

John Menadue – Pearls and Irritations

ERNST WILLHEIM. Secret trials in the ACT courts

Posted on 2 December 2019

Canberrans were shocked to read on the front page of the Canberra Times on Saturday 23 November about a mystery prisoner, referred to as 'Alan Johns', who was prosecuted and jailed for charges unknown to the public or the Alexander Maconochie Centre (the ACT prison).

The newspaper reports that ACT Justice Minister Shane Rattenbury said he was kept in the dark about the prisoner's existence. According to the Canberra Times, the secret prisoner is understood to be a former military intelligence officer. We don't know the identity of the prisoner, we don't know what crimes he has committed, we don't know the terms of his sentence. Apparently he was convicted and sentenced sometime in 2018, housed in the pedophile wing of the ACT jail (apparently to keep him isolated) and released in August 2019.

The only reason we know anything at all is because the prisoner took legal action alleging his privileges were improperly curtailed. His legal proceedings were unsuccessful but the judgment was reported. According to the Supreme Court judgment prisoner 'Johns' was writing a manuscript as part of a mental health recovery plan. He sought permission for a prominent Canberra author Robert Macklin to visit him to explore possible publication. The prison authorities informed the AFP who raided his brother's house (to whom he had emailed a copy of the manuscript). The AFP also raided his prison cell and seized copies of his writings. The prisoner's email access was frozen. We learn from the judgment that the head of the prison was aware of the existence of Commonwealth orders which applied to the prisoner, she was not aware of the specific orders but she was aware that the disclosure of information relating to the prisoner and the offences of which he had been convicted was prohibited. This seems extraordinary. How could the head of a prison be 'aware' of orders without having seen those orders? Why should she comply with orders she had not seen? How could she comply when she did not know the terms? How could the prison authorities properly care for this prisoner without knowledge of his offence? What crime can possibly be so secret that even the head of the prison cannot be trusted? Security and intelligence services have a legitimate role in keeping us safe. But are they obsessed with secrecy? What are they trying to cover up? Retired Supreme Court Justice Richard Refshauge has described the circumstances as bewildering and depressing.

Australians are entitled to ask why prosecution authorities, presumably the Commonwealth, covered up the very fact of the prosecution and the conviction? Why did an ACT court (from the length of the sentence it seems likely it was the Supreme Court) suppress the entire proceedings? What was his crime? In light of the extraordinary secrecy and the Commonwealth orders referred to in the judgment it is almost certain that a Commonwealth offence is involved. Why would a Supreme Court justice conduct a jury trial in complete secrecy? Was a completely secret trial valid having regard to requirements of the Commonwealth Constitution? Why was it so sensitive that the public was denied the right to know? Is this an isolated instance? Are there others also convicted and imprisoned in absolute secrecy, in the ACT or elsewhere? The ACT and Commonwealth Attorneys-General have been strangely silent. I understand they have declined media requests for comment. Now that some details have emerged, surely public explanation is necessary. But in the Senate on 28 November the Minister representing the Attorney-General refused to provide any further details.

This is absolutely chilling.

Australians used to think that secret trials and secret imprisonment happen only in foreign countries, in totalitarian states, under authoritarian regimes. They couldn't happen in Australia. Don't we have a free press, a system of open justice and an independent judiciary? How could an ACT judge preside over a trial in absolute secrecy?

We know that public confidence in government is declining. But most of us have continued to have confidence in our judicial system, in an independent judiciary and in the fair and open administration of justice. Is that confidence misplaced? If people can be prosecuted and imprisoned in absolute secrecy, how can we have confidence in the administration of justice in Australia?

This mysterious case, and developments in the prosecutions of Bernard Collaery and Witness K for exposure of illegal bugging of Timor Leste government offices during bilateral negotiations call our into question public confidence in the administration of justice..

Senator McKim in the Senate on 28 November put the issue succinctly ‘This is a shocking example of secrecy and abuse of state power and our descent into a police state. It is yet another argument for a charter of rights in Australia. Open justice is critical to the rule of law, which in turn is critical to our democracy. There is no reasonable conclusion to be drawn from this matter other than that we are living in an authoritarian state. I have to ask: what has and is our country coming to?’.

Of course much more is known about the prosecution of Bernard Collaery and Witness K for disclosure of illegal activity by a Commonwealth agency, ASIS, placing listening devices in the government offices of Timor Leste. We know about the prosecution. Preliminary hearings have been in open court. But even in the early stages of those prosecutions, members of the public have faced obstacles obtaining access to hearings. And secrecy is looming. In each case suppression orders have now been made. I made *amicus curiae* applications in each case. The purpose of each *amicus* application was to put to the Court submissions relating to the importance of open justice and the handling of national security submissions.

Amicus curiae submissions in Australian courts are rare. Whereas *amicus* applications are common in final appellate courts in other common law jurisdictions, especially the United States, Canada and the Constitutional Court of South Africa, the High Court of Australia has been more cautious. The perception in Australia remains that litigation is an adversarial process between parties with no role for strangers to the litigation.

I have argued elsewhere that this narrow approach to *amicus curiae* applications gives inadequate recognition to the role of the High Court as Australia’s final court of appeal, determining the law for the whole of the Australian legal community, settling legal principle and exercising an important law-making function. These principles have less application to a criminal trial. I understood from the outset that my applications in the Collaery and Witness K matters would be difficult to sustain. Nevertheless I thought the threat to open justice was so fundamental that it was important to challenge the Commonwealth’s demands for secrecy.

First some background to the two trials. Australia and Indonesia had negotiated maritime boundary treaties over a number of years. Shortly before Timor Leste became independent, when it appeared likely that a newly independent Timor Leste would seek to have its maritime boundary with Australia determined by the International Court of Justice, Australia withdrew from the jurisdiction of the International Court of Justice in relation to seabed delimitation disputes. Australia and Timor Leste then negotiated a series of treaties relating to oil and gas revenues in the area often referred to as ‘The Timor Gap’ but without determining a formal boundary. When it became known that an Australian intelligence agency, ASIS, had been placing listening devices in the Timor Leste government offices in the course of treaty negotiations, and that the Australian negotiating team was receiving real time briefing of the Timor Leste negotiating position, Timor Leste went to the Permanent Court of Arbitration in the Hague seeking to have the 2006 CMATS treaty declared invalid on the ground of fraud. Witness

K was to give evidence the Arbitration. Another Australian intelligence agency ASIO raided his home and seized his passport preventing him from travelling to the Hague to give evidence. ASIO also raided the offices of the lawyer acting for Timor Leste Bernard Collaery in the arbitration and seized his legal advice to Timor Leste.

The two prosecutions relate to alleged disclosure by Witness K and Bernard Collaery of the placement of listening devices in the Timor Leste government offices.

I tried to sit in on some of the early 2018 hearings. This was not always easy. The matter did not appear in the daily lists published by the ACT Magistrate's Court. The initial response to telephone inquiries asking for the time and location of hearings was that no information could be given. After complaints the necessary information was provided. But problems continued. Months later, at hearing on 28 February 2019, senior counsel for Collaery drew to the attention of the Court that the matter did not appear in the Court's daily lists, it was not on the normal public noticeboard downstairs and there was a 'closed court' sign outside the court even though no suppression order had been made. Months later a prominent supporter of Timor Leste was again informed that no information could be given about a hearing date. Why was the Magistrate's Court apparently seeking to shield these hearings from the public?

Initially both cases were heard together. Later counsel for Witness K informed the Court that he intended to plead guilty. Collaery consented to committal to the Supreme Court.

At a subsequent directions hearing in the Magistrate's Court in the Witness K matter counsel informed the Court they were close to agreement on orders under s 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. That was a significant development. Section 22 makes provision for secrecy orders. I was appalled. I was also surprised that the defence would consent. Perhaps I should not have been surprised. After all the principal interest of the defence is to secure an acquittal. The defence has no interest in objecting at its own expense to Commonwealth demands for secrecy. That was the point at which I decided to make an *amicus* application in the Witness K matter.

I was not familiar with magistrate's courts procedures (my appearances as counsel had been in the High Court and other superior courts) and I searched fruitlessly through the vast number of forms on the court's web site for an *amicus* application form. Eventually I drafted an application based on the format of other applications, emailed this to the registry, asked whether the form was appropriate and asked for waiver of any fees. The registrar was helpful, explained she also had not been able to find any form, my application was acceptable, she agreed to waive fees and when I explained I did not have the technology to scan a multipage document she kindly offered to scan and serve the sealed application on the other parties.

I also followed the Collaery matter in the Supreme Court. I had not envisaged making an *amicus* application in the Supreme Court. Collaery was represented by senior and junior counsel and I assumed, incorrectly as it turned out, that his counsel would contest applications for secrecy orders. In fact, as in the Witness K matter, counsel informed the Court that they were close to agreement on s 22 orders. The matter was listed, at short notice (2 days) the following week to finalise those orders. I hastily prepared an *amicus curiae* application in the Collaery matter. The Supreme Court registry was helpful. I prepared my *amicus* application in the expectation that it would be heard on the day listed for the s 22 orders. The registry told me the Judge had determined that I had not given the requisite 2 days notice and the application would be listed more than 2 weeks later. I pointed out that the court had itself listed the hearing for the s 22 orders at very short notice and I was seeking to be heard on the importance of open justice before secrecy orders were made. The registry official consulted the Judge and confirmed the later hearing date for my application. This did not augur well. The Judge was perfectly entitled to insist on compliance with the rules. It would also have been open to him to waive the timetable in light of the circumstances and to hear the *amicus* application before making the s 22 secrecy orders.

The 2 *amicus* applications were broadly similar. They were in two parts. The first part set out the principles to be applied to applications for leave to make submissions as *amicus curiae*. In brief, the core principle was that an application may be approved where the *amicus* can present argument on matters before the court which are unlikely to receive full treatment by the parties because it is not in the interests of the parties to present argument on those aspects or the parties lack resources. I noted that at a directions hearing counsel had indicated that they would be seeking s 22 orders (secrecy orders) by consent. That raised the possibility that the defendant could be convicted and sentenced to imprisonment on the basis of evidence that was not publicly known. This could bring into question public confidence in the administration of justice. Further substantive submissions drew attention to legal authorities emphasizing the fundamental importance of open justice. Public confidence in the independence and impartiality of the judiciary is diminished if the judiciary is involved in secret procedures.

Further submissions related to how the Court should deal with national security considerations. It was not obvious that national security was affected. The defendant was not charged with a terrorism related activity. It was not obvious that disclosure of a possibly illegal act by a Commonwealth statutory authority ASIS raised national security concerns. It seemed inconceivable that the prosecution would allege that Timor Leste was a potential adversary or constituted some kind of military threat to Australia.

The submissions also drew attention to some of the surrounding circumstances. It was a matter of public knowledge that before Witness K was due to travel to The Hague to give evidence in the arbitration hearing between Timor Leste and Australia his passport was seized, preventing him from travelling to The Hague to give evidence. In domestic proceedings preventing a witness from attending court to give evidence would constitute contempt of court.

It was also a matter of public knowledge that Australian security services raided the offices of the solicitor for Timor Leste Mr Bernard Collaery and seized the Timor Leste brief relating to the arbitration proceedings. Seizure by one side in litigation of the other side's brief would ordinarily constitute contempt of court.

In fact that conduct led to proceedings by Timor Leste against Australia in the International Court of Justice. That Court was not satisfied by undertakings given by the Australian Attorney-General and made a series of orders adverse to Australia.

I also submitted that if any party sought a closed court, constitutional issues required consideration. I referred to the High Court's decision in *Russell v Russell* invalidating provisions in the *Family Law Act 1975* requiring the Family Court to sit in private. That provision had an important social purpose. Previously the tabloid press used to publish lurid details of the previous day's divorce proceedings. Attorney-General Murphy wanted family disputes to be resolved in dignity and privacy. But the High Court determined that the principle of open justice was paramount. National security was also an important purpose but in my submission the Court was bound by the High Court's decision in *Russell v Russell*. I referred also to the *Kable* principle, that parliament cannot require a court exercising federal jurisdiction to exercise its jurisdiction in a manner contrary to the essential elements of judicial power and to the High Court's decision in *Cheatle* that, s 80 of the Constitution, which required trial by jury, preserved the essential features of a jury trial, one of which was an open trial.

The first part of the oral hearing in the Supreme Court was unremarkable. Mossop J assured me he had read my written submissions. I was somewhat taken aback when he asked me why he should entertain submissions on the constitutional issues when these issues had not been raised by the parties. My response was that it was always open to a superior court to ask parties whether the court had the power to make the orders the parties were seeking. (If I had been allowed more time, I would have been able to refer him to one of the earliest decisions of the High Court, back in 1906, that an *amicus curiae* can make objection to the jurisdiction of the court). Later Mossop J referred to the Commonwealth as a model litigant. I responded that I would wish to make submissions.

This was not to be. Around 9.55 am Mossop J said he had another matter listed at 10.00. He dismissed the *amicus* application. In very brief oral reasons he referred to the Commonwealth as a model litigant. He announced he would deliver his reasons at 4.00pm. I was unable to attend as I was committed to attend a funeral. A number of those who did attend later expressed to me their amazement that Mossop J again referred to the Commonwealth as a model litigant. The written reasons were not published till some time later. On reading the written judgment I also was amazed that one of Mossop J's reasons for dismissing the application was that the Commonwealth DPP and the Commonwealth Attorney-General were model litigants. Ordinarily such an observation might be seen as unexceptionable. But no party had submitted to the Court that the Commonwealth was a model litigant. My submissions, which Mossop J said he had read, were unequivocally to the contrary. Mossop J was aware that a Commonwealth agency had raided Mr Collaery's offices and seized his brief to his client, a Commonwealth agency had seized the passport of Mr Collaery's client Witness K and prevented him from giving evidence in the arbitration proceedings, conduct which would ordinarily constitute contempt of court. Mossop J gave no explanation of his finding that the Commonwealth was a model litigant. Observers indicated to me their concern that Mossop J was deliberately indicating a favourable attitude to the Commonwealth parties? Was it now clear that there was little prospect of a fair trial. That was the worrying perception of some who had sat in on the case. I am too close to the case to express a personal opinion. Readers can judge for themselves.

A separate hearing of my *amicus* application in the Witness K matter Magistrate's Court followed. I was given a good hearing but it was inevitable that the Magistrate's Court would follow the decision made by the Supreme Court. Notably the brief oral reasons of the Acting Chief Magistrate made no reference to the Commonwealth being a model litigant.

At this stage there had been at least 18 pre trial hearings. Many observers were concerned the Commonwealth was seeking to drag the proceedings out, that they were deliberately oppressive. Concern increased when at subsequent hearing before Mossop J on 26 November counsel for the Attorney-General sought to drag the timetable out even further. The reason? The defence had filed affidavits from former Minister for Foreign Affairs and Trade Gareth Evans, former Chief of the Defence Force Admiral Chris Barrie and former senior diplomat John McCarthy. Two other defence affidavits were from former Presidents of Timor Leste Xanana Gusmao and Jose Ramos Horta. The affidavits themselves are not yet public but Mossop J told the Court those affidavits are intended to directly challenge the assertion in the s 26 certificate and the evidence filed on behalf of the Attorney-General that there would be a risk of prejudice to Australia's national security if the information referred to in the s 26 certificate was disclosed publicly during the course of the substantive criminal proceedings. (That such eminent and experienced Australians were prepared to give evidence that there would be no prejudice to national security reinforces my own view that this case has nothing to do with national security-the national security claims may reflect no more than a culture of obsessive secrecy and a desire to cover up illegal or wrongful conduct).

Counsel for the Attorney-General claimed the Commonwealth needed more time to respond.

Counsel also informed the Court there would be 'court only' affidavits. This point has not yet been developed but it appears to relate to evidence which would not be disclosed to the defendant or to the jury. If my constitutional submissions in my *amicus* application have any merit, such a procedure would not be consistent with the essential features of a jury trial required by s 80 of the Constitution. They would also infringe the basic requirement of a fair trial. It is difficult to conceive on what basis it could be claimed that a trial about disclosure of illegal activity by ASIS, illegal bugging of the cabinet office of a friendly neighbour, should proceed on the basis of information that is not disclosed to the defendant. It is difficult to conceive how a fair trial could ever proceed on this basis. Would this be consistent with s 80 of the Constitution? Would it be in conformity with the essential elements of a jury trial? major questions are ahead.

The application to defer hearing dates surprised observers. The dates for filing affidavits and for the next hearing had been agreed by the parties. The Attorney-General could hardly have been surprised that reliance on national security would be strongly contested. The illegal bugging of the Timor Leste cabinet offices had been extensively reported. Public comments by two former Presidents of Timor Leste including that they would give evidence had been widely reported. My *amicus* submissions in the Collaery matter, filed on 2 October 2019, had questioned reliance on national security. My supplementary submissions in the Witness K matter, to which the Attorney-General was a party, had drawn to attention that ASIS had an interest in shielding its illegal conduct from scrutiny and any ASIS evidence needed to be viewed in this light. Senior counsel for the accused submitted that the hearing date should not be vacated. The accused had filed his evidence on time and the only complaint of the Attorney-General was that the accused's evidence was good evidence. He submitted that the evidence should not have come as a surprise to the Attorney-General and that nothing in the affidavits required that the Attorney-General be allowed more time to respond. Yet Mossop J granted the Attorney-General's application. He accepted the submission by counsel for the Attorney-General that the extent of the evidence to which he would be required to respond was not reasonably anticipated by him! In discussions outside the court, observers who had been sitting in on hearings expressed further concern that the Court seemed unduly favourably disposed to the Commonwealth Attorney-General.

What is the public to make of this? The extraordinary reports about Mr 'John', the strange silence of both the ACT and Commonwealth Attorneys-General, the impending secret trials of Bernard Collaery and Witness K, the forecasts of 'court only' evidence not to be available to the defence or the jury, and the way in which trials are being allowed to drag on to the detriment of the accused give cause for concern. Public confidence in the administration of justice is at risk.

Ernst Willheim is a Visiting Fellow in the College of Law at the Australian National University. Before his retirement he was a senior officer in the Commonwealth Attorney-General's Department where he headed several policy divisions, established the Office of General Counsel and was its first head, lead numerous Australian delegations to international conferences and appeared as counsel for the Commonwealth in the High Court and other appellate courts. He has published widely on international, constitutional, refugee and indigenous law matters.

6 Responses to *ERNST WILLHEIM. Secret trials in the ACT courts*

Kathryn Kelly says:

2 December 2019 at 4:01 PM

Thank you Ernst for such a clear and comprehensive outline of the issues involved in these outrageous prosecutions, which seem to me to be clear abuse of power, as well, as you have outlined, contempt of court.

It is shameful indeed that our judicial system has come to such a pretty pass. Secret courts, secret trials and secret evidence should not be countenanced in Australia!

We should also not forget David McBride, the ADF whistleblower, who is subject to many of the same sort of secrecy provisions as Witness K and Bernard Collaery.

The fact that the cry of 'national security' is being so misused in these cases will no doubt be exposed even further when the defence evidence is presented by witnesses, the former Presidents of Timor Leste, Xanana Gusmao and Jose Ramos Horta, and Evans, Barrie and McCarthy.

Lawry Herron says:

2 December 2019 at 3:53 PM

Thanks be we have you Ernst as "some village Hampden" in our midst. The applicant's performance in all of this is ill-conceived, egregious and, hopefully, unconstitutional. I would have said "un-Australian" but the more I hear of it the more I have doubts about my poor country.

Rex Williams says:

2 December 2019 at 3:28 PM

Ernst Willheim,

For the second time of recent times on the pages of P & I, you have gone to great efforts to acquaint those interested in the inner workings of the law and the ACT court system as it deals, week after week, with the fallout from the scandalous Timor Leste activities, full of anomalies in both the actions of government instrumentalities and the laws themselves.

We owe you our thanks for these detailed explanations.

I trust that others have also gained some value and better understand the devious dealings of a government exposed for excesses in their interpretation of the law and the reality of their past actions, known by all as "the bugging of a foreign embassy for commercial gain" and in train since 2004.

A criminal act and from which this country then gained valuable and secret information that gave Australia some serious advantage against perhaps the poorest country in the world, in their negotiations over an oil lease. A dirty business and one which all these legal actions and diversions are somehow designed to cover up.

Of course it would seem logical to any normal reader that the most sensible response would be to drop the case against Bernard Collaery, once the respected defence lawyer for the well known "Witness K", Mr. Collaery himself now being pursued by this feckless government for his part in just fulfilling his role as a lawyer and by all accounts, an effective one at that.

One has to ask if all these theatrics are just to save the hide of an ex-Minister in a previous government and/or the reputation of the security organisation responsible for these criminal activities, all this occurring in a government of the same political persuasion as our current collection of politicians. An earlier Attorney General Brandis sat on this action for years and did nothing, showing better judgement in the eyes of most people than the current incumbent Porter pursuing a cause that the government cannot possibly win, if there is even a modicum of justice left in this country and which will show to all other countries, yet again, how immature and arrogant we are in such matters.

One has to ask why Timor Leste still maintains any diplomatic relations with a country of such well proven poor judgement like Australia, a junior version of a corrupt USA

So your writings are of value, Mr. Willheim, and one would like to think that those public officers in the AG's department who have any concerns for the way Australia appears to our neighbours, will influence those feeble politicians who consider that they are able, in any way at all, to maintain even the slightest level of international credibility by pursuing this illegal and immoral charade.

Sandra Hey says:

2 December 2019 at 2:55 PM

Brian Toohey's recent book "Secret" The making of Australia's Security State, is a marvellous insight into how the Australian voter has been totally sidelined over the last 80 years into believing we live in a democratic country.

Susan Connelly says:

2 December 2019 at 2:52 PM

This excellent summary of the Witness K/Bernard Collaery outrage should be required reading for would-be citizens, just so they know what they're getting into. Those of us born here must do more than read, however.

Any "quiet Australians" out there ought to think twice before keeping their lips shut.

It is dreadful to think that terrorists have won – and it appears that they are doing just that. The 80+ new Australian laws since 9/11 – supposedly designed to thwart terrorism – are being misused in such a way as to undermine our national systems and structures. Who needs bombs when politicians, lawmakers and citizens can con themselves into eroding the foundational principles of openness, accountability, fair trials, and the separation of powers? And it's painted as "national security"! What a hoot! What a threat.

Lorraine Osborn says:

2 December 2019 at 12:49 PM

Great article and very alarming. It's not just public confidence in the administration of justice that's at risk. This shows the deep state developing in Australia overseen by a government that is increasingly unaccountable. Leaving it to the ballot box to sort it out won't work. The propaganda machine is in overdrive and we are in trouble.