

Secret hearings aren't the most unusual part of the case against Witness K lawyer Bernard Collaery

ABC News, by ACT Court Reporter Elizabeth Byrne 21 June 2020

Canberra lawyer Bernard Collaery's prosecution is an extraordinary thing. But the strangest part is not that some of the case against him has been discussed in secret — it's that he was ever charged at all.

In Canberra there are, from time to time, spies who find themselves in need of a lawyer; and there are lawyers who are vetted and security cleared to help.

The fact that Mr Collaery, a prominent Canberra lawyer and former ACT attorney-general, was charged alongside his client, Witness K, is bound to have sent a chill through others doing similar work.

What is the trial about?

Mr Collaery and Witness K, a former senior spy, are charged with revealing national secrets — specifically, **allegations that Australia bugged East Timor's government building in 2004 to gain advantage in crucial oil and gas negotiations.**

In 2013, as Mr Collaery was representing the government of East Timor at a case in the Hague, his home was raided by ASIO and his client, Witness K, detained.

No charges were laid until after a final treaty was signed in New York in March 2018.

But it is the claims of a "secret trial" targeting Mr Collaery that have captured national attention this week.

In reality, that's somewhat of a misnomer.

Pre-trial hearings have been going on for more than a year in Canberra and, **with the exception of part of one session, all have been open to the public and the press.**



Protesters outside the ACT Magistrates Court in 2018, when the case first began. (ABC News: Ian Cutmore)

Where did the mention of a secret hearing come from?

Mr Collaery and Witness K were charged under National Security laws and their prosecution is guided by the National Security Information Act.

That act sets out a process that begins with the Federal Attorney-General deciding whether he should issue a certificate to protect any classified evidence he believes is of national security importance, that is contained in the brief of evidence.

In Mr Collaery's case a certificate was issued.

The next step is for the accused and the prosecutors to agree on the matters that will remain classified.

The act says if they can't agree then a court must decide, in a special hearing.

This was the path chosen by Mr Collaery and where the talk of a "secret trial" comes in.



Bernard Collaery says his law practice has been destroyed by the secret Witness K trial (Adam Harvey)

Except for the first 10 minutes, that hearing was in a closed court and not open to the public or press.

Mr Collaery's lawyers would have used the hearing to convince ACT Justice David Mossop that much of the material the government is trying to keep secret is not actually of national security significance.

The ACT judge must now decide which issues will remain secret and which can be made public in the trial to come.

What do we already know?

The specifics of the national security matters, nominated by the Federal Attorney-General Christian Porter, are, of course, not public.

But quite a lot is known.

For instance, Mr Collaery announced plans in open court to call [two former East Timor presidents, Xanana Gusmao and Jose Ramos Horta](#), as well as former foreign minister Gareth Evans and former chief of defence Chris Barrie to support his case.

Mr Evans was even seen going into court on the day he was to give evidence in the closed hearing, although some of the evidence from other witnesses was delivered by affidavit.

Then, when the case was delayed because of COVID-19, even more details were revealed, specifically that several of the government's witnesses were not available because they were running the national response to the pandemic.

But what is in the public domain doesn't mean the impact of the classified material and the sensitivity of the Federal Government has not been very evident.

At one point, **Justice Mossop had to issue a ruling to protect his court staff from inadvertently breaching national security laws** that could expose them to jail terms.

And the Attorney-General's legal team was organising the collection of phones from members of the public and journalists outside the court, until Justice Mossop overruled it.



Bernard Collaery previously described the case as an attack on freedom of speech. (*ABC News: Nick Haggarty*)

But, part of this process is unusual...

Federal Attorney-General Christian Porter has said this is just a normal process.

"There are court cases all the time where some matters are not made public," Mr Porter told the ABC's *Insiders* program.

"That, in itself, is not terribly unusual."

He is right, to a degree.

It's very usual for there to be a closed court pre-trial hearing, to sort out which evidence is admissible.

There can be all sorts of issues, aside from national security, for which closed pre-trial hearings are held, including to protect victims of sex crimes or examine evidence from undercover police.

But what is unusual about Mr Collaery's case is that it is governed by a very specific piece of legislation.

The National Security Information Act stipulates who can be present at the closed hearing, and it **requires the court to give the greatest weight to the opinion of the Attorney-General about what is of national security importance.**

So, **unlike the normal process, the odds are stacked in the Government's favour**, although the judge does have some discretion.

What has happened to Witness K?

Witness K's identity is classified and he has only ever been represented in court by his lawyers.

Despite that, he did provide one of the more dramatic moments, when [his new lawyer swept into the ACT Magistrates Court, late, to one preliminary hearing, to announce he would plead guilty.](#)

That in itself has created something of a problem, as the ACT Magistrates Court demands the accused plead in person.

Managing that process will be difficult, as will maintaining an open system.

Witness K (or at least his lawyers) are expected to be back in court next month.



When considering what should remain classified, the court is required to give the greatest weight to the opinion of Attorney-General Christian Porter. (ABC News: Matt Roberts)



The trial of Witness J marked a departure from the norm. (ABC News: Emma Machan)

The march of secrecy

There have been several ACT Supreme Court trials and proceedings in recent years involving employees of the nation's security organisations that have been open, although restricted.

The recent so-called Witness J case marked a departure.

[This case only came to light because of a judgement against Witness J](#) in an application targeting jail authorities.

He had pleaded guilty to several crimes and been sentenced in the ACT court, in a completely closed session.

The give-away that something odd was going on was the two security guards posted outside the court.

And two journalists who asked what was going on were brushed aside, with the truth only emerging months later.

Compared to Witness J, **Mr Collaery is at least guaranteed a jury trial, and hiding his fate will be impossible.**

What his case has revealed is a tension between an open court system at odds with authorities preferring a more opaque version of justice.

For now all eyes are on Justice Mossop, who is yet to rule on what the trial will include in open court.