

# Judge rules Australian government's attempt to obstruct Bernard Collaery's use of barrister 'unfair'

*Justice John Burns says attorney general has no role in determining whether it is necessary for Collaery to engage new counsel*

Christopher Knause - *The Guardian* - 9 February 2021

<https://www.theguardian.com/australia-news/2021/feb/09/judge-rules-australian-governments-attempt-to-obstruct-bernard-collaerys-use-of-barrister-unfair/>

The federal government's attempt to use "extraordinary" national security powers to obstruct Bernard Collaery engaging a highly respected barrister in the [Timor-Leste](#) spying case was "disturbing" and "unfair", a judge has ruled.

Collaery is fighting allegations that he unlawfully shared protected information about a [2004 Australian spy operation that bugged allies in the Timor-Leste government](#) to gain the upper hand in negotiations over oil and gas resources in the Timor Sea.

The protracted case, which is shrouded in secrecy due to national security law, is winding its way to trial in the ACT supreme court.

Collaery, who is viewed in Timor-Leste as a heroic whistleblower, is appealing the decision to keep aspects of the case secret due to national security laws – a ruling sought by attorney general Christian Porter.

One of Australia's leading barristers, Bret Walker, SC, who was appointed [Australia's first independent national security legislation monitor](#), offered to represent Collaery in the appeal pro-bono just before Christmas.

Under the National Security Information (NSI) Act, Collaery's lawyers had to ask the federal government to approve Walker to view and handle confidential material relevant to the case.

Collaery also asked that the appeal be delayed for a short time because Walker was unavailable on the dates previously set down for hearing.

Lawyers for Porter took almost a month to properly respond to the request. When it did write back on 22 January, the Australian government solicitor's office said it was still "considering" the matter and wanted to limit the sensitive information to "active and necessary participants in the proceeding".

"Relevant Commonwealth officials have been considering your request to add Bret Walker SC to the certificate," the AGS wrote. "A guiding principle in these considerations is ensuring that access to the highly sensitive national security information disclosed in this proceeding is restricted to active and necessary participants in the proceeding."

The ACT court of appeal took a dim view of the government's approach.

In reasons published on Tuesday, justice John Burns said the attorney general had no role in determining whether it was necessary for Collaery to engage new counsel.

He labelled the suggestion "disturbing".

"The email from AGS to the appellant's solicitors on 22 January 2021 carries a disturbing suggestion that those who represented and advised the attorney-general perceived that their satisfaction at the necessity for Mr Walker to be briefed by the appellant was in some way relevant," Burns wrote.

"It clearly was not."

Burns said the decision whether to engage new counsel should be left to the client alone.

Burns described the powers in the NSI act as "extraordinary" and said they should be used carefully.

"The power to refuse to include a lawyer nominated by an accused person should not be exercised in order to gain a forensic advantage," Burns said. "Nor is it any part of the role of the attorney-general to base his or her decision on whether he or she thinks that is necessary for the accused to instruct that particular lawyer."

The government eventually permitted Walker to access the confidential material, with roughly two weeks until the appeal was to be heard.

Burns said the delay was "unfair" on Collaery. It meant that any benefit he obtained by briefing Walker was lost.

"For this reason I acceded to the appellant's application to vacate the appeal date," he said.