# ANU College of Law Webinar
# Secrecy and Spying: The Trials of Bernard Collaery and Witness K

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I'd like to begin by acknowledging the traditional custodians of the land on which I stand today – the Dharawal people – and pay my respects to Elders past, present and future. I would also like to extend my respect to Aboriginal and Torres Strait Islander people present today, and express my support for the Uluru Statement from the Heart and the constitutional enshrinement of a First Nations Voice to Parliament.

The subject I would like to speak to today is the rising tide of secrecy in court proceedings, and the attendant threat to democracy.

The trials of Witness K and Bernard Collaery are, we know, shrouded in a heavy blanket of state secrecy. Much of this secrecy is provided for under the *National Security Information (Civil and Criminal Proceedings) Act* – the '*NSI Act*'.

The NSI Act was introduced in 2004, in the context of the global 'War on Terror'. Its aim was to facilitate to prosecution of terrorists by allowing the state to rely on national security information (*very* broadly defined) in court; instead of facing a choice between revealing the sensitive information in open court, or removing it from the body of evidence and thereby potentially scuttling the prosecution's case and allowing a dangerous person to go free.

Indeed, the NSI Act *has* been used in terrorism prosecutions, with comparatively scant controversy.

The NSI Act introduced into the Australian legal system an as yet unheard of notion of secret evidence – that is, evidence, relied on in court, but withheld from the public, the defendant, *and their lawyers*.

We are 5 months shy the 20 year anniversary of September 11. In that time, we have learnt that terrorism laws tend to be justified as extreme measures to counter an extreme threat, and then, over time, they <u>normalise</u> and <u>spread</u>. And this is just what has happened to the NSI Act's notion of secret evidence.

In the Witness K and Collaery cases, we have the NSI Act deployed to try, secretly, a whistleblower and his lawyer. K and Collaery and decidedly *not* terrorists. *(refer to previous comments by Keiran and Nicholas?)*

Equally concerning are new laws, inspired by the NSI Act. These laws indicate that secret evidence and secret trials are at risk of becoming increasingly, and disturbingly, normalised across Australia.

Since 2007, State and Territory governments have been introducing "tough new measures" to combat organised crime and gang violence: 'bikie laws'. These laws, for example, tend to include provisions for secret evidence – they allow prosecutors to rely on 'criminal intelligence' information in closed court without showing the defendant or their lawyers.

Many judges have criticised the provisions. Nonetheless, repeated constitutional challenges to these kinds of laws have resoundingly failed. Afterall, our constitution contains no express protections for due process or open justice.

The fair trial impacts of secret evidence laws are clear and have been observed by others. But there is another side – Democracy. Justice ought to be <u>open</u> as well as <u>fair</u>.

Shutting the defendant and their lawyers out is one (very bad) thing. The implications of shutting the *public* out oughtn't be understated or overlooked.

I want to close by observing two ways in which this has happened in the K and Collaery context.

1. First, the NSI Act shuts the public (and practically speaking the *press*) out of the proceeding.
    a. This is done by the introduction of an extended and highly complex closed court process, through which a judge determines issues around national security information and secret evidence. Importantly, the judge is *required* to give the <u>greatest weight</u> to national security, over and above other considerations (including fairness).

    b. Alternatively, secrecy is preserved through a process of consent orders. This avoids the 'greatest weight' requirement, and instead places the emphasis on negotiations between the parties. Now that process has many advantages, but it is unlikely to significantly protect open justice. Afterall, what weight would you expect most parties to a court matter to place on openness? Or, to put it more practically, are they really going to negotiate hard to ensure journalists are present in the courtroom? It is far more likely that speed and fairness will be top priorities.

    In all, the NSI Act places a heavy mantle of responsibility on the judge. The judge must strike a delicate balance between national security, trial fairness, open justice and, yes, press freedom. How well-equipped is a judge to do this without the benefit of contested, *fully informed* submissions from all interested parties?

2. The second way that democracy is threatened is by stopping the stories from reaching the public in the first place.

    Our scant whistleblower protections contain carve outs for the intelligence sector and disclosures of intelligence information. In many respects that is appropriate. But sometimes check and balance provided by a whistleblower is necessary. Occasionally, public disclosure of misconduct may be the only path to true accountability.
    Recourse to the IGIS was inappropriate and inadequate for Witness K. Clearly a new path for protected disclosures, capable of enhancing government integrity and accountability across our powerful intelligence and law enforcement sectors, is sorely needed.