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Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
Department of Justice
GPO Box 31,
SYDNEY NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Cameron

I refer to the NSW Law Reform Commission's Open Justice Review on the operation of suppression and non-publication orders and access to information in NSW courts and tribunals. Thank you for providing the Australian Federal Police (AFP) with an extension to the deadline for preliminary submissions.

The AFP relies on the *Court Suppression and Non-Publication Orders Act 2010* (NSW) for the protection of sensitive AFP information in proceedings before NSW courts. In particular, the provisions are critical in ensuring the protection of information that may place a human source at risk, reveal sensitive police methodologies, or instruct on the commission of serious offences. The provisions are relied on in both criminal prosecutions and civil proceedings, and may protect AFP information in instances where there is no Commonwealth party to the proceedings.

The Commissioner of the AFP, as a proceeds of crime authority under the *Proceeds of Crime Act 2002* (Cth) (POCA), also relies on the *Court Suppression and Non-Publication Orders Act 2010* (NSW) with respect to information obtained by the Commissioner under the POCA, with a view to ensuring, for example, separate but concurrent criminal proceedings are not prejudiced when such information is put into evidence in POCA proceedings.

To assist the Open Justice Review, the AFP has included a number of case studies at **Attachment A**.

If you have any questions about the significance of these laws to the AFP, please do not hesitate to contact LegislativeReform@afp.gov.au.

Yours sincerely

Leanne Close APM
Deputy Commissioner National Security

Attachment A

Case study - *R v Musleh* [2018] NSWSC 1222

The offender in this matter was charged with, and plead guilty to, an offence against section 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (performing services to promote or support foreign hostile activities). During proceedings against the offender, a number of orders were made under the *Court Suppression and Non-Publication Orders Act 2010* (NSW) to protect human sources and police methodology.

Human source non-publication order

Evidence against the offender included material received from an informant. The AFP was concerned revealing the identity of the informant would jeopardise ongoing investigations, pose preventable harm or danger to the informant and the informant's family and reveal operational sensitivities.

The Commissioner of the AFP sought orders by way of Notice of Motion filed in court on 20 June 2018 to protect the name of the informant and associated information from disclosure. The orders were made under paragraphs 8(1)(a), (b) and (c) of the Act.

The Court held it was necessary to make the suppression orders, and there would be no disclosure of any information that would:

- reveal the identity of the person,
- reveal the name and address of the person,
- release any image or description of the appearance of the person, or
- reveal the fact or nature of assistance the person has provided or may in future provide to the authorities.

Police methodology non-publication order

The Court also made non-publication orders pursuant to section 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW), to restrict disclosure of methods used by the AFP in the detection, investigation and prosecution of the offences. The AFP submissions outlined the risk of real prejudice to future investigations if the methods were to be made public.

The orders prevented the disclosure of a number of pieces of evidence, including:

- surveillance images,
- details around the whereabouts, or information which tends to reveal the whereabouts, of the surveillance devices used to obtain the images, and
- the methods and means, or information which tends to reveal the method and means, by which the images were obtained.

Case study – AFP Operation Silves - R v Khaled Khayat; R v Mahmoud Khayat

The AFP Joint Counter Terrorism Team (JCTT) investigation known as Operation Silves concerned a plot to detonate an improvised explosive device on an aeroplane, and to produce hydrogen sulphide gas (H₂S) to deploy in a confined space ('the weapons').

The AFP brief of evidence comprised expert statements, opinions and various other exhibits that revealed methods for making the weapons and information about the efficacy of methods for deploying them.

The AFP was concerned that revealing this information would assist others to make similar weapons and to pursue similar plots. While this is a concern arising in many terrorism cases, it was particularly profound in this case due to the sophistication of the plot and the potential for significant loss of life if carried out.

There were strong arguments for the protection of information that would if disclosed significantly assist persons to make and deploy the weapons, including:

- the significant risk to public safety if the sensitive information were to be obtained by extremists and used in connection with an attempt to manufacture and use the weapons and their components, or similar weapons and components,
- the broader risks to community safety in public access to information that reveals methods for making and deploying the weapons, and
- the shared concerns of the AFP's domestic and international partners.

An application was made under the *Court Suppression and Non-Publication Orders Act 2010* (NSW) resulting in orders:

- granting suppression and non-publication of any information revealing the methods for making the weapons, specific details about the intended method for deploying the weapons, and specific details about the tests undertaken in relation to the weapons,
- closing the court while a limited number of witnesses gave particularly sensitive evidence about the weapons, and
- establishing a range of mechanisms to ameliorate the impact of the orders on open justice, including a process for the release of redacted court transcripts and court documents.