

Coalition's push for secret trials: behaviour of a tin-pot dictatorship

By Ian Cunliffe, 7 September 2020 in Michael West Media

Claims that the release of information poses a risk to national security can be used to avoid legitimate scrutiny of conduct. If ever there were reasons to suspect a cover-up by this government, the Bernard Collaery and Witness K court cases are prime examples, writes **Ian Cunliffe**.

Are secret trials, better known for occurring in tin-pot dictatorships, going to take root in Australia? Is the government able to bully and intimidate the judiciary to bend to its wishes?

The trials of Witness K and Bernard Collaery are test cases.

The prosecution of Witness K has been shrouded in near total secrecy. We know slightly more about the Collaery prosecution, mainly through the belated release of a redacted judgment on whether or not Collaery should largely be tried in secret – he is to be.

One of the most objectionable aspects of secret trials is that we don't know what evidence is being held back, and its significance. But it is safe to assume that evidence is more likely to be vital and significant than trivial.

I have previously analysed aspects of Justice Mossop's judgment that agrees with Attorney-General Christian Porter that secrecy should prevail for important parts of the trial. In answering that question, the judge applied the wrong legal test. He stated the question to be whether a public trial meant there would be "a risk of prejudice to national security". But the proper question under the *Intelligence Services Act* is whether openness was "likely to prejudice national security".

Justice Mossop noted the danger that claims of national security could be used to keep hidden information that was politically embarrassing or for a government to avoid legitimate scrutiny of its conduct. If ever there were cases in which there is reason to suspect such a cover up, the Collaery and K cases are prime examples. Yet Justice Mossop has ruled in favour of secrecy, in accordance with the expressed wishes of Porter, and without making clear why.

We can deduce that the case against Collaery relates to him telling ABC programs that the Australian Secret Intelligence Service (ASIS) had bugged Timor-Leste in 2004, and the allegation that he conspired with Witness K for K to tell the TimorLeste Government that ASIS had done so. However, the indictment against Collaery is silent about what the forbidden information was; another aspect of the appalling secrecy. Even Collaery does not know what his alleged crime was.

What is so secret and sensitive about the Collaery trial? It seems to come down to one thing and one thing only – the allegation that ASIS bugged Timor-Leste, which has been in the public domain since at least 2007. Justice Mossop noted that more than 600 media reports referred to the allegations. What is so secret?

I have concluded that Porter and the judge have decided that a secret trial is required to spare the Federal Government the embarrassment of having to confirm that ASIS did bug Timor Leste. That is the only “secret”.

We often hear politicians avoiding scrutiny by saying that they “neither confirm nor deny” (NCND) an allegation. Politicians from both sides have done that in relation to the Timor-Leste bugging.

Disturbingly, Justice Mossop has elevated that evasive political response to the status of significant legal principle. In the Collaery case, the utter hypocrisy of neither confirm nor deny is clear: either ASIS bugged Timor-Leste’s Cabinet Room – in which case, plausibly, it is a breach of secrecy to say that it did; or it didn’t bug, in which case it is furphy or a lie but most definitely not a breach of secrecy to say that it did. But by neither confirming nor denying what happened and still carrying on the Collaery prosecution, the Attorney-General is playing childish games.

Distinguished lawyers and politicians say that senior Cabinet ministers and senior officials likely committed serious criminal offences both in Australia and East Timor in carrying out an expensive program of commercial eavesdropping on behalf of major corporate interests, including notably Woodside Petroleum. Some of those ministers and officials who likely committed serious criminal offences benefited financially from their associations with Woodside.

Now, important principles of the rule of law – open justice, open courts, accountability and transparency and fair trials are to be sacrificed to enable the Government to prosecute K and Collaery while avoiding the embarrassment of acknowledging its disgraceful conduct towards Timor-Leste.

The ACT Supreme Court has only four resident judges. That is a very small court. Apart from Justice Mossop, Justice John Burns is a resident judge and he has been at the centre of even more intense pressure from security agencies in relation to the Witness J and Witness K cases. Mostly, hearings involving Witness K have not even been listed in the court list. No K judgments are public. Members of the public are entirely excluded. In Witness J’s case, the man was long since imprisoned before even the Attorney-General of the ACT knew he existed. The ABC’s Andrew Probyn wrote of J that he was “possibly the only person in Australian criminal history to be tried, [sentenced and imprisoned in secret](#)”. As far as I am aware, that is correct. Witness J spent 455 days in prison.

In such a small court, the pressure of events from the big house just across the lake must be intense, and difficult to resist. The ACT Supreme Court is under intense pressure. It is wrong that the Federal Government is exerting such pressure. Is the Court equipped and able to resist, as it should?

Secret trials – in any jurisdiction in Australia – undermine the rule of law. The judicial system must be, and must be seen to be, open and transparent. It is imperative to faith in our system of law and government that the judges are independent and are not bullied and intimidated into making decisions about the guilt or innocence of people. Or are we content for governments to bully and intimidate the courts, and to have secret trials in controversial criminal cases?