Bernard Collaery's lawyers argue secret 'court-only' evidence should be banned in national security cases

In evidence to the national security law watchdog, the legal team said the NSI Act had fundamental issues and needed reforming

The Guardian, 20 July 2023. By *Christopher Knaus*

Bernard Collaery's lawyers say courts should be banned from hearing secret evidence about crucial aspects of a case which are hidden from an accused under strict national security laws.

Collaery's legal team gave evidence on Thursday to the Independent National Security Legislation Monitor, Grant Donaldson, about their experience in dealing with the secrecy restrictions contained in the National Security Information (NSI) Act, which is designed to safeguard sensitive information during court proceedings.

Intelligence agencies believe the law is necessary to prevent sensitive material being exploited by foreign spies, who see court cases as a potential intelligence collection tool, and believe it is appropriately balancing the need for secrecy with the proper administration of justice.

Collaery's legal team told Donaldson that, while they understand the need for the NSI Act, it has fundamental problems and requires significant reform.

In a detailed submission earlier this month [see page 3], they told the inquiry the secrecy restrictions on the case were so severe that Collaery was forced to obtain government approval for his lawyer to view evidence against him, communicate with his legal team in-person in secure rooms chosen by the commonwealth, physically transport documents around the country at exorbitant cost and compose drafts on commonwealth laptop computers at pre-approved locations.

The government was also able to lead "court-only evidence" in support of its effort to impose secrecy on the case. That court-only evidence was deemed so sensitive that Collaery and his legal team were never able to see or know about it.

Phillip Boulten SC, who acted for Collaery and sits on the Law Council of Australia's national criminal law committee, said the use of court-only evidence could potentially go further.

He suggested that evidence about a defendant's guilt or innocence – material that goes to the substantive issues at trial – could be completely withheld from a defendant and their lawyers under the NSI Act, and shown only to a court or jury.

"It is more than theoretically open to the prosecuting authorities and to the government to want to try to prosecute someone where evidence that goes to the facts in issue is so secret that the accused should not know it," he said. "And we say there should be a ban on that."

Boulten said defendants could seek a permanent stay to halt the case against them in such cases, citing the unfairness.

Donaldson, a watchdog overseeing national security laws, suggested that the argument over a stay "wouldn't be a very long" one, given the clear unfairness such a scenario would pose to defendants.

"Are you talking about evidence that goes before a jury, to which jury has a regard in deciding guilt or innocence, that is not shown to the defendant or defence and they're not present in court while it's given?"

Boulten replied: "That's what I'm talking about. That might be very, very easily solved in a criminal trial. It might not be so straightforward in civil proceedings and it's certainly not the case in proceedings where they are designed to make orders against somebody."

Earlier, the Human Rights Law Centre and the Law Council of Australia raised serious concerns about the NSI Act and called for significant reform. The HRLC senior lawyer Kieran Pender told the inquiry the laws "significantly undermined open justice".

Pender made a series of recommendations, including that an independent advocate be appointed in NSI Act cases to ensure someone is in court arguing for open justice.

"[The open justice advocate] addresses an all-too-real vice in these cases where secrecy otherwise suits the interests of all of the parties," he said.

The Law Council of Australia said the way the NSI Act was operating represented an "unacceptable restriction on the right to a fair trial, and to a public hearing and the principle of open justice".

The Law Council said the NSI Act effectively allows the government to dictate which lawyers can act for defendants by imposing a security clearance requirement.

Lloyd Babb SC, the chair of the Law Council's national security law working group and the NT's top prosecutor, said the law is at odds with Australia's international obligations.

"Without significant amendments, these provisions permit an unjustified interference to a person's legal right to a legal representative of his or her choosing," Babb said. "This is a critical facet of the rule of law and it is protected by Australia's obligations under international human rights law."

Bernard Collaery trial highlights ‘prohibitive’ and ‘onerous’ government secrecy restrictions, lawyers claim

Exclusive: Whistleblower’s legal team detailed the ‘profound’ cost of the commonwealth’s rules in inquiry into the effectiveness of the National Security Information Act 2004

The Guardian, 3 July 2023. By *Christopher Knaus*

The secrecy restrictions around Bernard Collaery’s prosecution were so severe that he was forced to obtain government approval for his lawyer to view evidence against him, communicate with his legal team in-person in secure rooms chosen by the commonwealth, physically transport documents around the country at exorbitant cost and compose drafts on commonwealth laptop computers at pre-approved locations.

The national security law watchdog is currently investigating the operation and effectiveness of the National Security Information Act 2004 (NSI Act), which the federal government uses to protect sensitive information during court proceedings.

The use of the NSI Act has prompted concern in several cases in recent years, including in the Collaery case, where significant parts of his since-abandoned trial would have been hidden from the public.

In an extraordinary submission to the inquiry, Collaery’s legal team has detailed the “profound” cost and disadvantage his legal team faced as a result of the secrecy restrictions.

Collaery was forced to obtain government approval before his chosen barrister, Bret Walker SC, could view material against his client ahead of a crucial appeal. The government sat on the request for approval for four weeks, leaving Walker unable to access “any of the large amount of confidential material in the case to provide advice” until just before the hearing, conduct the judge described as “disturbing”.

Collaery’s team, spread across three cities, faced huge barriers in communicating about the case, obtaining instructions and sharing material.

Some documents could only be discussed in person, in rooms that were government-approved.

To share documents between members of the legal team, they either had to send physical copies carried by an approved lawyer between cities, or pay about $1,000 a trip for an approved courier. The documents had to be double-bagged within approved locked containers.

Some confidential documents had to be stored in locked safes and only handled in locations pre-approved by the government, and only in the absence of phones and other electronic devices, other than commonwealth equipment.

Documents containing confidential information had to be drafted on commonwealth laptop computers in approved locations and printed on a commonwealth-provided printer. They could not be copied and Collaery had to keep a secure register recording each time confidential material was handled, according to the submission.

“The loss of the ordinary efficiencies that come from use of email, the internet, and telephone and video meetings was profound,” Collaery’s lawyers told the inquiry.

“Repeated travel and in person meetings were required to obtain instructions and manage the case.

His lawyers were prevented from using the internet in some court proceedings, forcing them to print all material.

“If the need arose for an additional confidential document to be provided in court, an approved person had to return to a secure location, to connect to a secure printer from the secure laptop, print the document and transport it back to court.”

Collaery’s lawyers said they understood the need for document-handling restrictions, but said they currently posed serious practical barriers to running a case.

Meeting the costs of the requirements would also be “prohibitive” for most defendants.

They recommended the establishment of a public legal funding scheme to cover the costs of defendants involved in NSI Act cases.

That recommendation has also been made by the Law Council of Australia and the Human Rights Legal Centre (HRLC) in separate submissions to the inquiry.

“It is extremely onerous to represent a client under the NSI Act,” the HRLC said.

“Some of these requirements may be justifiable given the national security risk involved. But there is a significant risk that such burdens will lead to representatives declining to act in such matters, or the costs of such representation may increase to a position where clients cannot afford it.”

The Law Council of Australia said such a scheme should be funded by the commonwealth and “should not be means- or merits-tested”.

The attorney general, Mark Dreyfus, who intervened to end the Collaery prosecution, has already signalled he will pursue reforms to the NSI Act, but is awaiting the results of the current inquiry by the Independent National Security Legislation Monitor.