ANU College of Law Webinar
Secrecy and Spying: The Trials of Bernard Collaery and Witness K
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Pauline Wright Civil liberty and rule of law concerns

There are a number of civil liberty and rule of law concerns raised by the prosecutions of Witness K and Bernard Collaery including:

- Freedom of speech in the public interest
- Open justice
- Equality before the law
- Independence of the legal profession

Here we have two people who told the truth, in the public interest, about Australia's unfair and unlawful bugging for commercial gain of a friendly nation. Instead of the perpetrators of the initial wrongdoing, it is the individuals who exposed it who are being prosecuted and facing sanctions, potentially gaol. A law that prohibits the disclosure of an illegal act by a public authority may infringe the freedom of political communication which is implied into our Constitution.

To the extent that the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) requires this case to be conducted behind closed doors, it offends the principles of open justice, since holding proceedings other than in an open court contradicts a fundamental attribute of a fair trial. It is a basic rule of the common law that the administration of justice should not take place behind closed doors, but must take place in an open court.

Public faith in the administration of justice requires that justice must not only be done but it must also be seen to be done. Secrecy or suppression is only ever appropriate in those rare cases where the exceptions to open justice have been appropriately considered and applied. The avoidance of political embarrassment is not sufficient justification to warrant the shrouding of proceedings. To justify secrecy, some real threat to Australia's national security must be established. To date, the government has not given any adequate explanation for holding large parts of the cases in closed court.

Closing the proceedings must be a proportionate response to address the risk that information prejudicial to national security may be released. The Australian public, and indeed the world public, is already aware that Australian spies are alleged to have defied international law by bugging the offices of the government of Timor Leste in order to gain the upper hand over this tiny, impoverished and friendly nation in negotiating a lucrative oil and gas deal for commercial advantage. There has been no indication by the Attorney General that there is any other national security issue to be served here other than to hide the former Coalition governments dirty tracks.

It is interesting that just this week in the ACT magistrates' court in the Witness K case, the lawyers for the AG, now Michaelia Cash, indicated they did not want to "devise a regime that would see the court automatically closed whenever sensitive information was likely to be discussed" saying that "the Commonwealth wanted to keep proceedings as open as possible". The new Attorney General's position is totally at odds with the previous position adopted by AG Christian Porter, invoking the provisions of the NSI Act to hold large parts of both cases in closed court. It will be interesting to see if this new more open approach will be adopted in Bernard Collaery's case.

If Collaery is convicted in a closed court, where his lawyers and the jury are unable to see all of the evidence, then public confidence in the administration of justice will take a beating. As Richard Ackland put it "confidence is already a delicate flower. Judges and courts only have authority and

community acceptance if justice is seen to be done, if reasons are explained openly and if fairness is the guiding principle."

Australia has proudly promoted itself as being a standard bearer for the rule of law and civil rights and freedoms, but that reputation has in recent times suffered a number of serious blows – our treatment of people seeking asylum on Australian shores, the appalling justice gap for First Nations peoples being notable. And these prosecutions have not gone unnoticed. If our nation wishes to be heard internationally on human rights breaches in our region or further afield, we must regain and then maintain our reputation as a good international citizen.

It is of course a fundamental principle of the rule of law is that everyone is equal before the law and that no one is above the law. It has been argued that those who authorised the bugging of Timor Leste committed the common law crime of conspiracy to defraud. Yet it is those who exposed the unlawful behaviour facing the full force of the law, where the exercise of discretion ought to have gone in their favour given the public interest in exposing wrongdoing, while those who authorised and those who benefited from the bugging remain untouched – above the law.

Role of lawyers – national security, intelligence and the legal profession

A free and independent legal profession is essential to the operation of the rule of law People must be able to prosecute their rights and defend themselves in a fair trial.

Attacks by the state on individual lawyers doing their jobs is a dangerous threat to that fundamental tenet. If lawyers are prosecuted when they act for clients who have offended the government of the day, then an important means of holding government to account is lost.

At present the NSI Act is tilted too far in favour of the national security and against the rights of accused people. The legal profession, including the Law Council, has advocated for law reform, including a public interest defence, and the appointment of "contradictors", or special advocates, who speak on behalf of any party forced to leave a courtroom before confidential material is canvassed.

Reform is needed to recalibrate the balance between the requirements of open justice and protecting the community.

Law Council actions – lessons and challenges

The Law Council has from the start been informally observing the ACT Supreme Court proceedings against Bernard Collaery, and during 2020 we sought permission to address the Court to formalise our observer status with a view to monitoring, on behalf of the Australian legal profession, the effect of the NSI Act on the proceedings, given the high level of interest in the proceedings.

The request was declined, but the LCA has continued to attend and monitor the proceeding and in October 2020, I issued a media statement as President of the Law Council, on behalf of the profession across Australia, reaffirming our support to a highly-regarded member of the legal profession.