

'I am unable to say much': anger simmers as Timor bugging hearing goes ahead in secret

Christopher Knaus in The Guardian, 29 May 2020

On Wednesday, in Canberra's labyrinthine new court complex, a procession of remarkable power made its way past the guards stationed outside Bernard Collaery's hearing.

Intelligence leaders, diplomats and former ministers lingered briefly in the waiting area of the oddly quiet ACT supreme court, before entering a room where journalists could not follow.

What was said may never be known.

Collaery stands accused of sharing protected intelligence information by helping his client, the former spy Witness K, expose [Australia's bugging of Timor-Leste government offices in 2004](#), while the two allies were negotiating to carve up lucrative oil and gas reserves in the Timor Sea.

The barrister cannot speak about the case. But he remains unbowed.

"Our profession will not be cowed into ignoring those with a genuine grievance," Collaery told the Guardian. "My colleagues and I shall continue to represent those who expose impropriety even at a cost to our own selves."

Anthony Whealy, a former judge who has presided over NSW's highest courts, has followed the case closely through its various twists and turns.

He, like the former leaders of [Timor-Leste](#), sees Collaery as a hero, not a criminal.

"I think Collaery must be seen as somebody who's done something quite heroic in the public interest, rather than someone who has committed an offence and is facing trial and a possible jail sentence," he said. "That in itself places Australia in a position where its reputation would be very poorly received internationally."

A lawyer on trial, national security and secret hearings

On Monday, reporters, including [from the ABC and the Canberra Times](#), gathered in the public gallery for the start of Collaery's pre-trial hearing.

The hearing is designed, largely, to work out what evidence can be heard publicly. Reporters were, initially at least, asked to hand over their mobile phones before entering.

Then, after a short explanation, they were booted out of the courtroom.

As they left, Collaery handed them a statement.

"I am unable to say much and you are unable to report much. This is the state of our now fragile democracy," it read.

Justice David Mossop, a well-respected judge sworn in three years ago, has spent the time since hearing evidence in closed court.

He has little choice.

The commonwealth has intervened in the matter by invoking powers in the National Security

Information Act, which strictly govern how sensitive information is handled by the courts.

Those powers have caused controversy in a string of cases in recent years.

In fact, as the Collaery case was heard on Wednesday, the same powers were being used to [prevent the public airing of evidence](#) in a defamation case brought by special forces veteran Ben Roberts-Smith, which is canvassing disputed allegations of war crimes by Australian troops in Afghanistan.

Two years earlier, the commonwealth powers were [used to prosecute and jail a former military intelligence officer](#), Witness J, through the ACT's courts in extraordinary secrecy. Not even the ACT's justice minister knew of the proceedings.

The powers are designed to stop sensitive information finding its way into the wrong hands. The identities of intelligence officers, for example, or information about military tactics and capabilities.

There is little dispute that such material must be guarded closely, absent compelling public interest otherwise.

But critics say the NSI Act is not striking the right balance between principles of open justice, press freedom, and national security.

The powers are being closely monitored by the Law Council of Australia, among others.

Whealy dealt with issues of national security often when on the bench.

He says that, although the powers tip the scales towards national security, care is typically taken by courts to preserve a defendant's right to a fair trial.

But the commonwealth's approach in the Collaery case made it more complicated, he said.

"In the Collaery case, the commonwealth has adopted a neither-confirm-nor-deny approach," he said. "This means that for the purpose of arguing about national security they will neither confirm or deny the bugging has taken place, even though at the same time they are alleging that Collaery wrongly communicated information about the bugging."

"This poses a difficult question for the defendant at the trial."

The chief executive of Transparency International Australia, Serena Lillywhite, says the NSI Act is one element of what she sees as an "ever-increasing state of secrecy".

"While there needs to be a balance between the government's duty to protect Australians and the government's duty to be held to account by its people, I, like many Australians, am increasingly concerned that this balance is out of kilter," she told the Guardian.

The Law Council says the NSI Act needs reform to ensure that open justice, fundamental to a democratic society, is only limited in rare circumstances.

The council's president, Pauline Wright, said "careful scrutiny" was needed to ensure the powers maintained the right balance.

That includes reforms requiring judges to give reasons when they close the courts in such matters, and the appointment of "contradictors", or special advocates, who speak on behalf of any party forced to leave a courtroom before confidential material is canvassed.

"To maintain confidence in the administration of justice, trials must not only be conducted fairly, they must be seen to be conducted fairly," she said.

More generally, Wright is also concerned about any intervention by the commonwealth that would interfere in a lawyer's representation of a client.

“Having a robust and independent legal profession is fundamental to the proper administration of justice,” she said.

“To maintain separation of powers there should never be, or be the perception of, executive interference in the role of lawyers representing their clients and their clients’ interests.”

The bugging, a long memory and the prosecution

Protesters braved Canberra’s late autumn cold for Collaery’s arrival outside the gleaming new ACT court complex on Monday.

They’ve been there for many of the major milestones of this case, brandishing signs saying “defend whistleblowers”, “no secret trials”, and “spying is the crime”.

The anger over Collaery’s treatment still simmers, despite the long road to this point.

Collaery stands accused of unlawfully disclosing secret intelligence information and conspiring with Witness K, his client and a former Australian Secret Intelligence Service officer, in doing so.

Witness K was among a number of intelligence officers involved in a mission to bug the government buildings of Timor-Leste during oil and gas treaty negotiations in 2004.

The listening devices gave Australians the upper hand. They could get access to bargaining positions, tactics, and the competing positions of various ministers and officials.

Australia [secured a 50-50 split](#) of the Greater Sunrise fields, positioned 450km north-west of Darwin and 150km south of Timor-Leste. The deal was a boon for the Australian government and a [joint venture of multinationals](#), led by Woodside, seeking to exploit the Timor Sea.

Witness K became deeply uncomfortable about the operation, conducted at a time when Australian intelligence resources were needed to counter terrorist threats following the Bali bombings.

He approached the intelligence watchdog and was given approval to talk to a lawyer, Collaery.

Collaery later helped mount a case on Timor-Leste’s behalf in the international courts.

The scandal was revealed publicly, causing significant embarrassment to the Australian government.

It responded by raiding Collaery’s home office in Canberra, and seizing Witness K’s passport, in effect preventing him from going to the Hague to give evidence.

In 2018, after Timor-Leste dropped its case against Australia in the international courts, criminal proceedings against Collaery and Witness K began.

Whealy says the fact of Australia’s bugging of Timor-Leste is now well known.

“You could honestly say that horse has bolted now, it’s been known for a long while that this happened,” he said. “Even though the commonwealth won’t admit it, it could hardly damage our international standing,” he said.

“I’ve long argued that Australia should acknowledge and apologise that this happened.

“That would enhance our reputation, I believe, not harm it.”