

# HOW NATIONAL SECURITY POWERS ARE BEING USED TO PROSECUTE WHISTLEBLOWERS IN SECRET

By KIERAN ADAIR May 25, 2020

<https://xenophondavis.com/bernard-collaery-trial-abuse-of-justice/>



One of the most important trials in Australia will resume this week – but thanks to the Morrison Government, it will also be one of the most secretive.

The trial concerns lawyer Bernard Collaery, who has been charged for his role in revealing the Howard Government's **illegal bugging of the Timorese Cabinet** in 2004. Charges against Collaery has also used his powers to ensure the public stays in the dark about the case. Since 2018, there have been over **30 scheduled hearings** into the charges – most of them have been conducted in secret.

To do this, Porter has used a section of the National Security Information Act (NSIA) which allows him to prohibit information related to 'national security' from being revealed in court – except this isn't a trial that threatens national security, it's a trial that threatens to expose Porter's predecessors.

"The extreme powers we gave to prosecutors in Australia were meant to save us from terrorists. Now the government seems intent on using those powers to annihilate those who act with the most moral of reasons," Mark Davis, Principal of Xenophon Davis, said.

## Closed Courts, Closed Justice

The NSIA was introduced in 2004, **as part of a suite of counter-terrorism laws**, designed to help prosecutors convict people for terrorism offences.

It creates a special procedure, in which the Attorney-General can issue a **non-disclosure certificate** that prohibits information from being revealed if they believe it will compromise 'national security.'

Once this notice has been issued, the court must hold a closed hearing in which the judge decides whether, and how much, information may be issued. This hearing isn't just closed to the public and journalists – members or the jury, the defendant and even their lawyers may be prohibited from attending.

“This undermines the defendant’s ability to argue their innocence. A core aspect of **procedural fairness** and the right to a fair trial is that defendants must know the case against them. This allows their lawyers to contest the veracity of the evidence through cross-examination.” Kieran Hardy, a counter-terrorism expert, writes.

Using the NSIA in the Collaery trial is significant because the accused is a whistleblowing lawyer, and not someone accused of terrorism.

“Here is a case where we find national security is being played as a card to bully citizens, cast them in the role of “terrorists” and cover-up the wrongdoing of a previous Coalition government, of which the current attorney general is in a direct line of succession.” Richard Akcland writes.

Last year, ABC’s Four Corners investigated **Porter’s use of the NSIA against Collaery**. In response, Porter stated that his preference is that ‘as far as possible, any legal proceedings in this matter should be conducted in open court’. But his actions speak otherwise.

## A Collaery In The Coal Mine

Collaery isn’t the only whistleblower that’s been targeted by these laws. Unlike his predecessors, Porter has used these national security powers to interfere in a number of high profile cases that threaten to embarrass the Government.

David McBride is one such case. McBride is a former Australian military lawyer, who is facing charges for **leaking documents to the ABC** which outline a series of command failures, and alleged war crimes, committed by Australian soldiers serving in Afghanistan.

In their case against him, the Government has used the NSIA to limit the evidence available to McBride’s lawyers, Xenophon Davis.

According to Kieran Hardy, “without knowing when or how the prosecution’s evidence was collected, or even the precise claims the evidence is making, **lawyers cannot adequately defend their clients**. They are fighting with one hand tied behind their backs.”

“Historically, the courthouse held the evidence, and decided what could be presented – and judges have been good at protecting sensitive material with non-disclosure orders” said Mark Davis, McBride’s lawyer.

“But the NSIA has totally flipped the separation of powers. Instead of the judge deciding, the Government now sits in the courtroom and sets the terms by which it can be accessed.”

With the Government announcing their intention to **further tighter restrictions on courts**, including denying some defendants the ability to choose their lawyers, this case should be a concern for all Australians.