

Michael Pelly, 'Open justice and the curious case of Witness J', *The Australian Financial Review*, 7 March 2020

The extraordinary story of a former army intelligence officer tried and jailed in secret raises questions about the courts and national security, writes Michael Pelly.

Secret charges. Secret hearing. Secret sentence. Prison term served in secret. The curious case of "Witness J", an ex-military intelligence officer who spent 455 days in jail, sounded alarm bells for many when details started emerging late last year.

It was another worrying moment for open justice - and so soon after the furore surrounding "Witness K", his Canberra lawyer Bernard Collaery and efforts to suppress any detail about that spying case involving East Timor.

Witness J was tried and jailed under national security laws, and no one would have been any wiser but for a dispute with the ACT prison system that found its way into the courts.

The judge who conducted Australia's first terrorism trial - Anthony Whealy - says it should never be allowed to happen again.

The nation's peak legal body, the Law Council of Australia, is calling it a "disproportionate response" to concerns about national security. Others simply believe it's a bad look when an accused person, law enforcement agencies and the courts collude to lock the doors of our courts.

In that boat is the Independent National Security Legislation Monitor (INSLM), Dr James Renwick, SC. Renwick announced this week he would be holding an "own motion" inquiry. He said he would refer to Witness J by the moniker given to him during his civil litigation - "Alan Johns".

Johns complained that the general manager of the Alexander Maconochie Centre, Corinne Justason, had told police about a memoir he was writing on the advice of a prison psychiatrist.

He wanted his email access restored and a court to rule on whether the prison staff should have tipped off police, who had asked them to keep a watch for anything that suggested he might breach suppression orders related to his trial. He also complained police had searched the home of his brother looking for a manuscript - they suspected it had been emailed to him - after they executed a search warrant on his cell.

His action in the ACT Civil and Administrative Tribunal failed and he was released in August 2019, having been held in custody since May 2018. (He had been sentenced to 31 months' prison in February 2019).

Since then he's been quite active on Twitter - as Witness J. He claims to have done "15 years of arduous service", saying he was "once an army intelligence officer, but my uniformed service concluded years ago".

"More recently, I was a civilian intelligence official in the Australian intelligence community. And while I worked alongside Australian special forces in the Middle East, I did so as a civilian...

"Simply possessing knowledge of human intelligence operations in China does not make me a traitor."

Since the first reports in November, crossbench senator Rex Patrick has been pursuing the government for more information, like "how often does this go on?"

Like many, the Senator was left unsatisfied by the response of Attorney-General Christian Porter to his question on notice in November. Porter gave an equivocal answer - he said he was "not aware of any other similar cases" and pleaded that it was very serious business that would endanger lives if the details got out.

Renwick's inquiry delighted Patrick, who asked a series of leading questions at Senate estimates on Tuesday night.

Patrick: "Will you be considering in the context of the inquiry other litigation where the NSI [National Security Information] Act has been used or is being used?"

Renwick: "If you're asking about Witness K and Mr Collaery -"

Patrick: "I am."

Renwick: "Yes, I thought you might be. I take the view that I shouldn't be looking into current litigation."

The Witness K litigation is expected to proceed this year. The former spy will plead guilty to breaching secrecy laws by revealing Australia's bugging of the East Timor government as it negotiated an oil and gas agreement with the impoverished nation.

However his lawyer, former ACT attorney-general Bernard Collaery, will contest the same charge - conspiring to share information protected by Section 39 of the Intelligence Services Act.

Renwick told estimates he had formed a preliminary view about the Witness K matter - that the NSI Act should be amended to allow the judge to consider permitting the media and possibly a "special advocate" to make submissions about whether a court should be closed.

"The media have undoubted standing ... they stand in the shoes of members of the public, who would themselves be entitled to attend any case in open court. In this case, because the matter in substance proceeded entirely in secret, the public and the media were deprived of that opportunity."

He added that "it's unsurprising that almost any accused would agree to orders of that sort".

"But even if there is consent - because of the public interest in open justice - I was surprised that some public reasons were not given."

He assured the committee he knew a good deal about the facts of the case.

"There's never been another case, at least in peacetime in Australia, where all of it has been conducted in secret. That is something significant and different. For my part, I would not like to see it repeated."

Former NSW Supreme Court judge Anthony Whealy, who presided over the Operation Pendennis trials in 2009 - and made numerous non-publication orders - admitted he had been in Renwick's ear about Witness J.

"Even where orders are sought to be made by consent, judges must be extremely cautious before yielding to them," he said.

"Never again must judges permit the entire process to occur behind closed doors. At the very least, a contradictor should be appointed to oppose the orders and argue for the public's right to know ... The Witness J orders tore up the principles of open justice."

The first INSLM, Bret Walker, SC, was also in the cheer squad. "Courts are well used to keeping certain information secret," he said. "It's just odd that the whole of a proceeding would be conducted in secret when it could have been cloaked."

"It may well be that there turn out to be reasons, but at the very least shouldn't they have been disclosed?"

He said it was important to get the balance right. "We've got all the right values - an open court system and respect for national security secrecy," he said.

"I think we get it wrong when there are secrets that don't have anything to do with national security - the business of government is not national security - and there are aspects of the definitions of some of the provisions in national security [legislation] which are plainly too wide ..."

"By and large, we do OK compared to other places, but compared to our own ideals we have too much secrecy and not a sufficiently concerted manner of dealing with it."

Law Council president Pauline Wright reckons Renwick's inquiry - his findings will be published in his annual report - "will ensure that the suppression of disclosure or publication of judgments, convictions, sentences and sentencing remarks is confined to the most exceptional cases".

That's optimistic. The government will probably say "thanks for the report" and file it - sadly the fate of most INSLM reports - after tabling it on the very last available day.

However, there is feeling, at least among lawyers, that a bit of light on this dark place might stop there being a whole alphabet of secret trials and secret justice