

Secret Australian prosecution ‘unprecedented’ and must never happen again, watchdog told

Law centre says ex-spy Witness J’s case has echoes of authoritarianism and National Security Information Act needs ‘adequate safeguards’

Christopher Knause – *The Guardian* - 4 May 2021

https://www.theguardian.com/australia-news/2021/may/04/secret-australian-trial-unprecedented-and-must-never-happen-again-watchdog-told?utm_term=.676974fd36139512d2966e322dc937eb

The Human Rights Law Centre told the national security laws watchdog, which is reviewing the case of Witness J, that secret trials ‘have no place in liberal democracies like Australia’.

The secret prosecution and imprisonment of a former intelligence officer was “unprecedented”, reminiscent of authoritarian regimes and should never be repeated, Australia’s national security laws watchdog has been told.

The Independent National Security Legislation Monitor (INSLM) is [examining the case of Witness J](#), a former military intelligence officer who was charged, sentenced and imprisoned in 2018 in complete secrecy in the Australian Capital Territory.

Witness J pleaded guilty to the disclosure of confidential information and served out a sentence in Canberra’s jail without any public knowledge, due to secrecy imposed by the National Security Information Act (NSI Act) and orders agreed to by commonwealth prosecutors, the attorney general and Witness J’s lawyers.

The total secrecy in the case [shocked observers](#), including the former INSLM, James Renwick, who [initiated the current inquiry](#) last year.

“As 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,” Renwick said. “That is something significant and different, and for my part, I would not like to see it repeated.”

In a submission to the watchdog’s review, the Human Rights Law Centre described the complete secrecy in the case as “wholly unprecedented”.

“It should never be repeated,” the submission said. “We urge the INSLM to recommend that the NSI Act be amended to include adequate safeguards.

“Secret trials have a long history in authoritarian states. They have no place in liberal democracies like Australia.”

The NSI Act is designed to ensure the proper handling of sensitive information in court cases, to avoid any risk to national security. But legal groups and experts [have warned the laws](#) can tip the scales too far, unnecessarily obstructing open justice and hiding critical elements of criminal proceedings from the public.

The Human Rights Law Centre said the NSI Act should be reformed to ensure a minimum standard of transparency. The safeguarding of national security could almost always be met with partial closures of the courts, rather than total secrecy.

“It is difficult to conceive of a situation where total secrecy, and not only partial secrecy, will be justified,” the centre’s submission said.

It also called for the appointment of an open justice advocate to argue for the need for transparency during proceedings where the NSI Act was invoked.

Courts should also be required to publish a statement of reasons when they made orders under the NSI Act, and the attorney general’s department should include information on the use of the NSI Act in its annual report, the submission said.

The government should also be required to keep a “library of secret judgments”, which are subject to periodic review to ensure the NSI Act is being used appropriately.

Human Rights Law Centre senior lawyer Kieran Pender said the changes would “go a long way” to ensuring open justice in matters involving the NSI Act.

“There is no place for secret trials in Australia,” Pender said. “The NSI Act must be urgently amended to ensure the secrecy which shrouded the Witness J case can never be repeated.

Former attorney general Christian Porter has previously said the information being disclosed by Witness J was extremely sensitive.

“The information was of a kind that could endanger the lives or safety of others,” Porter said. “The risk to the lives and safety of others continued to exist as at the date of the attorney general’s answer.”

He said the NSI Act orders allowed Witness J to disclose the fact of his conviction, that the offending involved “mishandling classified information”, and the terms of his sentence.

The Witness J case is not the only matter in which the NSI Act has been invoked in recent times.

The [cases against barrister Bernard Collaery](#) and his client, the former intelligence officer Witness K, are also partially shrouded by the NSI Act, as is the prosecution of David McBride, a former military lawyer accused of leaking documents to the ABC.

The law [has also been used in the defamation trial](#) involving Victoria Cross winner Ben Roberts-Smith.