal trial in relation to national security information. A special advocate was allowed in a recent Australian civil case with respect to a PII claim over cabinet documents about high-level government decision making.[86]

As an aside, the use of secret evidence has been considered by the High Court of Australia. In three separate cases, different states in Australia have enacted legislation to permit coercive orders, in particular control orders, over organised criminal groups.[87] In all cases, the government sought declarations over motorcycle gangs.[88] In two cases, the legislation was found to be

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[82] Tomkins, *supra* note 83, at 217.

[83] Charkaoui v. Minister of Citizenship and Immigration, [2007] S.C.C. 9 (CanLII). A statutory regime for special advocates was created after this case under the Immigration and Refugee Protection Act, S.C. 2001, ch. 27 (Can.).

[84] Immigration and Refugee Protection Act, S.C. 2001, ch. 27 (Can.).

[85] Kavanagh, *supra* note 85, at 840 (referring to the Constitutional Affairs Committee 7th Report).

[86] New South Wales v. Pub. Transp. Ticketing Corp. (No. 3) [2011] N.S.W.C.A. 200 [33], [34] (Austl.). In a terrorist trial, the trial judge found that there was power to appoint a special advocate. *See* R v. Lodhi [2006] 163 A Crim R 475, 486 (Austl.).

[87] Control orders (a product of strategies to combat terrorism) have been used to address organized crime by statutory schemes that have particular organizations declared and individuals subject to control orders. *See* Serious and Organised Crime (Control) Act 2008 (S. Austl.); Crimes (Criminal Organisations Control) Act 2009 No. 6 (N.S.W.) (Austl.); Criminal Organisation Act 2009 (Queensland) No. 53 (Austl); *see also* S. Australia v. Totani [2010] H.C.A. 39 (Austl.) (declaring the 2008 Act partly invalid); Wainohu v. New South Wales [2011] H.C.A. 24 (Austl.) (declaring the NSW 2009 Act wholly invalid); Assistant Commissioner Michael James Condon v Pompano Pty Ltd & Anor [2013] H.C.A. 7 (declaring the Queensland 2009 Act valid).

[88] The Hells Angels and the Finks Motorcycle Club.

unconstitutional because it was inconsistent with the valid exercise of judicial power, as judges were able to make orders based on secret intelligence in secret hearings with no obligation to provide reasons for their decision. Recently, legislation was found to be constitutional even though the government's application for a declaration was made ex parte in a closed hearing, supported by intelligence based on anonymous informants. However, the procedure did use special advocates who assist the court to make a decision as an independent and impartial tribunal.[89]

B. English Procedural Developments—"Closed Court Procedure" for Civil Cases

In *Al Rawi v. The Security Service*,[90] the issue before the U.K. Supreme Court was whether it had the power to order a "closed court procedure" instead of determining PII in respect to each document that was the subject of the government's PII claim. This was a civil claim where several plaintiffs claimed damages because the Security Service (and other organs of the State) had been complicit in their detention and ill treatment at Guantanamo Bay.[91] The government contended that the course of the trial should contain both open and closed procedures. The government submitted that it required closed procedures so it could prevent the plaintiffs from seeing material while still relying on the material as evidence to defend the plaintiffs' claim. The government denied liability for the plaintiffs' detention or alleged mistreatment. The government contended that special advocates would represent the interest of the plaintiffs when the court was in the closed hearing.[92] The plaintiffs objected to a "closed court procedure" and argued that a conventional PII exercise should be

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[89] Assistant Comm'r Michael James Condon v. Pompano Pty. Ltd. & Anor. [2013] H.C.A. 7.

[90] [2011] 3 W.L.R. 388 (Eng.) (Lord Dyson with Lord Hope and Lord Kerr agreeing, Lord Brown, Lord Phillips and Lord Rodger dismissed the appeal, Lord Clarke and Lord Mance with whom Lady Hale agrees (in dissent) would have allowed the appeal).

[91] The plaintiffs pleaded causes of action, including false imprisonment, trespass to the person, conspiracy to injure, torture and breach of The Human Rights Act, 1988, ch. 42 (U.K.). *Id.*

[92] *Id.* at 395, ¶ 4 (Lord Dyson).

conducted by a judge in relation to the "closed" material.[93] In response, the government submitted that the sheer volume of documents would mean that the PII claim would be of an "enormous scale."[94] The government estimated that 140,000 documents may have a PII claim and that it might take three years to complete just the PII hearing.[95]

The primary judge allowed parallel procedures; however, the Court of Appeal reversed that decision and the government appealed. The question posed before the Supreme Court was:

> Could it be lawful and proper for a court to order that a "closed material procedure "(as defined below) be adopted in a civil claim for damages?
>
> Definition of "closed material procedure"[:]
>
> A "closed material procedure" means a procedure in which
>
> (a) a party is permitted to
>
> (i) comply with his obligations for disclosure of documents, and
>
> (ii) rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as "closed material"), and
>
> (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and
>
> (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest.
>
> For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United

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[93] *Id.* at 395, ¶ 5.
[94] *Id.*
[95] *Id.*

> Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.[96]

The lead judgment of Lord Dyson, in dismissing the appeal, found that the common law of PII could not develop so that it extended to closed-court procedures, but rather specific legislative amendment was required for such a fundamental departure from the essential features of a common law trial (namely, open justice, natural justice, and the right of confrontation).[97] Lord Dyson noted that the court had an inherent power to control its own process to innovate in the interests of justice; however, he found that the interests of justice were not served by this development.[98] Lord Dyson also highlighted the limitation of the special advocate system, in particular that it is not capable of ensuring the measure of procedural justice required.[99] Lord Dyson's position is summarized by his statement:

> The PII process is not perfect. Perfection cannot be achieved in any system. It has been improved over time as the history of its development shows. One particular development to note is the use of special advocates *to enhance the PII process*. There can be no objection to the use of special advocates for that purpose, since the PII process fully respects the principles of open justice and natural justice. There is nothing objectionable about excluding a party from the PII process. There can, therefore, be no objection to improving the position of that party in the process by the use of a special advocate.[100]

The procedure suggested was to have a secret hearing with only the judge, government, and special advocate present so that secret documents could be tendered as secret evidence to defend the government's claim. Lord Dyson found that the common law principles of open justice and natural justice are so important that

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[96] *Id.* at 394-95.
[97] *Id.* at 396-97.
[98] For example, as it did for the *Anton Piller* and *Mareva* orders.
[99] *Id.* at 403.
[100] *Id.* at 406.

they should not be eroded unless Parliament sees fit to do so.[101] Lord Mance (with Lady Hale agreeing) was in dissent and would have allowed the closed-court procedure to avoid future plaintiffs having their claims struck out due to their action being untriable because of the lack of access to material to prove their case.[102] Lord Mance would have ordered the procedure after a PII exercise concluded that there be no disclosure.[103] Lord Clarke, in dissent, would have developed the common law to permit a closed-court procedure involving special advocates.[104]

C. Legislative Change in the United Kingdom?

In response to *Al Rawi*, the U.K. government conducted an enquiry into the use of closed-court procedures in civil proceedings.[105] The U.K. Parliament has now introduced primary legislation to permit "closed material procedures" with the *Justice and Security Bill*.[106] This bill would legalize such closed procedures with the use of special advocates. The effect of the model would be that secret evidence could be used in a civil proceeding where the parties and their lawyers are absent from the trial and therefore do not know the evidence relied on by another party. The benefit of the legislation is said to be that it will allow a greater range of evidence to be heard in national security cases.[107] However, it has been observed that greater disclosure of secret evidence and intelligence leads to fairer trials

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[101] *See* Tariq v. Home Office, [2011] U.K.S.C. 35 (U.K.) (using a statutory closed material procedure in the Employment Tribunal was lawful under Article 6 of the Convention).

[102] *Al Rawi,* [2011] W.L.R. at 420 (Lord Mance).

[103] *Id.*

[104] *Id.* at 435-36 (Lord Clarke). Lord Clarke emphasized the flexibility of the common law.

[105] SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, Cm. 8194, at app. B (U.K.), http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2011/green-paper.pdf.

[106] Justice and Security Bill, 2012-13, H.L. Bill [27] (U.K.). This bill was introduced in the House of Lords on 28 May 2012. Both Houses of Parliament have agreed on the text of the Bill and it waits Royal Assent at which time it will become an Act of Parliament. As at the date of writing, Royal Assent is yet to be scheduled.

[107] Justice and Security Bill, 2012-13, H.L. Bill [27] (U.K.)—Lords Library Note, 14 June 2012, at 1, *available at* http://www.parliament.uk/briefing-papers/LLN-2012-024.

and greater accountability in the gathering of evidence.[108] It is of great concern that the United Kingdom is moving in this direction.

IV. NATIONAL SECURITY INFORMATION IN THE UNITED STATES

A. National Security Information in Criminal Trials

A legislative model applies to criminal trials in the United States to permit disclosure of information that may harm national security.[109] This model requires the accused to notify the prosecutor and the court before trial if they expect to disclose, or cause the disclosure of, classified information. Section 3 requires the court, upon the request of the government, to issue an order "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case."[110] The protective order provides access to classified information that is restricted to security-cleared persons. This means that the accused's lawyer, if security cleared, can view the material. After the discovery process,[111] the defendant must specify in detail in a written notice the precise classified information she or he expects to disclose.[112] The court, upon a motion of the government, will then hold a hearing[113] to determine the use, relevance, and admissibility of the proposed evidence. After the hearing, the court will determine the admissibility of the information and the government may move to substitute redacted versions of classified documents from the originals or prepare an admission of certain relevant facts or summaries for classified information that the court has ruled admissible.

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[108] Kent Roach, *Secret Evidence and its Alternatives*, *in* POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 18 (Aniceto Masferrer ed., 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888615.

[109] Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16 (2006).

[110] *Id.* § 3.

[111] *Id.* § 4 (allowing the government to redact information that is provided in discovery).

[112] *Id.* § 5(a).

[113] *Id.* § 6(a).

B. State Secrets Privilege

In civil proceedings, the situation is very different. State secrets privilege is used to prevent disclosure of information in civil proceedings that could harm national security.[114] This doctrine has been the subject of strong criticism for its ability to force dismissals of claims.[115] In *United States v. Reynolds*, families of military crewmembers who died in a plane crash could not pursue their negligence claim against the government because they were unable to access the written statements of three men who survived the crash and an official accident report.[116] The government claimed state secrets privilege over the documents.[117] The Supreme Court upheld the claim and found that the claim of privilege must be lodged by the head of the government department, and the court cannot force the disclosure of the document for the purpose of determining the claim.[118]

This part of the test sets the United States dramatically apart from the United Kingdom and Australia. In both those jurisdictions, it is critical for the judge to look at the information (usually a document) that is the subject of a claim for privilege to determine whether disclosure ought be made. The danger of the court accepting an assertion of privilege by the government was shown by the fact that the daughter of one of the deceased in *Reynolds* found the accident report in 2000 (after it was declassified) and found that it did not contain state secrets but rather proved the government's negligence.[119] This privilege was also used to dismiss a civil claim by an alleged victim of extraordinary rendition and torture by the Central Intelligence Agency.[120]

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[114] United States v. Reynolds, 345 U.S. 1 (1953).

[115] Louis Fisher, *State Secrets and Democratic Values, in* COURTS AND TERRORISM—NINE NATIONS BALANCE RIGHTS AND SECURITY 50 (MARY L. Volcansek & John F. Stack Jr. eds., 2011); Kalajdzic, *supra* note 76.

[116] Fisher, *supra* note 120, at 60.

[117] *Reynolds*, 345 U.S. at 1, 6.

[118] *Id.* at 7-9.

[119] Fisher, supra note 120. It has been argued that the state secrets doctrine has expanded well beyond *Reynolds.* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 213 (2010).

[120] El-Masri v. United States*,* 479 F.3d 296 (4th Cir. 2007). Note that *El-Masri v. Macedonia* is currently being considered by the Grand Chamber of the European Court of Human Rights. It was heard on 16 May 2012.

Australia has not had the United States' experience where the government has used privilege at the start of civil cases involving issues of national security to dismiss the case altogether. In cases like *El-Masri*, the government has argued that to even answer the complaint by confirming or denying its allegations would risk the disclosure of secrets that could cause exceptionally grave damage to the national security. In the United Kingdom, there is one example of a case being dismissed due to the sensitive information that would be disclosed.[121]

C. Recent Attempt for Legislative Change in the United States?

A 2012 bill before the U.S. Congress sought to amend the U.S. Federal Rules of Evidence to provide a mechanism to resolve claims of state secret privilege in civil claims.[122] The bill would have enacted a new rule to allow the government to raise state secrets privilege in any civil action where the government shows that disclosure of the information would be "reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States."[123] Under the bill, the application by the government was to be supported by affidavit from the head of the executive branch agency, and, most significantly, the court would review the actual information that was the subject of the privilege claim to assess the validity of the claim.

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[121] *See* Carnduff v. Rock, [2001] E.W.C.A. Civ. 680 (Eng.); Al Rawi v. The Sec. Serv., [2011] 3 W.L.R. 388, 398 (Eng.) (Lord Dyson) (reiterating that *Carnduff* was the only case cited to the Supreme Court in which "the court has decided that the public interest in maintaining confidential information trumps the public interest in the administration of justice to the extent that *on that ground* a trial has been denied altogether."). *Carnduff* involved a claim by a police informer for payments for information. The claim was made against the police. The Court of Appeal held that the case could not be litigated without disclosure of the sensitive information (police method and how the police used the information); therefore, the case was struck out. A complaint about this to the European Court of Human Rights failed. *See* Carnduff v. United Kingdom, [2004] E.C.H.R. 731 (Eng.).

[122] State Secrets Protection Bill, H.R. 5956, 112th Cong. (2d Sess. 2012). This bill was introduced in the 112th Congress of the U.S. House of Representatives on 18 June 2012. The bill would insert a State Secrets Privilege provision as Rule 503 in the Federal Rules of Evidence. This bill was assigned to a congressional committee on 18 June 2012 and appears to have been unsuccessful.

[123] *Id.* at 503(a).

CONCLUSION

Although the jurisdictions discussed derive from the English common law, there are significant differences in determining whether privilege attaches to national security information. At one end, the U.S. government can claim state secrets privilege in civil cases, if it takes the view that the information will harm national security, without a court deciding the correctness of that view by assessing the validity of the government's claim. Australia's response to the heightened concern for national security is a terribly complex and unused statute to regulate the process for making a PII claim in civil and criminal proceedings, which puts the balance in favour of national security. Further, Australian reform could include discarding its complicated statute. After England's highest court rejected a radical submission that the PII exercise should be replaced with a secret trial within a public civil trial for some cases involving national security information, the English Parliament legislated to allow such procedures Closed-court procedures, a giant departure from the open-justice principle, procedural fairness and the right of confrontation, are the subject of an English bill which appears likely to be enacted. Finally, the United States' attempt towards transparency and accountability with a bill to enact a procedure for dealing with state secrets privilege in civil proceedings unfortunately appears to have had no success. In recent times, all three jurisdictions have grappled with the question of the disclosure of national security information. England has devised a new method of hearing some civil claims rather than engage in the PII exercise, Australia continues determining questions of disclosure and in the United States the government's power to claim state secrets privilege can trump litigation, without a court's assessment of the likely harm caused by disclosure.