

Bernard Collaery trial: Coalition tells high court release of judgment would risk national security

Collaery won ACT court of appeal case lifting previous secrecy orders and declaring importance of open justice

The Guardian, 7 December 2021. By Christopher Knaus

The full publication of a key judgment in the trial of Bernard Collaery would prejudice Australia's national security and must not be allowed, the federal government has told the high court.

Prior to October, significant parts of Collaery's trial were to be shrouded in secrecy after some of Australia's most senior intelligence and foreign affairs officials convinced a court of the risk an open hearing posed to national security.

Collaery later [won a major victory](#) in the Australian Capital Territory court of appeal, which lifted the previous secrecy orders and declared the importance of open justice in, among other things, deterring political prosecutions.

A summary of its decision was published. The court of appeal's full judgment, however, has never been seen by the public, because the commonwealth intervened to demand it be redacted.

When the court's chief justice, Helen Murrell, refused to do so, lawyers for the attorney general, [Michaelia Cash](#), took the remarkable step of seeking the high court's intervention.

In its application to the high court, obtained by the Human Rights Law Centre senior lawyer Kieran Pender and seen by Guardian Australia, the government argues allowing the public to see the unredacted judgment would "prejudice national security".

"The result is that, unless special leave is granted and the Redaction judgment is overturned, information the disclosure of which is likely to prejudice national security will be made public," the document says.

The government acknowledges that open justice is of "undoubted importance".

But it said that national security must be given the greatest weight when deciding what information can be disclosed to the public through the National Security Information (NSI) Act, which governs how courts handle sensitive information.

The courts are still deciding precisely how much of Collaery's trial will be held in open court.

It is still possible that the ACT supreme court will decide to conduct parts of it in a closed court, if it is convinced by secret evidence, which not even Collaery has seen, from heads of Australian intelligence agencies, and the departments of foreign affairs and home affairs.

The Commonwealth argues that publishing the unredacted judgment would compromise that ongoing process, by putting information into the public domain before the issue has been fully concluded in the ACT supreme court.

“Chief Justice Murrell assessed it to be ‘particularly important that the public has unadulterated access to the core parts of the court of appeal’s reasoning’,” the government told the high court. “However, the redactions sought by the attorney general were designed simply to preserve the position until final [NSI Act] orders were made. The redactions could then have been revisited in light of those orders.”

The high court fight will be championed by solicitor general Stephen Donaghue, QC.

It’s not the only front on which the government and Collaery are fighting over secrecy.

Last week, the [attorney general attempted to convince the ACT supreme court](#) to let it produce new evidence about the potential risks to national security that would justify holding parts of the trial behind closed doors. The new evidence would take into account the changed national security and international relations environment, which could warrant holding parts of the trial in secret.

Collaery would also not have been able to see that evidence.

His lawyers argued against allowing the government to “update” its evidence on the national security risks, saying it would be hugely unfair and create a perpetual vortex of delay.

Justice David Mossop on Tuesday denied the government the opportunity to add new evidence.

But he left the door open for the government to make a new application under the NSI Act to keep parts of the Collaery trial secret.

Collaery is facing trial for his alleged role in revealing an Australian intelligence operation that bugged the offices of the Timor-Leste government during 2004 oil and gas negotiations.

He and his client Witness K, a former spy, helped Timor-Leste mount a case before the international courts on behalf of Timor-Leste.

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