

The controversial law that will decide the future of the Witness K trial

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The Witness K and Bernard Collaery case could well continue behind closed doors, prompting great concern over their right to a fair trial. But who gets to make the decision?

Last Wednesday, a group of loyal protesters huddled in the drizzling rain out the front of the ACT Magistrates' Court in solidarity with former Australian Secret Intelligence Service spy Witness K and his lawyer Bernard Collaery. For many, this was the third time they had travelled to the court, after finding out on previous trips the trial had been delayed. Some thought these delays were a deliberate attempt to evade public scrutiny.

Such scepticism was further agitated when the case was omitted from the court lists. As the clock was reaching 9am, journalists and even Collaery and Witness K's lawyers were frantically trying to find out which courtroom they were supposed to be in. Now there are serious questions about the whole case being decided behind closed doors.

The question of 'national security'

Collaery and Witness K are charged with criminal offences for allegedly revealing information about ASIS posing as aid workers and bugging the Timor-Leste cabinet to listen in to oil negotiations in 2004. Such actions by ASIS, in quite clear breach of international law, could also constitute a misuse of power under Australian law.

Why is there so much secrecy around the case? It's all down to a 2004 piece of counter-terrorism legislation, the [National Security Information \(Criminal or Civil Proceedings\) Act](#).

The law was intended to set out the power the court already had to prevent certain information from being revealed to the public (obvious cases relate to the protection of children, but it also included matters of national security). But, one highly contentious development was the expansion of the involvement and role of the attorney-general in the court process; the attorney-general would now have direct input on whether to make trials private on matters of "national security".

The law was criticised for being quickly introduced to Parliament with limited opportunity for scrutiny by the public. With very late notice, the bill was put before the [Senate Legal and Constitutional Legislation Committee](#). The Attorney-General's Department had failed to convince several senators and lawyers' organisations (including the Law Council of Australia, Australian Lawyers for Human Rights, the NSW Bar Association and the Australian Press Council) that the law did not threaten the right to a fair trial.

There were concerns about the broad definition of "national security" that could land someone a trial behind closed doors, the ability of the accused's lawyer to be excluded from parts of the trial if they did not hold a security clearance (which can be a lengthy exercise to acquire), and the law's failure to make clear the exact effect of the attorney-general's opinion.

Labor Senator Nick Bollock commented: "In my 24 years in politics I have seen some fairly offensive pieces of legislation but, unless I have got it wrong, this one appears to be the most pernicious of the lot."

Law Council of Australia President, Bret Walker SC, said: "A fair trial is a part of national security. It is not true to say that a free citizenry stands apart from national interests. You do pursue criminals by giving them rights otherwise we better get used to the idea that a trial is simply a waste of public time and money a ritual before you shoot someone."

These questions and concerns are now looming over the Collaery case.

The attorney-general's certificate

On Friday morning, Chief Magistrate Lorraine Walker [decided](#) that, under the *NSI Act*, the trial against Collaery and Witness K could not go ahead until Attorney-General Christian Porter either issues a certificate declaring that he considers the information in this case would be "prejudicial to national security" or not prejudicial. It is anticipated he will issue a certificate saying the case is prejudicial to national security.

If this happens, under the NSI law, the court must close to the public and then decide whether the rest of the trial should be held behind closed doors.

However, the million-dollar question is: how much weight must be given to this certificate? Is it ultimately up to the court to make an independent evaluation of the evidence to decide if it is prejudicial to national security? The law is not clear.

On the one hand, the NSI law says the court must consider, in having regard to the attorney-general's certificate, whether there would be a risk to national security. That's fine. The same provision goes on to say the court must also consider whether ordering a closed trial or excluding witnesses or the defence's lawyers from certain parts of evidence would have a substantial adverse effect on the accused's right to a fair trial. Makes sense.

But, almost as a caveat, the provision says that in making its decision, the court must give the "greatest weight" to the attorney-general's certificate and national security. Suddenly, it is unclear whether the attorney-general's opinion outweighs the right to a fair trial.

At the Senate hearing, the Attorney-General's Department insisted that elevating the status of the attorney-general's certificate "is certainly not the intention" of the law.

In 2013, the recently established Independent National Security Legislation Monitor (INSLM), [recommended](#) that the government make this abundantly clear by deleting the part that says the court "must have regard to" the attorney-general's certificate and deleting the provision that states that the court must give it the greatest weight. However, these recommendations were not implemented, and those parts remain.

As the INSLM said in 2013, it might "suffice to predict that no court would ever venture [in a finding that the attorney-general's certificate is determinative that the court should be closed]". It also said, however, that "there was a striking shortage of concrete cases in which the *NSI Act* has actually been applied in a fully contested manner".

With the Collaery and Witness K case now putting this to the test, these debates are beginning anew. In a statement released last week, the Australian Lawyers Alliance said: "An open court is usually an essential component of a fair trial and we believe it is required for the defence to be able to properly exercise their right to defend themselves. However, we still maintain there is no public interest in this case proceeding at all."

It is anticipated that Porter will soon issue a non-disclosure certificate and that the preliminary hearings will recommence in secret as early as February next year.