

## Why is Bernard Collaery's trial a secret?

Commentary in the Weekend Australian by Steve Bracks, 15 June 2020



Bernard Collaery is 'being tried in secret for reporting a crime by one of the richest nations in the world against one of the poorest'. Picture Kym Smith

The pandemic and the tragic unravelling of President Donald Trump's America have combined to aid Canberra's agenda to keep the prosecution of former ACT attorney-general Bernard Collaery out of the public eye.

There has been barely a mention in the media recently about an extraordinary cohort that included former prime ministers, presidents, ministers, generals and ambassadors who had provided affidavits to the ACT Supreme Court in support of Collaery's submission that his trial for breaching the Intelligence Services Act should be held in public.

It is a year since the AFP raided the home of News Corp journalist Annika Smethurst and the ABC headquarters over separate reports sourced from whistleblowers.

Now we have the media banned from covering key elements of a whistleblower's trial.

The charges against Collaery concern revelations that in 2004, the then foreign minister, Alexander Downer, approved an Australian Secret Intelligence Service operation to bug the room used by East Timor's negotiators during maritime boundary negotiations with Australia.

The ACT Supreme Court pre-trial hearing was necessary because Attorney-General Christian Porter issued a nondisclosure certificate under the National Security Information Act.

The act was introduced in 2004, the year the bugging in Dili occurred, to allow national security information to be used in Australian courtrooms — under a regime of strict secrecy. It was a response to the war on terror.

It is sensible that alleged perpetrators of breaches of Australia's "security" should be prosecuted without exposing our intelligence secrets.

But why is an Act, introduced to facilitate the prosecution of terrorists, invoked in the trial of a whistleblowing lawyer, who revealed Australia's spying on East Timor during Timor Sea maritime boundary negotiations almost a decade and a half ago?

There was no national security threat to Australia or Australian citizens, and any damage to Australia's relationship with our close, friendly, underdeveloped neighbour East Timor, has surely already occurred – and arguably been remedied by the median line-based maritime boundary treaty East Timor signed in March 2018. If anything, the government's decision to prosecute Collaery and Witness K, just two months after the treaty was signed, has again tested and stressed Australia's relationship with Timor-Leste.

Two of the new nation's leading statesmen, my friends Xanana Gusmao and Nobel Laureate Jose Ramos Horta, both of whom have served as prime minister and president, swore affidavits in support of Collaery's plea for an open trial.

Both were prepared to travel to Canberra to be cross-examined on their evidence until the COVID-19 pandemic made that impossible.

The pre-trial hearing started on May 25 – in the ACT Supreme Court.

The absurd degree of secrecy surrounding the prosecution means that we don't know if Gusmao or Horta appeared by video link, or if they will appear at a later date when they can travel, or if their evidence has been accepted by the prosecution unchallenged.

Nor do we know if Collaery's other high-profile witnesses, Australia's former Indonesia ambassador John McCarthy, former foreign minister Gareth Evans and former defence chief Chris Barrie, have given evidence.



Illustration: John Tiedemann

The trio's statements are not public, but Justice David Mossop told the court during an earlier pre-trial hearing that their affidavits were intended to directly challenge assertions by the Attorney-General that there would be a risk of prejudice to Australia's national security if certain information was disclosed publicly during the trial.

Interestingly, given the past roles of Evans, McCarthy and Barrie, all three would have the highest level of security clearance. But again, we don't know if this means they have been able to see and challenge the evidence against Collaery.

I suspect a primary motivation for the excessive secrecy surrounding Collaery's prosecution is to protect former prime minister John Howard and Alexander Downer, who could both be called to give evidence about why the spying was authorised.

I can understand why they would be uncomfortable seeking to justify the bugging in open court.

How do you defend diverting ASIS officers from the war on terror to spy on the leaders of the desperately poor Timorese?

At the time of the bugging, the nation had only been in existence for two years and carried the physical and emotional scars of the brutal 24-year Indonesian occupation.

In what moral universe can you justify installing listening devices to add to Australia's already massive advantages in negotiations with the Timorese for rights to \$40bn-plus worth of oil and gas in the Timor Sea — on Timor's side of the median line? Clearly the same moral universe in which Collaery is being tried in secret for reporting a crime by one of the richest nations in the world against one of the poorest.

The spying was a disgraceful episode in Australia's history perpetrated by the Howard government, and successive Coalition governments have continued to defend the indefensible.

The spying is out of the bag, and attempts to cover it up, and impose secret trials on moral men, only adds to Australia's shame.

*Steve Bracks was premier of Victoria from 1999 to 2007.*