

‘Absurd’: lawyers criticise government’s high court bid to keep Collaery decision secret

Commonwealth also seeking to put forward new secret evidence that Bernard Collaery’s lawyers say would cause ‘irreparable prejudice’

Christopher Knaus – *The Guardian* – 03 December 2021

The federal government will attempt to use the high court to thwart the publication of a decision ruling that Bernard Collaery’s trial should not take place in secret, a step human rights lawyers have slammed as “not only absurd but undemocratic”.

Earlier this year, the Australian Capital Territory’s highest court, the ACT court of appeal, ruled that [Collaery’s trial](#) should be held in the open, citing the importance of open justice and the need to deter political prosecutions.

But the ACT court of appeal never published its reasons for making that decision, because the Commonwealth wanted them partly suppressed on national security grounds.

The court of appeal refused to redact the judgement.

In a dramatic escalation late on Friday, the Commonwealth sought leave to appeal in the high court to have parts of the judgement suppressed.

The attorney-general Michaelia Cash did not respond to requests for comment. But the high court confirmed the application had been filed.

The government’s actions drew immediate condemnation from human rights lawyers.

Human Rights Law Centre senior lawyer Kieran Pender said it was another “perverse turn” in the government’s pursuit of secrecy in the prosecution.

“The Attorney-General’s attempts to have a decision that said no to secrecy itself be kept secret is not only absurd but undemocratic,” he told the Guardian.

“Rather than seeking to shroud this prosecution in secrecy at every turn, the Morrison Government should be reforming the law – like it promised to do 12 months ago – so that whistleblowers who speak up are protected, not punished.”

Collaery, a barrister, is [facing trial](#) for his alleged role in revealing a 2004 bugging operation Australia mounted against Timor-Leste. Timor-Leste claims the operation was designed to give it an advantage during negotiations with the impoverished and fledgling nation over oil and gas reserves in the Timor Sea.

At the same time as it seeks a high court hearing to redact the judgement, the Commonwealth is also seeking to put new secret evidence before a judge, which Collaery cannot see, to justify the need for secrecy in his trial.

That evidence would only be available to the judge, and would tell him that the national security situation and Australia's international relations in the past two years, as Collaery's trial has dragged on.

The evidence would force the court to again decide whether, on balance, Collaery's trial may need to be partly heard in secret.

Earlier on Friday in the ACT supreme court, Collaery's lawyers said that would cause "irreparable" and "obvious" unfairness.

"The unfairness is obvious and it is irreparable," Collaery's barrister, Christopher Ward SC, told the court. "It is an irreparable prejudice. The unfairness is that the commonwealth gets to update evidence ... as to world events, as to the current state of asserted threats to national security in the way that the defendant is simply unable to respond to."

The court heard that much has changed for Australia's international relations in the 18 months since the case began, including, for example, the dispute with France over the submarines contract, the resignation of Christian Porter as attorney general, and the Brereton inquiry report into alleged special forces war crimes in Afghanistan.

Ward warned of an "endless process" in which delays to the case allowed the commonwealth a continuous ability to say the world had changed, and that new factors ought to be taken into account when determining the national security risk of the trial.

But Jeremy Kirk SC, representing the attorney general, said the commonwealth was simply trying to update the evidence, now two years old, on the potential national security ramifications, not reopen the original hearing on how much of the trial should be conducted in secret.

Kirk said it would be absurd to not allow such evidence to be updated and dismissed the suggestion it would lead to an endless process of delay and updating evidence.

The unfairness, he said, would be towards the attorney general and the national security interests of Australia, should the commonwealth not be permitted to update the evidence.

"That is a bit of an unreal submission, in our respectful submission ... this evidence is 18 months to two years old," he said.

Justice David Mossop has reserved his decision on whether to accept the new evidence. He will hand down his judgment on Tuesday.

Collaery was acting for his client, former intelligence officer Witness K, when the pair helped Timor-Leste mount a case in the international courts against Australia, alleging a treaty governing resources in the Timor Sea was void because of Australia's bugging operation.

Timor-Leste subsequently negotiated a better deal for a fairer share of the oil and gas reserves.