Open Justice, Closed Courts and the *Constitution*: Australian and Comparative Perspectives

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Open justice is an essential feature of the judiciary, in Australia and elsewhere. The principle has constitutional salience, as an element of judicial power in Chapter III of the Constitution. Yet, open justice is not absolute. In recent years, the tension between open justice and national security has been a matter of public controversy in Australia, as a result of the Bernard Collaery, Witness K and Witness J prosecutions, which have all been shrouded in secrecy. Reconciling open justice with the confidentiality required to protect national security is a common challenge for many jurisdictions. This article compares the Australian approach with the United Kingdom and Canada. It argues that Australian law and practice in relation to protecting open justice in the national security context is underdeveloped. Drawing on the British and Canadian experience, the article proposes methods to better balance these competing interests in Australia, in a manner which would reflect emerging constitutional principles.

I Introduction

Where there is no publicity there is no justice.[1]

Open justice is a significant, and longstanding,[2] judicial principle. It is considered a hallmark of the judicial branch of government in many jurisdictions, including Australia.[3] In some legal systems, open justice has been constitutionalised,[4] while the principle is also protected in national and international human rights

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1 Jeremy Bentham, quoted in *Scott v Scott* [1913] AC 417, 477 (Lord Shaw) ('*Scott*').

2 Garth Nettheim, 'The Principle of Open Justice' (1984) 8(1) *University of Tasmania Law Review* 25, 26–30 ('Open Justice').

3 As one scholar notes, the principle 'is treated as sacrosanct in a number of Commonwealth jurisdictions': Eric Barendt, 'Happy Centenary Birthday to *Scott v Scott*' (2013) 5(2) *Journal of Media Law* 297, 297.

4 Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40(3) *Federal Law Review* 385, 388.

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frameworks.[5] At its essence, open justice requires that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[6] This takes a range of practical forms: for example, that judicial hearings are open to the public, including the media,[7] that judgments are published, and that court records are accessible.[8] But open justice 'is a means to an end, and not an end in itself.'[9] The principle is therefore not absolute. In a range of circumstances, a tension will arise between the desirability of open justice and the benefits of secrecy. Where the interests of justice so require, courts can derogate from what open justice would otherwise demand.[10]

One context in which this tension is felt acutely is national security.[11] In Australia, the appropriateness of limitations on open justice in proceedings involving a national security dimension has been hotly contested in recent years.[12] The high-profile criminal cases of whistleblowers Bernard Collaery and Witness K have seen observers barred from the courtroom through the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*').[13] Even Collaery and his lawyers were prevented from viewing evidence, described as 'court only' evidence, that the federal government had sought to rely upon in seeking an order that the trial be held behind closed doors (the case was subsequently discontinued).[14] In the case of Witness J, meanwhile, a former intelligence officer was charged, sentenced, and imprisoned in complete secrecy.

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5 See, eg, *Human Rights Act 1998* (UK) sch 1 art 6; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

6 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Hewart CJ). For an amusing discussion of the appropriateness of Lord Chief Justice Hewart's fame for this encapsulation of open justice, see JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29(2) *University of New South Wales Law Journal* 147, 147–50.

7 For discussions of the special role of the media in the context of open justice, see, eg, Michael Douglas, 'The Media's Standing to Challenge Departures from Open Justice' (2016) 37(1) *Adelaide Law Review* 69; Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29(3) *University of New South Wales Law Journal* 90.

8 See generally Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38(2) *Melbourne University Law Review* 482, 493–4.

9 *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ) ('*Hinch*').

10 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2nd ed, 2020) 552–5 ('*Federal Judicature*').

11 See generally Garth Nettheim, 'Open Justice and State Secrets' (1986) 10(3) *Adelaide Law Review* 281 ('State Secrets').

12 See, eg, Kieran Pender, 'There is No Place for Secret Trials in Australia', *Canberra Times* (online, 17 May 2021) <https://www.canberratimes.com.au/story/7254301/there-is-no-place-for-secret-trials-in-australia/>.

13 Christopher Knaus, 'Open Justice v Secrecy: What is the Case Against Witness K Lawyer Bernard Collaery All About?', *Guardian Australia* (online, 31 January 2022) <https://www.theguardian.com/australia-news/2022/jan/31/open-justice-v-secrecy-what-is-the-case-against-witness-k-lawyer-bernard-collaery-all-about>.

14 Elizabeth Byrne, 'Top-Secret Evidence Will be Allowed in Bernard Collaery's Court Case, ACT Supreme Court Judge Rules', *Australian Broadcasting Corporation* (online, 16 March 2022) <https://www.abc.net.au/news/2022-03-16/bernard-collaery-top-secret-evidence-allowed/100914432>.

The situation provoked outcry when it subsequently came to light.[15] Whereas other exceptions to open justice, such as those relating to trade secrets, may be relatively uncontroversial, the use of secrecy in cases relating to government conduct or where the secrecy is invoked by the government itself raises greater concern. In such cases, questions may arise about the appropriate accommodation of competing interests. What safeguards ensure that the right balance is struck?[16]

This article explores the constitutional dimensions of the principle, through an Australian and comparative lens, to consider the extent of permissible departure from open justice. Is open justice a protected constitutional value in Australia? How are limits on open justice to be assessed for compatibility with constitutional principle? How do the constitutional underpinnings of open justice in Australia compare to cognate jurisdictions, such as the United Kingdom ('UK') and Canada? And are there practical steps that could be taken to better reconcile secrecy and transparency in Australian courts, borrowing from international practice?

It proceeds in five parts. Part I explores the development of open justice in Australian law and outlines the application of the *NSI Act* to limit open justice in two prominent cases, Collaery and Witness J. Part II considers two potential limits on departures from open justice, Chapter III of the *Constitution* and the implied freedom of political communication, and how these principles have developed in existing case law. Part III explores cognate British and Canadian law and practice. Part IV concludes by considering how Australian law might evolve and what could be learned from these comparative perspectives. Part V briefly summarises the anticipated way forward.

An exploration of these themes is overdue. While there is extensive literature on the open justice principle in Australian law generally,[17] less attention has been given to the constitutional dimensions. Although parts of the *NSI Act* were subject to constitutional challenge in *R v Lodhi* ('*Lodhi*'), in the NSW Supreme Court[18] and

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15 Andrew Probyn, '"The Quiet Person You Pass on the Street": Secret Prisoner Witness J Revealed', *Australian Broadcasting Corporation* (online, 5 December 2019) <https://www.abc.net.au/news/2019-12-05/witness-j-revealed-secret-trial/11764676>.

16 The author has ventilated similar questions, in a shorter format, elsewhere: Kieran Pender, 'Witnesses J, K – and L? Open Justice, the *NSI Act* and the *Constitution*', *AusPubLaw Blog* (online, 12 October 2021) <https://www.auspublaw.org/2021/10/witnesses-j-k-and-l-open-justice-the-nsi-act-and-the-constitution/> ('Open Justice, the *NSI Act* and the *Constitution*').

17 See, eg, Bosland and Gill (n 8); Douglas (n 7); Rodrick (n 7); Nettheim, 'Open Justice' (n 2); Jason Bosland, 'Two Years of Suppression under the *Open Courts Act 2013* (Vic)' (2017) 39(1) *Sydney Law Review* 25; Jason Bosland and Judith Townend, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) 23(4) *Communications Law* 183; Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35(4) *Sydney Law Review* 671; Chief Justice JJ Spigelman, 'Seen to Be Done: The Principle of Open Justice: Part I' (2000) 74(5) *Australian Law Journal* 290.

18 *R v Lodhi* (2006) 163 A Crim R 448 ('*Lodhi*').

on appeal,[19] there has been little detailed analysis of that case and its wider implications.[20] In light of the subsequent operation of the *NSI Act* in cases where democratic concerns are more central, such as Collaery and Witness J, it is necessary to squarely revisit these issues.[21] In July 2022, the Independent National Security Legislation Monitor ('INSLM') delivered its report into the Witness J case;[22] the Attorney-General, Mark Dreyfus KC, subsequently requested that the INSLM undertake a full review of the *NSI Act*. That inquiry is ongoing, due to report in late 2023; it is hoped this article can contribute to these continuing discussion around the appropriateness of the current law and its compliance with constitutional bounds. As has been said, 'recognition of open justice as a constitutional principle remains incomplete',[23] such that '[t]he accommodation of the constitutional value of open justice and competing interests will no doubt require further refinement and calibration.'[24] Legislative and jurisprudential development is to be anticipated.

Given the British provenance of the open justice principle, and the continuing similarity in conceptions of open justice across the common law world, comparative perspective is helpful in the present context.[25] This is particularly the case given the common challenge faced by many jurisdictions with the rise in national security-related litigation in recent decades, including the post-9/11 rise in terror-related trials. Given the shared legal context, similar parliamentary systems and common engagement with the dilemma of balancing of open justice and national security imperatives in recent years, Britain and Canada are compelling subjects for comparative analysis, notwithstanding divergent approaches to constitutional position for free speech.

Departing from open justice can impact both a litigant and the public at large (including the media). The use of court-only evidence in *R v Collaery (No 11)*[26] is a vivid illustration, whereby the defendant cannot make submissions in relation to

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19 *Lodhi v The Queen* (2007) 179 A Crim R 470. Special leave to appeal to the High Court was denied: Transcript of Proceedings, *Lodhi v The Queen* [2008] HCATrans 225.

20 But see Michael McHugh, 'The Constitutional Implications of Terrorism Legislation' (2007) 8(2) *Judicial Review* 189; Justice Anthony Whealy, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials' (2007) 8(3) *Judicial Review* 353; Lawrence McNamara, 'Counter-Terrorism Laws and the Media: National Security and the Control of Information' (2009) 5(3) *Security Challenges* 95.

21 For an earlier contribution on the tension between national security and open justice, pre-*NSI Act*, see Nettheim, 'State Secrets' (n 11).

22 Matthew Doran, 'National Security Watchdog Launches Investigation into Secret Trial of Witness J', *Australian Broadcasting Corporation* (online, 2 March 2021) <https://www.abc.net.au/news/2021-03-02/investigation-restarted-witness-j-secret-trial/13206154>; Christopher Knaus, 'Labor Announces National Security Law Review after Inquiry Criticises Secrecy of Witness J Case', *Guardian Australia* (online, 28 July 2022) <https://www.theguardian.com/australia-news/2022/jul/28/labor-announces-national-security-law-review-after-inquiry-criticises-secrecy-of-witness-j-case>.

23 Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16).

24 Stellios, *Federal Judicature* (n 10) 555.

25 For other scholars who have drawn on comparative perspective in this field, see: Cunliffe (n 4); Garth Nettheim, 'Open Justice Versus Justice' (1985) 9(4) *Adelaide Law Review* 487.

26 [2022] ACTSC 40.

that evidence, while the public is unaware of the evidence on which the federal government is seeking a closed-court trial.[27] For the litigant, such secrecy also raises procedural fairness issues, in addition to questions of open justice. However, in the interests of brevity, this article will not consider the related but distinct principle of procedural fairness.[28] The intersection between secrecy, procedural fairness, and the *Constitution* was recently considered by the High Court in *SDCV v Director-General of Security*.[29]

The principle of open justice is directed at the need to uphold public confidence in the judicial branch. In the seminal British case, *Scott v Scott* ('*Scott*'), Lord Shaw quoted philosopher Jeremy Bentham: '[p]ublicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'[30] While national security cases will often give rise to a legitimate, indeed, compelling interest in confidentiality, the use of secrecy around proceedings must be carefully contained. In October 2021, in the *Collaery* case, the Australian Capital Territory ('ACT') Court of Appeal accepted an appeal against secrecy orders issued at first instance. At the time of writing, the Court's judgment has still not been published, with an appeal against the level of redactions to be applied to the reasons pending,[31] the Court issued a summary. It said, relevantly, that 'there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed.'[32] In light of this and other developments, a close consideration of the constitutional dimensions of open justice, drawing on Australian and comparative perspectives, is timely.

II Context

A *Open Justice*

1 *Origins*

The timing and manner of the emergence of open justice as a significant legal principle is not entirely clear.[33] In a recent speech, Justice Stephen Hall traced the

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27 Ibid.

28 On the distinction, see *Guardian News & Media Ltd v Incedal* [2014] EWCA Crim 1861 [12] ('*Incedal*').

29 (2022) 405 ALR 209. See *SDCV v Director-General of Security* (2021) 284 FCR 357 ('*SDCV*').

30 (n 1) 477.

31 Transcript of Proceedings, *A-G (Cth) v Collaery* [2022] HCATrans 66. The new Albanese government withdrew the High Court appeal, and sought to have the issue reheard by the ACT Court of Appeal. The argument was heard in September 2022. As at June 2023, reasons had not been delivered.

32 'Judgment Summary: *Collaery v The Queen (No 2)* [2021] ACTCA 28', *Supreme Court of the Australian Capital Territory* (Web Page, 6 October 2021) <https://www.courts.act.gov.au/___data/assets/pdf_file/0004/1870627/Collaery-v-The-Queen-Judgment-Summary.pdf> ('*Collaery* Judgment Summary').

33 Nettheim, 'Open Justice' (n 2) 26.

principle back to the late Middle Ages, noting that the practice of public attendance at criminal trials 'has been so since at least the beginning of reliable records.'[34] In a record from court proceedings in the early 1300s, it was said to be the monarch's will that 'all evil doers should be punished after their just deserts … and for the better accomplishing of this, he prayed the *community of the county by their attendance there* to lend him their aid'.[35] Two centuries later, Sir Thomas Smith wrote that trials were conducted 'openly in the presence of the judges … the prisoner, and so many as will or can come so near as to hear it'.[36] On the other hand, open justice was not mentioned in significant legal documents of the era, including the *Magna Carta* (1215) and *Bill of Rights* (1689).[37] Far from being a foundational judicial value, some scholars have suggested the principle arose in a 'more or less accidental' manner, as a necessary corollary of jury trials.[38] '[I]t seems almost a necessary incident of jury trials', Max Radin suggests, 'since the presence of a jury — involving a panel of thirty-six men and more — already insured the presence of a large part of the public.'[39]

In any event, by the 1700s the principle was entrenched and referred to approvingly by key jurists. 'In other countries the Courts of Justice are held in secret; with us publicly and in open view,' wrote one author in 1730.[40] At the time the benefits of open justice were thrown into stark relief by more tyrannical 'justice' carried out in continental Europe—the Spanish inquisition, *lettre de cachet* and so on. The 'evil reputation' of such methods 'gave the "open and public trial" of the common law something of an odor of sanctity', even if, in the view of some, this feature was hardly 'a deliberately planned safeguard against the dangers incident upon secrecy.'[41]

The principle was affirmed in Britain in *Scott*, in 1913, in what has become the leading authority for open justice.[42] The case arose out of a petition for divorce, heard in closed court, and subsequent contempt proceedings after notes from the proceedings were provided to third parties. The House of Lords held that there was no justification for the proceedings to have been closed. '[E]very Court of justice is open to every subject of the King,' noted the Earl of Halsbury.[43] Lord Shaw added: '[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the

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34 Justice Stephen Hall, 'Open Justice: Seen to be Done' (Speech, Piddington Society, 19 February 2021) 2.

35 Quoted in William Holdsworth, *A History of English Law* (Methuen, 1927) vol 3, 268 (emphasis added).

36 Sir Thomas Smith, *De Republica Anglorum* (Alston, 1972) 101.

37 Nettheim, 'Open Justice' (n 2) 26.

38 Max Radin, 'The Right to Public Trial' (1932) 6(3) *Temple Law Quarterly* 381, 388.

39 Ibid.

40 Sollom Emlyn, *A Complete Collection of State Trials and Proceedings for High-Treason and other Crimes and Misdemeanours from the Reign of King Richard II to the Reign of King George II* (J Walthoe, 3nd ed, 1730) iii.

41 Radin (n 38) 389.

42 *Scott* (n 1).

43 Ibid 440.

sand.'[44] The case put beyond doubt the primacy of open justice, subject only to limited exceptions: 'the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done.'[45]

Scott was endorsed in Australia within a year, Barton ACJ holding that 'one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings'.[46] The principle's enduring application has been reiterated on many occasions. In *Russell v Russell* ('*Russell*'), Gibbs J observed: '[t]he fact that courts of law are held openly and not in secret is an essential aspect of their character.'[47] In *Grollo v Palmer*, McHugh J noted that '[o]pen justice is the hallmark of the common law system of justice'.[48] Open justice considerations have arisen frequently in the *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')[49] line of cases.[50] The principle has also been given statutory footing; the *Federal Court of Australia Act 1976* (Cth), for example, provides that, except where a departure from justice is otherwise authorised, 'the jurisdiction of the Court shall be exercised in open court.'[51]

2 *Contemporary Position*

Accordingly, the present position in Australia is that open justice must be upheld except where a departure from the principle is permitted by statute or the category of exceptions.[52] The substantive content of this principle includes, at least:

> first, that judicial proceedings are conducted, and decisions pronounced, in 'open court'; second, that evidence is communicated publicly to those present in the court; and, third, that nothing should be done to discourage the making of fair and accurate reports of judicial proceedings, including by the media.[53]

The category of cases where departure is permitted at common law include those involving trade secrets (where '[r]evelation of the secret would destroy its value to the person seeking the court's protection'),[54] cases involving blackmail or police informants, proceedings involving children or people experiencing mental

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44 Ibid 477.
45 Ibid 437 (Viscount Haldane LC).
46 *Dickason v Dickason* (1913) 17 CLR 50, 51 ('*Dickason*').
47 (1976) 134 CLR 495, 520 ('*Russell*').
48 (1995) 184 CLR 348, 379.
49 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*').
50 See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licencing Court (SA)* (2009) 237 CLR 501; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 ('*Pompano*').
51 Section 17.
52 See, eg, *Hinch* (n 9) 530–1 (French CJ).
53 Bosland and Gill (n 8) 483–4.
54 *SDCV* (n 29) 366–7 [26].

illness (where jurisdiction has a 'parental and administrative' nature)[55] and those relating to national security. In *Hogan v Hinch* ('*Hinch*'), French CJ held that '[t]he categories of case are not closed, although they will not lightly be extended.'[56]

The common law test for departing from open justice is often described in the language of necessity, specifically: 'necessary to secure the proper administration of justice.'[57] In an early Australian case, Isaacs J noted that publicity 'can only be disregarded where necessity compels departure'.[58] Kirby P more recently observed: '[i]f the very openness of court proceedings would destroy the attainment of justice in the particular case … the rule of openness must be modified to meet the exigencies of the particular case.'[59] But these are high thresholds — they are not met by expediency or to avoid embarrassment.[60] As a 2017 review of Victoria's open justice legislation summarised: 'The law recognises that restricting access to a courtroom, or limiting publication about a proceeding, should only be considered in exceptional circumstances.'[61] In practice, though, courts in several Australian jurisdictions have been criticised for their willingness to depart from open justice.[62] One commentator has bemoaned that '[t]he Courts are singularly happy to hand out suppression orders, like lollies to children.'[63]

B *Closed Courts*

1 *National Security*

The tension between open justice and the imperatives of national security is not new. The need for open justice to accommodate the secrecy that might sometimes be required by national security is recognised by the common law in a range of jurisdictions,[64] and in international law. For example, the *International Covenant on Civil and Political Rights*, to which Australia is a signatory, provides a right to a 'public hearing' in criminal cases. However, the clause is expressly limited: '[t]he press and the public may be excluded from all or part of a trial for reasons of … national security in a democratic society'.[65] Thus while *Scott* did not identify

55 *Scott* (n 1) 437 (Viscount Haldane LC).
56 *Hinch* (n 9) 531 [21].
57 Ibid.
58 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518, 549.
59 *John Fairfax Group Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141.
60 See, eg, *John Fairfax & Sons Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523; *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 294–5.
61 Frank Vincent, *Open Courts Act* Review (Report, September 2017) 32.
62 For a nuanced analysis, see Jason Bosland, 'Debunking the Myth: Why Victoria is Not the Suppression Order 'Capital' of Australia' (2020) 24(1) *Media and Arts Law Review* 11.
63 Richard Ackland, 'You Wouldn't Read About It: Not That You Can', *Sydney Morning Herald* (online, 27 January 2006) <https://www.smh.com.au/national/you-wouldnt-read-about-it-not-that-you-can-20060127-gdmusc.html>.
64 See generally Nettheim, 'State Secrets' (n 11).
65 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

national security as a standalone exception, it is widely accepted today that 'some measure of secrecy' will be permitted 'for material related to issues of defence and national security.'[66]

Prior to the enactment of the *NSI Act*, that secrecy came about through several common law methods. In some cases, courts have refused to consider claims relating to national security matters on the basis that they are non-justiciable.[67] More commonly, relevant information was protected through the public interest immunity doctrine. As Gibbs ACJ summarised in *Sankey v Whitlam*, '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'.[68] Importantly, this was a judicial determination: '[i]t is in all cases the duty of the court … to decide whether a document will be produced or may be withheld'.[69] The public interest immunity doctrine continues, at common law and in evidence statutes.[70] Additionally, the inherent common law jurisdiction of a court to control its processes[71] has seen, in exceptional cases, hearings held *in camera.* In a British case, *R v Govenor of Lewes Prison*; *Ex parte Doyle*, heard only a few years after *Scott*, the turmoil in Ireland at the time was held to justify deviation from the general rule.[72] Lastly, courts have jurisdiction—at common law (in the case of superior courts) and in statute (generally)—to issue suppression orders and restrict access to evidence.[73]

The adequacy of these mechanisms to protect national security interests was called into question in Australia (and globally)[74] in the early 2000s. In *R v Lappas*, in 2001, an intelligence officer had been charged with secrecy offences after seeking to sell classified information to a foreign power.[75] During the prosecution, the federal government made a public interest immunity claim over various documents. The claim was successful. However, Gray J subsequently stayed one of the charges: 'I do not think the accused can have a fair trial unless far more of the text of the documents is disclosed'.[76] This apparent inability to prosecute secrecy offences while also protecting classified information was the primary impetus for a law reform process that led to the *NSI Act*. It is noteworthy, though, that Gray J expressed frustration that the immunity claim was made 'at this late

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66 Nettheim, 'State Secrets' (n 11) 281.
67 Most famously in *Liversidge v Anderson* [1942] AC 206. See ibid 282–4.
68 (1978) 142 CLR 1, 38.
69 Ibid.
70 See Adrian Hoel, 'Public Interest Immunity' (Speech, Legalwise Public Sector Law Conference, 5 March 2019).
71 See generally Rebecca Ananian-Welsh, 'The Inherent Jurisdiction of Courts and the Fair Trial' (2019) 41(4) *Sydney Law Review* 423.
72 [I917] 2 KB 254. See also *A v Hayden (No 2)* (1984) 156 CLR 532, 599 (Deane J).
73 See generally Bosland (n 17).
74 Isabella Cosenza, 'Open Justice and National Security Cases' (2004) 84 *Australian Law Reform Commission Reform Journal* 50, 50.
75 [2001] ACTSC 115.
76 Ibid [24].

stage', indicating that if the matter had been raised earlier, it might have been appropriately managed.[77]

Nonetheless, the partially-failed *Lappas* prosecution, and the spectre of an evolving post-9/11 security landscape, prompted the Howard government to instruct the Australian Law Reform Commission ('ALRC') to review mechanisms for protecting sensitive information in litigation and consider potential reform.[78] This was concluded in mid-2004, with a comprehensive consideration of the issue and extensive recommendations for reform, most significantly the enactment of dedicated legislation to manage the tension between open justice and secrecy in national security cases.[79] The ALRC's report is the most detailed analysis of this tension in Australian law and remains a valuable resource. However, five days *before* the ALRC was set to report, the legislation which became the *NSI Act* was introduced to parliament.[80] While directed at the same dilemma, the Howard government's *NSI Act*, and the proposal advanced by the ALRC, differ in terms of the level of judicial discretion, power given to the Attorney-General, and safeguard mechanisms.

The *NSI Act* is intended to protect information where disclosure 'is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.'[81] National security is defined to mean 'Australia's defence, security, international relations or law enforcement interests.'[82] Primary aspects of the operation of the *NSI Act* will be outlined below, in the context of two recent cases. In short, the law requires a party that anticipates national security information will be disclosed during proceedings to notify the Attorney-General.[83] The Attorney-General may issue a non-disclosure or witness exclusion certificate.[84] The issuing of such a certificate precipitates a hearing where the court considers whether to make an order to protect the information during the ultimate trial.[85] Alternatively, at any time, the parties can agree an arrangement to protect national security information, which the court can then give effect to.[86] While this article largely focuses on the operation of the *NSI Act* in criminal proceedings, the regime also has application in civil proceedings. In one case, the Attorney-General gave notice that the *NSI Act* applied to defamation proceedings between a former Australian soldier and several newspapers.[87]

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77 Ibid [18].
78 See *R v Collaery (No 7)* [2020] ACTSC 165 [12] ('*R v Collaery (No 7)*').
79 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report No 98, May 2004).
80 Ibid 38.
81 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3(1).
82 Ibid s 8. Each part of this definition is, in turn, defined — see ss 9, 10, 11.
83 Ibid s 24.
84 Ibid ss 26, 28.
85 Ibid s 31.
86 Ibid s 22.
87 See, eg, *Roberts-Smith v Fairfax Media Publications Pty Limited (No 4)* (2020) 277 FCR 337.

2 *The Collaery Trial*

In 2018, Collaery, a Canberra lawyer and former ACT Attorney-General, was charged with five offences under the *Intelligence Services Act 2001* (Cth).[88] He was charged alongside his client, Witness K, a former intelligence officer. Collaery pleaded not guilty and was subsequently embroiled in litigation over the application of the *NSI Act* to his trial, involving over a dozen judgments and almost 100 court dates.[89] Witness K pleaded guilty and was given a suspended sentence in 2021.[90] In the Collaery trial, the Attorney-General applied for orders under s 31 of the *NSI Act* 'which would have the effect of requiring that significant parts of the trial on those charges not be conducted in public'.[91] Pursuant to s 29, a hearing to consider the making of orders under s 31 *must* be held in closed court. The court has no discretion in this respect. Section 31(7) outlines the factors for the court to consider in deciding the nature of the orders to make. The court *must* consider whether 'having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security' if the information was disclosed, whether such an order 'would have a substantial adverse effect on the defendant's right to receive a fair hearing' and 'any other matter the court considers relevant'. Notably, under s 31(8), in making its decision, the court 'must give greatest weight' to the risk of prejudice to national security (informed by the Attorney-General's position). In this way, the scale is tilted against open justice.

In *R v Collaery (No 7)*, Mossop J made s 31 orders substantially in the form sought by the Attorney-General.[92] His Honour reached this position having determined that the orders would not have 'a substantial adverse effect on the defendant's right to receive a fair hearing' and that 'the principle of open justice does not outweigh the desirability of protecting the information'.[93] Instead, Mossop J held, 'the risk of prejudice to national security is a real risk which is entitled to significant weight'.[94]

Collaery successfully appealed. The judgment has not yet been published.[95] However, in a summary, the ACT Court of Appeal noted that it 'doubted that a

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88 Andrew Greene and Lucy Sweeney, '"Witness K" and Lawyer Bernard Collaery Charged with Breaching Intelligence Act over East Timor Spying Revelations', *Australian Broadcasting Corporation* (online, 28 June 2018) <https://www.abc.net.au/news/2018-06-28/witness-k-and-bernard-collaery-charged-intelligence-act-breach/9919268>.

89 See 'Explainer: The Unjust Prosecution of Bernard Collaery', *Human Rights Law Centre* (Web Page) <https://www.hrlc.org.au/explainer-the-unjust-prosecution-of-bernard-collaery>.

90 Christopher Knaus, 'Witness K Spared Jail after Pleading Guilty to Breaching Secrecy Laws over Timor-Leste Bugging', *Guardian Australia* (online, 18 June 2021) <https://www.theguardian.com/australia-news/2021/jun/18/witness-k-should-be-shown-judicial-mercy-not-used-to-deter-others-court-told>.

91 *R v Collaery (No 7)* (n 77) [2].

92 Ibid.

93 Ibid [128].

94 Ibid.

95 See Transcript of Proceedings, *Attorney-General (Cth) v Collaery* [2022] HCATrans 66.

significant risk of prejudice to national security would materialise. On the other hand, there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed.'[96] During the first-instance proceeding, the Attorney-General sought to rely on 'court only' material, which Collaery would not be permitted to see. Mossop J reached his initial conclusion without determining whether to accept the court only evidence.[97] As such, following the resolution of the appeal, the Court remitted the matter to Mossop J to consider whether to accept the judge-only evidence and, if so, whether it altered the Court's ultimate decision.[98] That aspect of the litigation remained unresolved when, in July 2022, the Attorney-General discontinued the prosecution – the first time in Australian legal history this power had been exercised.[99]

3 *Witness J*

Another recent criminal case involving the *NSI Act* is that of 'Alan Johns' (a pseudonym), known publicly as the Witness J case. The defendant was, as the INSLM has subsequently summarised, 'charged, arraigned, convicted on his plea of guilty, sentenced and served his sentence — without public awareness of any of this.'[100] Witness J had been charged with secrecy offences relating to conduct occurring during his employment with an intelligence agency. By virtue of a s 22 agreement reached by the parties, and given effect by the ACT Supreme Court, the entire case was resolved in secret. It was only thanks to a series of coincidences and the work of journalists that the public came to be aware of the case.[101] Once the Witness J case became known, it caused considerable public uproar. The then-INSLM, James Renwick SC, noted: '[a]s far as we know there has never been another case, at least in peacetime in Australia, where all of it has been conducted in secret.'[102] The current INSLM, Grant Donaldson SC, undertook an inquiry,

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96 *Collaery* Judgment Summary (n 32).
97 *R v Collaery (No 7)* (n 77) [129].
98 See *R v Collaery (No 10)* [2021] ACTSC 311.
99 Paul Karp, 'Prosecution of Whistleblower Lawyer Bernard Collaery Dropped after Decision by Attorney General', *Guardian Australia* (online, 7 July 2022) <https://www.theguardian.com/australia-news/2022/jul/07/prosecution-of-whistleblower-lawyer-bernard-collaery-dropped-after-decision-by-attorney-general>.
100 'The Operation of Section 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) as It Applies in the 'Alan Johns' Matter (A Pseudonym)', *Independent National Security Legislation Monitor* (Web Page) <https://www.inslm.gov.au/node/191>.
101 Probyn (n 15).
102 James Renwick, 'What are the Right Encryption Laws for Australia?' (Speech, Lowy Institute, 5 March 2020) 13.

which reported in June 2022 and was made public the following month.[103] The recommendations of the INSLM's inquiry will be considered further below.

In April 2023, and prompted by a recommendation of the INSLM, the ACT Supreme Court published a redacted version of the original sentencing remarks in the Witness J case. In her covering judgment, McCallum CJ observed:

> The prospect of a person being imprisoned in this country in proceedings closed to the public on suppressed charges proved by secret evidence is inherently likely to cause consternation. Secrecy is anathema to the rule of law. The administration of justice thrives on the discipline that comes with public scrutiny. That is the premise of the principle of open justice.[104]

III Open Justice and the *Constitution*

Open justice has two constitutional dimensions in Australian law: salience in relation to Chapter III of the *Constitution*, which establishes the federal judiciary, and protection in relation to the implied freedom of political communication, to the extent that limitations on open justice burden political communication. This Part will consider these dual constitutional aspects in turn, before analysing the only Australian case where the constitutional validity of the *NSI Act* has been directed considered, *Lodhi*. The section will conclude with several observations.

It is helpful to begin, though, with some overarching remarks. Limitations on open justice can arise in two primary forms: through statute, such as the *NSI Act*, or through common law. Both legislation and common law must conform with the *Constitution*.[105] To the extent that legislation does not conform with the *Constitution*, it will be invalid. To the extent that common law does not conform with the *Constitution*, it will be altered to ensure conformity. As the High Court said in *Lange v Australian Broadcasting Corporation* ('*Lange*'), '[t]he development of the common law in Australia cannot run counter to constitutional imperatives'.[106] While this article predominantly focuses on the *NSI Act*, this dual-application of constitutional limitation is important given the authority to derogate from open justice typically has both statutory and common law bases. This observation also denies the strength of the argument against invalidity that

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103 Independent National Security Legislation Monitor, *Review into the Operation of Part 3, Division 1 of the National Security Information (Criminal and Civil Proceedings) Act 2004 as it applies in the Alan Johns Matter* (Report, June 2022) ('Witness J'). In the interests of transparency, it should be noted that the author made written submissions to the INSLM and participated in a hearing of the inquiry, on behalf of the Human Rights Law Centre.

104 *R v Johns (A Pseudonym) (No 2)* [2023] ACTSC 83 [4], agreeing to the publication of *R v Johns (A Pseudonym)* [2019] ACTSC 399.

105 See, eg, James Stellios, '*Marbury v Madison*: Constitutional Limitations and Statutory Discretions' (2016) 42(3) *Australian Bar Review* 324; Joshua Sheppard, 'Why Does the Common Law Conform to the *Constitution*?' (2021) 49(4) *Federal Law Review* 569; Adrienne Stone, 'The Common Law and the Constitution: A Reply' (2002) 26(3) *Melbourne University Law Review* 646.

106 (1997) 189 CLR 520, 566 ('*Lange*').

what is provided in statute could in any event be done through common law — a point that has been made, and resisted, in the cognate procedural fairness context in *SDCV*.[107]

A *Chapter III*

Chapter III of the *Constitution* establishes the federal judicature and permits the government to invest state courts with federal jurisdiction. The High Court has identified limits on the federal and state parliaments in legislating in relation to the judicial process, derived by implication from Chapter III.[108] These respective limits 'differ, in their constitutional foundation and scope'[109] — the limitation on federal legislative power arising as a result of separation of powers and the constitutional meaning of a court,[110] the limitation on state legislative power arising from the *Kable* principle and the integrated nature of the Australian court system.[111] However, as James Stellios has observed, 'at least in the area of due process protections, there is considerable overlap'.[112] Accordingly, while there is conceptual distinction in the constitutional context between open justice limitations arising in the *NSI Act*, a statute of federal parliament, and laws enacted by states, the distinction is not presently material.

1 Russell

Since federation, open justice has been accepted as a central feature of judicial power. The seminal British case, *Scott*, was promptly endorsed by the High Court.[113] It was not until 1976 that a significant open justice issue returned to the High Court. In *Russell*, the validity of s 97 of the *Family Law Act 1975* (Cth) was called into question. That provision provided, subject to exceptions, that 'all proceedings in the Family Court, or in another court when exercising jurisdiction under this *Act*, shall be heard in closed court.' The High Court, by majority, held that the provision was unconstitutional in its application to state courts. Gibbs J observed:

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107 SDCV, 'Submissions of the Appellant', Submission in *SDCV v Director-General of Security*, S27/2022, 11 April 2022, 13–16.

108 Stellios, *Federal Judicature* (n 10) 317–8.

109 Ibid 318.

110 See generally *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 274–5 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32(2) *Federal Law Review* 205; Will Bateman, 'Procedural Due Process under the *Australian Constitution*' (2009) 31(3) *Sydney Law Review* 411.

111 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; Stellios, *Federal Judicature* (n 10) ch 9.

112 Stellios, *Federal Judicature* (n 10) 318.

113 *Dickason* (n 46).

> To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule … and the category of such exceptions is not closed to the Parliament … In requiring them to sit in closed court in all cases … the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.[114]

Stephen J and Barwick CJ concurred, although the Chief Justice added: 'this conclusion does not affect the validity of the section in relation to federal courts created under s 71 of the *Constitution*.'[115] Jacob J and Mason J both dissented, the latter holding that 'neither provision interferes with the constitution, structure or organization of State courts.'[116] His Honour said: 'No doubt a hearing in open court has been traditionally regarded as of great importance. Yet this in itself does not warrant the conclusion that a hearing in open court is a constituent element in the organization of State courts'.[117]

2 *Subsequent Developments*

The constitutionalisation of open justice continued a decade later in a statement made by Deane J sitting alone in *Commonwealth v Toohey*.[118] This was a peculiar case, arising out of a courtroom incident. The Commonwealth had sought an injunction to prevent the publication of an intelligence agent's identity. After completion of proceedings, Deane J became aware that a government representative had sought to record the names of members of the public seated in the gallery during the hearing. Deane J convened a special sitting:

> The *Constitution* establishes this Court as the ultimate repository of national judicial power. As a general rule the Court's exercise of that judicial power is in public sittings … One reason for that approach to the exercise of judicial power is that open and public administration of justice by the country's final Court is a safeguard of judicial independence and conducive to public trust … [The incident underscores] the importance of ensuring that the right of members of the public to attend the public sittings of the Court be not compromised …[119]

In the subsequent decade, a number of High Court justices made curial statements, underscoring the significance of open justice to the exercise of judicial power. In *Re Nolan; Ex parte Young*, Gaudron J observed: '[q]uite apart from the public's right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.'[120] Similar comments were made by McHugh J and Gummow J in *Grollo*

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114 *Russell* (n 47) 520.
115 Ibid 507.
116 Ibid 536.
117 Ibid 537 (citations omitted).
118 'Orders in ASIS Secrets Case' (1988) 19 *Legal Reporter* 6.
119 Ibid 6–7.
120 (1991) 172 CLR 460, 496–7.

v Palmer.[121] This string of cases led Fiona Wheeler to observe that the nature of the judicial process 'would necessarily embrace the associated requirement that courts proceed, save in exceptional circumstances, by way of open and public hearing.'[122] Establishing the bounds of those exceptional circumstances, she continued, 'will of course involve the Court in "policy evaluation" and a balancing of social interests. Nonetheless, it is a balancing process which in other contexts the High Court has been prepared to undertake.'[123] Subsequently, in *Nicholas v The Queen*, Gaudron J noted that 'a court cannot be required or authorised to proceed in any manner … which brings or tends to bring the administration of justice into disrepute.'[124]

This series of cases made clear that open justice is a central feature of the exercise of judicial power. However, little clarity was provided as to the maximum extent of parliament's ability to limit open justice. As Leslie Zines observed, '[w]hile the Court has continued to affirm that Chapter III restricts the power of Parliament to interfere with due process in the courts, it has left open the question of what common law rules are essential to the judicial process and which can be modified and changed by Parliament.'[125]

3 Kable *Cases*

Since the High Court's decision in *Kable*, these issues have been further explored in the context of the institutional integrity of courts and limits on state legislative power. As James Stellios notes, 'it has been recognised that courts exercising federal judicial power must be characterised by procedural features of *an open and public* inquiry.' However, 'while there may be a general rule that judicial proceedings shall be conducted in public — a rule that is now constitutionalised as a feature of State courts — that rule is not absolute'.[126] Indeed, litigants seeking to uphold open justice in *Kable* cases have largely failed.

In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* ('*Gypsy Jokers*'), one vice asserted by the appellant was a provision of the relevant legislative scheme, s 76(2), which provided the Commissioner to identify information that would prejudice its operations, and 'information so identified is for the court's use only and is not to be disclosed to any other person, whether or not a party to the proceedings, or *publicly disclosed in any way*.'[127] The majority rejected a challenge to the validity of this provision, holding that the Supreme Court retained power to review the Commissioner's identification of information.

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121 (1995) 184 CLR 348, 379–80 (McHugh J), 394 (Gummow J).

122 Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23(2) *Monash University Law Review* 261–2.

123 Ibid 248.

124 (1998) 193 CLR 173, 208–9.

125 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 274.

126 Stellios, *Federal Judicature* (n 10) 552–5 (emphasis added).

127 (2008) 234 CLR 532, 558 (emphasis added).

The joint judgment observed that the public disclosure limitation 'should not be read as an attempted legislative direction as to the manner of the outcome of any review application … The words are no more than an attempt at exhortation and an effort to focus attention by the Court to the prejudicial effect disclosure may have.'[128] Kirby J, in dissent, would have found the provision invalid.[129] Similar issues were raised in *K-Generation Pty Ltd v Liquor Licencing Court (SA)* ('*K-Generation*').[130] Again the High Court held that sufficient judicial discretion remained. French CJ, for example, noted, '[s]ection 28A infringes upon the open justice principle that is an essential part of the functioning of courts in Australia … However, it cannot be said that the section confers upon the [relevant court] functions which are incompatible with their institutional integrity as courts of the States'.[131]

In *Hinch*, meanwhile, a challenge to Victoria's suppression law scheme was unsuccessful.[132] For French CJ, the existence of similar powers at common law supported a finding of validity, as did the fact that discretion remained with the court in the exercise of the statutory power.[133] His Honour noted that 'Chapter III does not impose on federal courts or the courts of the States a more stringent application of the open justice principle than [at common law].'[134] French CJ therefore concluded, '[t]here is nothing in the nature of the power conferred upon the court by s 42, properly construed, which is repugnant to or incompatible with the judicial function or otherwise incompatible with any implication derived from Ch III.'[135]

The majority reached the same conclusion. Applying *Russell*, and Gibbs J's distinction in that case between providing discretion to close the court and insisting on a closed court,[136] they held:

> This reasoning should be followed here and has three consequences. First, it denies any restriction drawn from Ch III which in absolute terms limits the exercise of the legislative power of the Parliament. Secondly, it indicates that a federal law to the effect of s 42 would be valid and would not deny an essential characteristic of a court exercising federal jurisdiction. Thirdly, this being so, as a State law s 42 does not attack the institutional integrity of the State courts as independent and impartial tribunals …[137]

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128 Ibid 561.
129 Ibid 579.
130 (2009) 237 CLR 501.
131 Ibid 512.
132 (n 9).
133 Ibid 534.
134 Ibid 541.
135 Ibid 542.
136 Stellios notes that the reliance on *Russell* is somewhat curious, given that case was concerned with federal legislation and state courts. But he notes 'the slippage in analysis may be of little consequence': Stellios, *Federal Judicature* (n 10) 555.
137 (n 9) 554 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

Finally, in *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*'),[138] a statutory provision required the Queensland Supreme Court to consider an application, for information to be declared 'criminal intelligence',[139] in an ex parte 'special closed hearing'.[140] The High Court rejected a challenge to the validity of the relevant provision. French CJ began by tracing the significance of the open justice principle and conceded that such hearings were '[a]ntithetical to that tradition'.[141] However, giving attention to the 'statutory scheme taken as a whole', French CJ was satisfied that the Supreme Court retained power to mitigate unfairness where necessary.[142] His Honour therefore held: '[d]espite the incursions on the open court principle … effected by the impugned provisions … they do not so impair the essential or defining characteristics of the Supreme Court as a court as to be beyond [the Queensland Parliament's] legislative power'.[143] The majority, Hayne, Crennan, Kiefel and Bell JJ, agreed.[144] Gageler J broadly agreed with French CJ, although held that the closed court provisions were 'saved from incompatibility … only by the capacity for the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest.'[145] Notwithstanding these unsuccessful challenges, the High Court has continued to underscore that open justice is a cornerstone of the judicial function in a number of recent cases.[146]

B *Implied Freedom of Political Communication*

Since the 1990s, the High Court has recognised an implied freedom of political communication in the *Constitution*.[147] Where a law burdens political communication, the widely although not unanimously accepted test for assessing validity is identifying the law's purpose and then using a structured proportionality process to ask whether the law is suitable, necessary, and adequate in balance.[148] While limitations on open justice may raise implied freedom concerns, this potential constitutional constraint has been litigated far less frequently than Chapter III. The primary High Court authority is *Hinch*, where the implied freedom claim failed. French CJ and the majority judgment each

138 (2013) 252 CLR 38.
139 *Criminal Organisation Act 2009* (Qld) s 63.
140 Ibid ss 66, 70.
141 *Pompano* (n 50) 46–7.
142 Ibid 78 [87].
143 Ibid 80 [89].
144 Ibid 95.
145 Ibid 105 [178].
146 *Wainohu v New South Wales* (2011) 243 CLR 181, 208–9 (French CJ and Kiefel J); *Kuczborski v Queensland* (2014) 254 CLR 51, 118–19 (Crennan, Kiefel, Gageler and Keane JJ); *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 593–4 (French CJ, Kiefel and Bell JJ).
147 See, eg, *Lange* (n 106).
148 See, eg, *McCloy v New South Wales* (2015) 257 CLR 178.

accepted that the suppression order regime challenged in that case could constitute a burden on political communication. Nonetheless, the Court found that the law was reasonably appropriate and adapted to a legitimate end.[149]

However, an open justice challenge was successfully mounted in an earlier case, in the NSW Court of Appeal, in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*.[150] In that case, legislation required certain proceedings in relation to contempt to be held in closed court. Although the Court by majority rejected a Chapter III argument, it invalidated the law on implied freedom grounds. Spigelman CJ held (with Priestley JA agreeing) that 'parliament went too far in the sense that it intruded into the freedom of communication … in a manner not reasonably appropriate and adapted to achieving the legitimate objective'.[151] This was largely because the requirement for hearings to be held *in camera* went beyond what was necessary, as the legitimate purpose — to protect reputation — could have been achieved by anonymity orders.[152] Meagher JA dissented. 'There is nothing in the legislation which prevents [the relevant issues] being discussed, and endlessly,' his Honour held.[153] 'In these circumstances the possibility of [the provision] being contrary to the doctrine in *Lange's* case is non-existent.'[154]

C Lodhi

The constitutional validity of the *NSI Act* was considered in *Lodhi*,[155] a prosecution related to terrorism offences. A group of media interests, intervening, were granted leave to challenge Part 3 of the *NSI Act*. This challenge was framed in relation to both Chapter III and the implied freedom. The accused also argued for invalidity, although with less substance. Whealy J rejected the constitutional challenge. His Honour did not accept that the 'greatest weight' requirement constituted an 'infringement of the judicial power of the Commonwealth' or an 'alteration by the legislation of the character or nature of the Supreme Court'.[156] Counsel for the media interests had described the discretion in s 31 as a 'sham' or 'mere window dressing', because of the 'greatest weight' direction. But Whealy J noted that 'there is no suggestion, on the proper construction … that the certificate is conclusive or determinative of the issue. Subject to giving the [certificate] the appropriate weight, the Court is free to form a view that is entirely contrary to the tenor of the certificate.'[157] Accordingly, his Honour rejected the Chapter III argument.

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149 *Hinch* (n 9) 544.
150 (2000) 158 FLR 81 ('*Fairfax*').
151 Ibid 104 [129].
152 Ibid 103–4.
153 Ibid 112.
154 Ibid.
155 *Lodhi* (n 18).
156 Ibid 458 [55].
157 Ibid 468 [105].

In relation to the implied freedom, Whealy J proceeded on the presumption — without deciding — that the freedom was burdened. But he held it was nonetheless valid: 'the fact that the s 31 hearing is to be a closed hearing does not place an undue burden given the legitimate aim of such a hearing and the subject matter with which it deals … it is not far different from the method in which a public interest immunity claim is dealt with by a court dealing with sensitive material.'[158] The media interests had highlighted their inability to participate as an additional factor. His Honour rejected this, too: 'Nor do I consider the fact that the media interests have no right to make submissions in relation to such a hearing is itself an impermissible burden.'[159] Lodhi appealed to the NSW Court of Criminal Appeal.[160] One appeal ground related to the 'greatest weight' provision in s 31 of the *NSI Act* and fair trial concerns. The appeal was unsuccessful. The media interests did not seek to appeal the implied freedom argument. An application by Lodhi for special leave to appeal to the High Court was denied.[161]

D *Observations*

A number of observations can be extracted from the preceding analysis of constitutional evolution of open justice in Australia. Four critical contentions will now be articulated:

1. open justice as a constitutional principle in Australia remains underdeveloped, which is undesirable;
2. residual judicial discretion has been an important factor in preserving the validity of legislation which limits open justice;
3. it is arguable that parts of the *NSI Act* are unconstitutional, even on current, underdeveloped jurisprudence, in light of the lack of discretion; and
4. there must be a constitutionalised open justice 'floor', such that the level of secrecy in the Witness J case was arguably unconstitutional.

1 *Constitutional Evolution*

As is clear from the preceding discussion, open justice is underdeveloped as a freestanding constitutional value. As most of the jurisprudence has arisen by way of constitutional challenge from a party to litigation, frequently criminal

158 Ibid 473–4 [123].
159 Ibid 474 [124].
160 *Lodhi v The Queen* [2007] NSWCCA 360 (20 December 2007).
161 Transcript of Proceedings, *Lodhi v The Queen* [2008] HCATrans 225.

defendants, the analysis has typically proceeded with a focus on due process and procedural fairness; open justice has therefore developed as a notion within these other principles, subsumed by, for example, fair trial rights. In notable contrast to the position in Britain and Canada, considered below, where much open justice case law has arisen through interventions by media organisations, this standalone open justice litigation has been less common in Australia (*Lodhi* and *Fairfax* being the notable exceptions). The underdevelopment of the principle, as a standalone value which can be vindicated by third party interests, such as media organisations, and rather than as a constituent element of procedural fairness, is undesirable.[162] Given the constitutional importance of open justice, it is overdue for Australian courts to move beyond high-level value statements and give the principle greater practical substance.[163]

2 *Discretion*

The case law, particularly arising from the *Kable* jurisprudence, has underscored the importance of residual judicial discretion in protesting open justice and procedural fairness. Even pre-*Kable*, in *Russell*, the lack of discretion was a central factor in the finding of invalidity. Hence, Gibbs J noted that if the law had only empowered the courts 'to sit in closed court in appropriate cases', rather than requiring it, 'I should not have thought that the provision went beyond the power of the Parliament.'[164] In *Gypsy Jokers*, *K-Generation* and *Hinch*, the court ultimately retained discretion, while in *Pompano* the residual power to stay a proceeding for unfairness was important to the validity analysis (indeed, for Gageler J, it was determinative).[165] Accordingly, legislation that directs courts to proceed in a certain manner in relation to open justice, and denies discretion, is likely to face stricter constitutional scrutiny.

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[162] Notably, in the recent Witness J matter, Guardian Australia sought to intervene in relation to the level of redactions to be applied to the sentencing remarks. McCallum CJ indicated that her Honour would not grant leave, because there was 'no issue in which the Guardian has an interest': Paul Karp, 'ACT Supreme Court Intends to Publish Alan Johns Sentencing Remarks', *Guardian Australia* (online, 22 February 2023) <https://www.theguardian.com/australia-news/live/2023/feb/22/australia-news-live-anthony-albanese-defence-aukus-military-spies-asio-economy-interest-rates-energy-cost-of-living-health-weather-housing?page=with:block-63f558108f08305414a34f21#block-63f558108f08305414a34f21>. Despite this, her Honour subsequently noted of the need for close scrutiny of the Attorney-General's position: '[t]hat is particularly so in light of the second point made by the offender, which was that there are significant practical impediments to any potential challenge by him to the redactions proposed by the Attorney-General in this case. In that circumstance, which means that there is in effect no contradictor to the Attorney-General's application, close scrutiny of the Attorney-General's claims for secrecy is all the more important': *R v Johns (A Pseudonym) (No 2)* [2023] ACTSC 83 [9].

[163] Of course, such jurisprudence can only come about via appropriate litigation, although there is somewhat of a chicken-and-egg problem given the limited existing case law on which to run such a case.

[164] *Russell* (n 47) 520.

[165] *Pompano* (n 50) 105.

3 *Invalidity*

The significance of discretion in those constitutional cases focuses attention on the potential invalidity of s 29 in the *NSI Act*, which denies any discretion to the court in requiring the s 31 hearing to be closed. In *Lodhi*, such an argument was rejected, with Whealy J focusing on the narrow nature of a s 31 hearing. 'In my opinion, the function is a very limited one and is concerned only with the disclosure of information,' his Honour held.[166] 'It is quite clear that a s 31 hearing is concerned essentially with disclosure as between the parties.'[167] This characterisation was central to his implied freedom analysis: 'the fact that the ... hearing is to be a closed hearing does not place an undue burden given the legitimate aim of such a hearing and the subject matter with which it deals. It is a limited hearing dealing with a limited topic as I have indicated'.[168]

That may have been an accurate characterisation in *Lodhi* (although the primary vice, an absence of discretion, is still problematic). Yet in the Collaery trial, the public interest in the litigation and the contested nature of the s 31 hearing — involving the extent to which a trial of major national interest, involving alleged wrongdoing by the federal government, was to be held behind closed doors — is evidently distinguishable. The absence of discretion in s 29, for the trial judge to determine the appropriate level of secrecy required in the s 31 hearing, therefore runs contrary to the authorities canvassed above, and suggests that s 29 may be invalid, on Chapter III grounds or under the implied freedom (with the necessity analysis failing given the possibility of less burdensome measures, namely a residual discretion).

There may also be compelling Chapter III grounds to contest the validity of s 31, particularly the 'greatest weight' requirement contained therein. In *Lodhi*, Whealy J upheld the provision's validity. However, in a 2007 article following *Lodhi*, former High Court Justice Michael McHugh cast fresh doubt:

> It is no doubt true that in theory the [*NSI Act*] does not direct the court to make the order which the Attorney wants. But it goes as close to it as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing.[169]

McHugh proceeded to ask, rhetorically, '[h]ow can a court realistically say I am going to make an order in favour of a fair trial even though, in exercising my discretion, I give the issue of a fair trial less weight than the Attorney-General's certificate.'?[170] On one hand, the fact that the ACT Court of Appeal in the Collaery trial did just that partially addresses McHugh's concern (although it is difficult to assess the significance of that judgment when it remains unpublished). But the

166 *Lodhi* (n 18) 464 [82].
167 Ibid.
168 Ibid 473 [123].
169 McHugh (n 20) 209.
170 Ibid.

force in his position remains. As McHugh concluded, the various aspects of the *NSI Act*'s wider scheme 'combine to make a strong case that the legislation is an attempt by parliament to usurp the judicial power of the Commonwealth.'[171] In a subsequent paper, Justice Whealy admitted that 'there is plainly a highly respectable school of thought that thinks [the *NSI Act* is unconstitutional] ... it appeared that the more powerful arguments in favour of invalidity had not been presented before me ... I am sure we have not heard the last of this contention.'[172] A further constitutional challenge to the *NSI Act* may therefore have prospects of success.

4 *Minimum 'Floor'*

Notwithstanding the underdevelopment of open justice as a standalone constitutional principle, its constitutional importance is sufficiently clear. It follows that there must be a minimum standard of openness, below which legislation and courts cannot go, such that the application of the *NSI Act* in the Witness J was arguably unconstitutional. This minimum 'floor' of transparency is necessary because, without it, review of the secrecy imposed in a particular case is impossible. As this author has argued elsewhere:

> Even if it was accepted that there might be extraordinary circumstances [where] the complete denial of open justice was desirable, cloaking a case in total secrecy, – as in Witness J – permits no safeguard to the possibility that the balancing act was wrongly decided.[173]

Just as the *Constitution* entrenches a minimum level of judicial review,[174] recognition of open justice as a constitutional value necessitates the ability to contest the balance struck, by legislation or common law jurisdiction, in a particular case. Where a case is held in complete secrecy, as in Witness J, the ability to seek appellate review of the level of secrecy imposed, or even challenge the constitutional validity of the authorising provision, is removed. Given the recognition, at common law and in statute, that the media, for example, has standing in public interest cases,[175] a minimum floor of openness must necessarily follow.[176] Otherwise, there is no way to exercise that standing.

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171 Ibid.

172 Whealy (n 20) 365.

173 Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16) .

174 See, eg, Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463.

175 Douglas (n 7).

176 In the Witness J inquiry, the INSLM indicated a contrary position: see INSLM, 'Witness J' (n 103), 37–8. The INSLM suggested 'an a priori definition of minimum standards of openness, required in all cases, is extremely problematic': 37 [140]. However, his recommendations have the same effect, albeit achieved via different methods: 'if these recommendations are accepted and implemented, there is no practical need for the prescription of immutable minimum standards of openness': 38 [141].

Against this argument,[177] it might be put that if natural justice can be reduced to nothingness, so too can open justice in the appropriate circumstances. In *Leghaei v Director General of Security* ('*Leghaei*'),[178] the applicant's visa was cancelled on national security grounds. He sought judicial review on the basis that no allegations had been put to him and hence he had been denied natural justice. At first instance, it was held that 'the potential prejudice to the interests of national security involved in such disclosure appears to be such that the content of procedural fairness is reduced, in practical terms, to nothingness'.[179] This holding was not disturbed on appeal, in a heavily-redacted judgment.[180]

However, the critical distinction is that, in *Leghaei*, the applicant still knew the adverse decision had been made. He could therefore exercise his constitutionally-entrenched ability to seek judicial review (even if that was to prove a fruitless exercise). In contrast, in a Witness J scenario, other interested parties (such as the media) have no ability to contest the appropriateness of the secrecy imposed on a case. It may well be that, in extraordinary circumstances, the minimum standards guarantee only minimal disclosure of the bare fact of a case taking place. That may not be much. But it is better than nothing and enables interested parties to seek review by a superior court. Having considered the Australian position, it is now instructive to venture to other jurisdictions for comparative perspective.

IV Comparative Perspective

The challenge of balancing the competing interests of transparency and national security in the judicial process is a shared one, at least in legal systems where open justice is a central feature.[181] The tension between these two interests has only become more acute in the past two decades, following an increase in global terrorism activity and related criminal prosecutions, which has also been a shared experience. Given the mutual inherited principles in the common law world, and the similarity of challenges presented in recent years, comparative perspective sheds helpful light on the prevailing Australian approach. In particular, the UK (more precisely, England and Wales), and Canada serve as useful case studies, given the similar legal and constitutional contexts. These jurisdictions are frequently chosen for the purpose of comparative analysis in Australian

177 This subsection is adapted from Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16).
178 [2005] FCA 1576 ('*Leghaei*').
179 Ibid [88].
180 *Leghaei v Director-General of Security* (2007) 97 ALD 516.
181 Although the principle resonates most strongly in the common law world, equivalent concepts are also found in some civil law jurisdictions. For example, across Europe, open justice is required in domestic legal systems by a supranational treaty: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6.

scholarship, including in relation to open justice.[182] Notwithstanding the occasional hostility of Australian courts to comparative constitutional law,[183] comparative inquiry is illuminating in the present context. There is one significant difference, though: both the UK and Canada have express legal protections for human rights (including free speech, with constitutional status in Canada[184]). Australia, on the other hand, lacks comprehensive protections for human rights in federal law, other than limited constitutional protections for certain rights, such as the implied freedom.

A *UK*

Open justice has constitutional status in the UK (a jurisdiction without a written constitution). In *Scott*, the principle was described as 'a sound and very sacred part of the constitution of the country and the administration of justice'.[185] The principle is also reflected in domestic human rights legislation, which implements European human rights law.[186]

The most significant judicial attempt to balance the competing interests of open justice and national security occurred in the 2014 case of *Guardian News and Media Ltd v Incedal*.[187] In that case, two individuals had been charged with terrorism offences. The trial judge ordered that the entirety of the trial take place in closed court, and that the identities of the defendants not be published.[188] The media appealed. After affirming the importance of open justice, the Court of Appeal noted the growing tension between open justice and national security: '[a]ll the more so, given the emergence of the Agencies from the shadows … and the extension of the law's reach over the past decades.'[189] Having reviewed the authorities, the Court set out a 'serious possibility' threshold for departing from open justice in this context: 'where there is a serious possibility that an insistence on open justice in the national security context would frustrate the administration of justice … a departure from open justice may be justified.'[190]

The Court ultimately held that this test was satisfied, and that an *in camera* hearing was justified. However, on the basis that 'no departure from the principle

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182 Bosland and Townend (n 17) 1.

183 See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530, 570 (Keane J); *Monis v The Queen* (2013) 249 CLR 92, 183 (Heydon J); *Brown v Tasmania* (2017) 261 CLR 328; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13(1) *Indiana Journal of Global Legal Studies* 37. See also, in a related context, Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29(1) *Melbourne University Law Review* 95.

184 *Human Rights Act 1998* (UK); *Canada Act 1982* (UK) c 11 sch B pt I.

185 (n 1) 473 (Lord Shaw).

186 *Human Rights Act 1998* (UK) sch 1 art 6.

187 [2014] EWCA Crim 1861 ('*Incedal*').

188 Ibid [2].

189 Ibid [15].

190 Ibid [17].

of open justice must be greater than necessary', the Court determined that at least some parts of the case — the swearing in of the jury, reading of the charges, initial opening remarks, verdicts and sentencing — could be held in open court. Additionally, in a rather novel approach, the Court ordered that 10 accredited journalists be permitted to attend the closed hearing, even though they would not be able to contemporaneously report it (and indeed any subsequent reporting would require reconsideration of the orders by the court). Nonetheless, the Court observed, 'the proposal for the attendance of accredited journalists means that the scrutiny function of the media will be preserved throughout the trial'.[191]

The Court therefore concluded that it was 'satisfied that the solution arrived at in this Court means that everything possible has been done to minimise the departure from the principle of open justice.'[192] On the other hand, the Court revoked the anonymity orders in relation to the defendant, expressing 'grave concern as to the cumulative effects' of a closed hearing and anonymised defendants.[193] The Court held: 'We find it difficult to conceive of a situation where both departures from open justice will be justified.'[194]

Notwithstanding these accommodations, *Incedal* was not uncontroversial. Scholars have described it as offering 'further evidence of diminished state accountability, with insufficient regard to the public interest in open justice and an individual's right to a fair trial and is a dangerous precedent for case management more generally … The judgments reveal an ill-defined, *sui generis* approach with no statutory basis.'[195] In subsequent proceedings in 2016, after media organisations unsuccessfully sought to vary the public restrictions following the trial, the Court of Appeal cast doubt on the efficacy of the *Incedal* model. The Court noted that the partial-attendance of journalists 'made the management of the trial very much more difficult', adding: 'the experience of the way in which it affected the conduct of the trial leads us to the firm conclusion that a court should hesitate long and hard before it makes an order similar to that made'.[196]

While *Incedal* was a criminal case, a legislative procedure to manage confidential evidence and closed hearing also exists: the *Justice and Security Act 2013* (UK), enacted in response to two high profile cases which the British government had argued showed insufficient deference to national security.[197] A statutory review of closed material procedure brought about by the 2013 law was

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191 Ibid [41].
192 Ibid [44]
193 Ibid [47].
194 Ibid.
195 Lorna Woods, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) 84(3) *Modern Law Review* 553, 569–70.
196 *Guardian News & Media Ltd v Incedal* [2016] EWCA Crim 11 [68]–[69].
197 *Al Rawi v The Security Service* [2011] UKSC 34; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (Admin).

reported in November 2022, recommending a range of improvements.[198] The law has proven controversial; a civil society submission to the review argued that its procedures were 'inherently unfair' and 'fundamentally inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal. Their use across the justice system threatens both the right to a fair hearing and the accountability of the Government.'[199]

B *Canada*

Like Australia, the Canadian judiciary also inherited the British legacy of open justice — although the concept is more commonly known in Canada as the 'open court' principle.[200] The principle has constitutional status, as a consequence of the *Canadian Charter of Rights and Freedoms* ('*Charter*').[201] Section 2(b) of the *Charter* protects freedom of expression, including freedom of the press, and Canadian jurisprudence has identified the open court principle as a necessary corollary of those freedoms.[202] In a 1996 case, *Canadian Broadcasting Corporation v New Brunswick*,[203] La Forest J held that the *Charter* provision 'protects the freedom of the press to comment on the courts … [a]s a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information.'[204] More recently, in *Toronto Star Newspapers Ltd v Ontario*,[205] Fish J underscored the nexus between s 2(b) and the open court principle: '[i]n any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy … These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest.'[206] Section 11(d) of the *Charter* also provides a right 'to be presumed innocent until proven guilty according to law in a fair and *public hearing* by an independent and impartial tribunal'.[207] This duality

198 Sir Duncan Ouseley, *Independent Report on the Operation of Closed Material Procedure under the Justice and Security Act 2013* (Report, November 2022) 118–25.

199 JUSTICE, 'Call for Evidence: JUSTICE's Response', *Statutory Review of the "Closed Material Procedure" Provisions in the Justice and Security Act 2013* (Web Page, June 2021) 3 <https://files.justice.org.uk/wp-content/uploads/2021/07/06141459/Review-of-CMP-in-the-JSA-2013-JUSTICE-Response.pdf>.

200 For comparison of open justice in Australia and Canada, albeit in a different context, see Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia: Part One' (2007) 31(1) *Melbourne University Law Review* 171; Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia: Part Two' (2007) 31(2) *Melbourne University Law Review* 443.

201 *Canada Act 1982* (UK) c 11 sch B pt I ('*Charter*').

202 See generally Dana Adams, 'Access Denied? Inconsistent Jurisprudence on the Open Court Principle and Media Access to Exhibits in Canadian Criminal Cases' (2011) 49(1) *Alberta Law Review* 177.

203 [1996] 3 SCR 480.

204 Ibid 498 [26].

205 [2005] 2 SCR 188 ('*Toronto Star*').

206 Ibid 191 [1]–[2].

207 *Charter* (n 200) cl 11(d).

to open justice in Canada means that the distinction 'between the public's and litigant's rights' is more pronounced.[208]

Recognising the *Charter* imperative, the Canadian Supreme Court has developed an exacting test for determining whether to permit departures from the open court principle. This test only allows a publication ban where:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[209]

This test was later extended to govern '*all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.'[210]

Even pre-9/11, Canadian law and practice was well developed in seeking to balance secrecy and transparency in the present context; as one scholar noted in a 1996 paper, 'Canada has gone further than any other legal system in devising novel procedures to meet these difficulties.'[211] These mechanisms continued to evolve following 9/11. Amendments were made to s 486(1) of the *Criminal Code of Canada*[212] to provide that a hearing could be closed to the public where 'necessary to prevent injury to international relations or national defence or national security'. While this change was 'more symbolic than technically significant', it signalled to the courts a legislative desire for departure from the open court principle where appropriate.[213] This change, together with a range of other measures, led one respected observer to note that the previously-existing 'degree of commitment to the open court principle has not survived 9/11 … While things could have been worse, I do not think that this balance has been achieved.'[214]

However, in two significant cases, the Canadian Supreme Court has upheld the open court principle in the face of incursions prompted by national security law. In *Re Vancouver Sun*,[215] in 2004, the Court considered the open justice position of judicial investigative hearings held under provisions inserted into Canadian law by the *Anti-Terrorism Act*, SC 2001. One of these unusual investigative hearings was taking place *in camera* when a newspaper journalist recognised lawyers involved in an open part of the terrorism-related case and sought access to the

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208 Ian Leigh, 'Secret Proceedings in Canada' (1996) 34(1) *Osgoode Hall Law Journal* 113, 120.
209 As summarised in *Vancouver Sun v Attorney-General (Canada)* [2004] 2 SCR 332, 347 ('*Vancouver Sun*').
210 *Toronto Star* (n 204) 192 [7] (emphasis in original)
211 Leigh (n 207) 114.
212 RSC 1985, c C-46.
213 David Paciocco, 'When Open Courts Meet Closed Government' (2005) 29(1) *Supreme Court Law Review* 385, 403.
214 Ibid 402.
215 [2004] 2 RCS 332REF.

court-room the lawyers had entered. Access was refused; the newspaper subsequently commenced a constitutional challenge. The Supreme Court held that the *Dagenais/Mentuck* test applied, notwithstanding the novel nature of the investigative exercise, and that, while an initial ex parte dimension of the hearing was properly *in camera*, the remainder should have been open to the public.[216] Iacobucci and Arbour JJ observed that 'the present facts clearly illustrate the mischief that flows from a presumption of secrecy'.[217] The case was therefore a significant victory for the open court principle in Canada.

Similarly, in *Ruby v Solicitor-General of Canada*, the Supreme Court read down a mandatory closed-hearing provision.[218] In that case, arising after a Canadian lawyer made a request under privacy law for materials held by the Canadian Security Intelligence Service, an administrative review court was *required* by legislation to be closed when considering the applicability of a national security exemption. The Court held that the provision was contrary to the *Charter*, noting that '[t]he concept of open courts is deeply embedded in our common law tradition'.[219] The mandatory requirement was unconstitutional because it failed 'on the question of minimal impairment', as judicial practice in other cases had already developed such that the hearing was only closed when receiving ex parte submissions, and not otherwise. Accordingly, it was read down to only apply to a narrow part of the hearing.[220] Canada has also developed a system of special advocates and *amici curiae* to mitigate unfairness in relation to the use of 'secret' evidence under national security law (although the efficacy of these measures is contested).[221]

Notwithstanding the considerable constitutional protection for the open court principle in Canada, there has recently been an outcry in Quebec in relation to a 'secret trial', echoing the Witness J controversy in Australia. The 'phantom trial', *Designated Person v Her Majesty the Queen*, came to light in April 2022 after an appeals court issued a heavily redacted decision.[222] '[N]o trace of this trial exists, other than in the minds of the individuals implicated,' said the judgment.[223] According to reports, 'the trial had no docket number, … was never archived' in the court system, the names of lawyers and the judge involved was not made public, while 'witnesses in the case were questioned outside the courtroom and the parties asked the judge to decide the case based on

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216 *Vancouver Sun* (n 208) 353–4.
217 Ibid 354.
218 [2002] 4 SCR 3.
219 Ibid 31 (Arbour J).
220 Ibid 33–5.
221 See Graham Hudson and Daniel Alati, 'Behind Closed Doors: Secret Law and the Special Advocate System in Canada' (2018) 44(1) *Queen's Law Journal* 1.
222 Gail Cohen, 'Canadian Lawyers Decry Secret Trial', *Law.com* (Web Page, 6 April 2022) <https://www.law.com/international-edition/2022/04/06/canadian-lawyers-decry-secret-trial-in-organized-crime-probe/?slreturn=20220519232209>.
223 Quoted in ibid.

transcripts.'[224] In June 2022, media organisations petitioned the Court of Appeal for more details to be made public; the petition was rejected.[225] In March 2023, the Supreme Court agreed to hear the case and, at the time of writing, it is scheduled to be heard in December 2023.[226]

V Resolving the Tension?

The British and Canadian experiences contain lessons for Australia. Given the cognate legal and constitutional contexts, there is much to commend the additional measures taken by British and Canadian courts to protect open justice. With the INSLM's review of the *NSI Act* underway, and reform expected to follow, consideration of comparative perspective can helpfully inform these anticipated changes. If legislative amendment and jurisprudential development are pursued, the *NSI Act* and the wider constitutional backdrop might evolve to better maintain the balance between secrecy and transparency in national security cases.

A *Higher Threshold*

Both British and Canadian courts have adopted exacting scrutiny in considering whether to depart from open justice, even in the national security context. In *Incedal*, this was expressed as a 'serious possibility' of adverse impact on the administration of justice; in Canada, the two-tier test requires both a necessity analysis, informed by alternative measures, and consideration of the negative impact of a departure from open justice. In contrast, the *NSI Act* does not even explicitly consider open justice in the s 31 analysis, although it has been accepted as a factor that falls within the catch-all 'any other matter the court considers relevant' provision.[227] Within the wider open justice jurisprudence, the test is typically expressed in the language of necessity, albeit there has been no specific approach developed in the national security context (no doubt given the work already done by the *NSI Act*), nor for assessing conformity with constitutional requirements. The contrast with the higher threshold adopted in comparable jurisdictions underscores the underdevelopment of open justice as a standalone constitutional value in Australia and the need for legislative reform.

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224 Ibid.

225 'Lawyers Ask Quebec Court of Appeal to Shed More Light on Secret Trial', *CTV News* (online, 7 June 2022) <https://montreal.ctvnews.ca/lawyers-ask-quebec-court-of-appeal-to-shed-more-light-on-secret-trial-1.5935145>.

226 'Supreme Court Agrees to Hear Case About Quebec's "Secret Trial"', *CBC* (online, 16 March 2023) <https://www.cbc.ca/news/canada/montreal/secret-trial-quebec-supreme-court-quebec-court-of-appeal-1.6780731>.

227 See *R v Collaery (No 7)* (n 78) [122]–[124].

B *Awareness*

The contention advanced earlier, that a minimum standard of openness is essential, finds support in these comparative approaches. In *Vancouver Sun*, not dissimilarly to the Witness J case, there was an element of coincidence about the manner in which the newspaper became aware of the closed hearing. The Supreme Court was critical of this departure from the open court principle, distinguishing the situation from a typical, partially-closed hearing, where the partial closure is publicly-known and open to challenge by media interests:

> Whether better notice should be given to the press, or to other possibly interested parties, of proceedings that are held in camera or that are subject to a publication ban is beyond the scope of the issues raised on this appeal but we again suggest serious consideration should be given to this matter …[228]

One shortcoming in *Witness J* was that the complete departure from open justice came about through agreement between the parties, given force by a judge. This was a significant and distinctive feature of the case. The absence of a contradictor has been criticised.[229] In the British context, one expert has made the salient point that '[i]t should not be up to the parties to decide what the public gets to know. Consent arrangements are very troubling because information which is not potentially prejudicial to national security may for reasons of trial management or embarrassment be considered under a closed procedure.'[230] The force in this proposition is underscored by the facts in Witness J. The INSLM has subsequently said that he saw no reason why at least some material in relation to that case was not published at the time,[231] and the sentencing remarks have now been published (if in redacted form).

C *Practical Solutions*

The *Incedal* case provides an instructive guide as to some of the practical solutions available to mitigate the impact of sweeping secrecy while still protecting national security interests. In its initial judgment, the Court of Appeal sought to find a middle-ground, a position in contrast to the binary approach largely adopted to date by an Australian court, as a result of the strictures of the *NSI Act*.

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228 *Vancouver Sun* (n 207) 355.

229 See Human Rights Law Centre, Submission No 8 to Independent National Security Legislation Monitor, *The Operation of Section 22 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) as it Applies in the 'Alan Johns' Matter (A Pseudonym)* (30 April 2021) 10.

230 Lawrence McNamara, 'Open Justice and Secret Justice: National Security and Law Reform in the UK' (Discussion Paper, April 2012) 3.

231 Sarah Basford Canales, '"No Reason" Most Witness J Case Details Couldn't Be Made Public Earlier: Grant Donaldson', *Canberra Times* (online, 9 June 2021) <https://www.canberratimes.com.au/story/7289705/no-reason-witness-j-details-couldnt-be-made-public-earlier/>.

By permitting parts of the otherwise closed hearing to be held in public, and allowing journalists to attend, with the possibility for subsequent review of reporting restrictions, the Court sought to balance competing interests in an eminently practical manner. While the methods adopted have been criticised, by open justice advocates on one hand, and the Court of Appeal on the other, for being, with hindsight, unduly burdensome on the trial, the Court's approach contrasts favourably to the Australian approach. Such safeguards, although ad hoc, at least ameliorate the worst of the secrecy and its negative impact on open justice and democratic accountability.

D *Retention and Review of Redacted Judgments*

Both the British and Canadian experience have underscored the need for the retention, and ongoing review, of judgments that are subject to some form of departure from open justice. At the end of the second *Incedal* appeal judgment, the Court of Appeal noted that existing court practice did not facilitate the retention of closed judgments. 'This is not satisfactory,' it observed. 'A court ought to be able to refer to earlier decisions to achieve consistency and take advantage of the experience to be derived from the way in which the issues were approached.' This was particularly so, the Court added, given 'it must always be a possibility, that at a future date, disclosure will be sought at a time when it is said that there could no longer be any reason to keep the information from the public'.[232] Subsequently, a practice direction established a dedicated library.[233] In *Vancouver Sun*, the Canadian Supreme Court underscored the need for the level of secrecy to be reconsidered: 'we would also order that the investigative judge review the continuing need for any secrecy at the end of the investigative hearing and release publicly any part of the information gathered at the hearing that can be made public without unduly jeopardizing [other relevant interests].'[234] Given the interests of national security evolve, what is required to be kept secret today might not be so in a decade, but, unless there is a process of retention and review, the limitation on open justice is effectively permanent. In a submission to the INSLM, the Law Council of Australia has called for the establishment of a 'repository' of closed judgments.[235]

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232 *Incedal* (n 186) [77]–[80].

233 Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Practice Direction: Closed Judgments' (14 January 2019) <https://www.judiciary.uk/wp-content/uploads/2019/01/lcj-and-spt-practice-direction-closed-judgments-jan-2019-as-published.pdf>; Owen Bowcott, 'Secret Judgments Database Opened to Special Advocates and Senior Judges', *The Guardian* (online, 24 January 2019) <https://www.theguardian.com/law/2019/jan/23/secret-judgments-database-opened-to-special-advocates-and-senior-judges>.

234 *Vancouver Sun* (n 207) 357.

235 Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Inquiry Into the Operation of the NSI Act as it Relates to the 'Alan Johns Matter'* (3 April 2020) 16 [53].

This solution is not entirely unproblematic. One risk of establishing such a repository is that it might in fact support a regime of greater secrecy, by permitting courts to defer the problem of balancing open justice and national security. It offers a remedy that, somewhat ironically, entrenches the position of the judiciary in maintaining secrecy, contrary to the tenets of open justice.[236] Practical concerns also abound with establishing such a library. Nonetheless, it might be the least-bad solution to a problem that lacks an easy resolution.

These are several themes and solutions emerging from the British and Canadian experience. If implemented in Australian law, through jurisprudential evolution and amendments to the *NSI Act*, the competing interests of open justice and national security would be more appropriately balanced. These suggestions are not exhaustive; other safeguards, such as the appointment of a contradictor (an 'open justice advocate'), a public statement of reasons when departures from open justice take place (as proposed by the ALRC in its 2004 report) and greater data collection and transparency around the use of the *NSI Act* have been recommended elsewhere (most recently by the INSLM itself, outlined further below).[237] Together, such changes would better uphold open justice

VI Next Steps

In July 2022, the Attorney-General tabled the INSLM's inquiry into the Witness J case. The INSLM made several recommendations. First, where closed court orders are sought under s 22, the Attorney-General be required to make submissions 'why such orders are appropriate and should be made having regard to the object of the NSI Act and the deeply rooted common law tradition of the open court.'[238] This, the INSLM suggested, could be achieved by regulation or direction, rather than amendment to the *NSI Act*. Second, that the *NSI Act* be amended to allow the court to appoint a contradictor when s 22 orders are sought.[239] Third, that s 22 orders be made publicly available (redacted, if necessary), and that annual reporting requirements required by the *NSI Act* include data on s 22 orders.[240] Fourth, that the Attorney-General be required to seek reasons for s 22 closed court orders.[241] Finally, although not subject to a formal recommendation, the INSLM indicated that he concurred with submissions that recommended periodic review and retention requirements, and would consider them further.[242]

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236 With thanks to an anonymous reviewer for highlighting this risk.
237 See, eg, Human Rights Law Centre (n 228) 10–12.
238 INSLM, 'Witness J' (n 103), 40–1.
239 Ibid 41–3.
240 Ibid 43–4.
241 Ibid 48.
242 Ibid 44–8.

In a response issued in January 2023, the Attorney-General accepted the INSLM's recommendations.[243] They have not, at the time of writing, been formally implemented. As and when adopted, the recommendations will address some of the concerns highlighted above. Additionally, following the Witness J inquiry and comments from the INSLM about the need for a wider-ranging review into the *NSI Act*, the Attorney-General referred to the INSLM a review of the entire *NSI Act*. In a statement, Dreyfus indicated that '[t]he review will consider how the Commonwealth can better balance the vital importance of open justice with the essential need to protect national security.'[244] The review has commenced and is due to report in October 2023. It is hoped that the analysis and commentary in this article will helpfully contribute to the review.[245]

VII Conclusion

Prior to the 2022 federal election, Labor MP Dreyfus said of the Collaery case that the 'very manner in which the government has sought to conduct the prosecution appears to me to be an affront to the rule of law'.[246] The level of secrecy was a particular concern for Dreyfus; in an earlier press release, responding to the Court of Appeal's judgment last October, Dreyfus said that 'Labor strongly supports the principle of open justice'.[247] Following the election, Dreyfus was appointed Attorney-General; he subsequently discontinued the prosecution, although continued the prior government's attempts to have the Court of Appeal's judgment partially-redacted.

Yet, the open justice concerns raised by the Collaery prosecution, and the secret case of Witness J, go far beyond the particular facts of each case. They point to wider issues undermining open justice in Australia and an urgent need to reform the *NSI Act*. As the Human Rights Law Centre submitted to the INSLM review, 'further safeguards are needed in the *NSI Act* to protect the public interest

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243 Attorney-General's Department, *Australian Government Response to the Independent National Security Legislation Monitor Report: Review into the Operation of Part 3, Division 1 of the National Security Information (Criminal and Civil Proceedings) Act 2004 as it Applies in the Alan Johns Matter* (Report, January 2023) <https://www.ag.gov.au/sites/default/files/2023-01/Government%20response%20to%20recommendations%20in%20INSLM%20Alan%20Johns%20Report.PDF>.

244 Attorney-General's Department, 'INSLM to Review National Security Information Act' (Media Release, 28 July 2022) <https://ministers.ag.gov.au/media-centre/inslm-review-national-security-information-act-28-07-2022>.

245 The author contributed to the Human Rights Law Centre's submission to the review and appeared before it at a hearing in July 2023.

246 Christopher Knaus, 'Mark Dreyfus Flags Bernard Collaery Case as Priority if Appointed Attorney General', *Guardian Australia* (online, 24 March 2022) <https://www.theguardian.com/australia-news/2022/may/24/mark-dreyfus-flags-bernard-collaery-case-as-priority-if-appointed-attorney-general>.

247 Mark Dreyfus, 'Morrison Government Humiliated by Collaery Ruling' (Media Release, 6 October 2021) <https://www.markdreyfus.com/media/media-releases/morrison-government-humiliated-by-collaery-ruling-mark-dreyfus-qc-mp/>.

in open justice.'[248] This article has sought to explore the constitutional themes that must animate ongoing legislative and jurisprudential progress in this context. Drawing on comparative perspectives from the UK and Canada, the article has considered alternative approaches to reconciling the competing interests of secrecy and transparency in national security cases. It has recommended practical steps Australia might take to better resolve this tension, in light of the British and Canadian experience.

The principle of open justice is primarily directed at ensuring public confidence in the judiciary. National security may from time to time require departures from the principle. But, as this article has demonstrated, with reference to the UK and Canada, more can be done within Australia's current legislative and jurisprudential milieu to maintain open justice, even when a level of secrecy is required by the demands of national security. The inadequacy of the existing law and practice risks undermining public confidence in the court system.[249] The Witness J case is a sobering example. The idea that the Australian court system might permit someone to be prosecuted and imprisoned in complete secrecy would have previously seemed absurd. The notion is anathema to a fundamental judicial principle and, quite possibly, unconstitutional. And yet it happened. In the absence of reform, it might happen again.[250] The INSLM's proposed reforms are an important start. But there is much more work to be done to ensure an appropriate balance is struck between open justice and national security in Australia.

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248 Human Rights Law Centre (n 229) 10.

249 For a consideration of similar issues, albeit from a press freedom perspective, see George Williams and Keiran Hardy, 'Press Freedom in Australia's Constitutional System' (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 222.

250 See Pender, 'Open Justice, the *NSI Act* and the *Constitution*' (n 16).