

Bernard Collaery's appeal hearing to challenge secret trial closed to the public

Anthony Galloway - *Sydney Morning Herald* May 17, 2021

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A two-day court hearing into an appeal brought by Witness K's former lawyer Bernard Collaery challenging a secrecy order is being held behind closed doors after his lawyer didn't challenge holding the appeal in secret.

The barrister and former ACT attorney-general is facing the prospect of jail for allegedly helping his client, the ex-spy known as Witness K, reveal [information about Australia's bugging operation of East Timor's government](#) during commercial negotiations to carve up the oil and gas resources in the Timor Sea.

Mr Collaery is [challenging a ruling to hold his trial largely in secret](#) under national security laws.

The hearing in the ACT Court of Appeal was open to the public for about three minutes on Monday morning. ACT Chief Justice Helen Murrell noted there was an application by Mr Collaery's legal team to lead further evidence and then asked if there was any challenge to the hearing being held in secret.

Barrister Bret Walker, acting for Mr Collaery, conceded it was regrettable the court had to be closed but he was not challenging it, as it was required by the National Security Information Act.

'Entirely undemocratic': Bernard Collaery to challenge secrecy orders

"We do regret the appearance of that, but we can't see any other way around it," Mr Walker said.

The decision means most or all of the two-day hearing will be held in secret. A ruling on Mr Collaery's challenge likely won't be handed down for months. If it doesn't go his way, Mr Collaery could then appeal to the High Court, which would further delay his trial.

Mr Collaery is challenging an order made by the ACT Supreme Court last year to accept former attorney-general Christian Porter's application to invoke the NSI Act, which governs how courts should handle sensitive information. The NSI Act requires the court to give "greatest weight" to the Attorney-General's views about the national security implications of a case, which has resulted in large portions of the hearings being held in secret.

Human Rights Law Centre senior lawyer Kieran Pender said the secrecy surrounding the prosecution of Mr Collaery was "wrong and undemocratic".

“We should be protecting whistleblowers, not punishing them. Shrouding this case in secrecy only exacerbates the injustice being done,” he said.

“The NSI Act is broken and must be amended to better protect the public interest in transparency. The Attorney-General’s use of secrecy in the Collaery case, to enable the government to admit in court that it spied on Timor-Leste, while refusing to admit that publicly, is undemocratic.

“The NSI Act makes a mockery of open justice, a vital democratic principle.”

Witness K, a former intelligence officer for the Australian Secret Intelligence Service, has indicated he will plead guilty to breaching secrecy laws by revealing Australia’s spying on East Timor, but Mr Collaery is continuing to fight the charges against him.

Secrecy

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Mr Collaery is charged with offences relating to the alleged disclosure of information to both the East Timor government and the Australian media.

After East Timor commenced legal proceedings in the International Court of Justice and Permanent Court of Arbitration, the two nations signed a revised energy treaty in 2018 dividing the Greater Sunrise oil and gas fields.

The NSI Act is being probed by the national security legislation watchdog as part of its inquiry into the secret trial of another former spy, a man known as Witness J, who was convicted of mishandling classified information that potentially revealed the identities of agents recruited by Australian intelligence agencies.

Labor MP Alicia Payne, who represents the federal seat of Canberra, said on Monday the court system was being used for “contravening the very most important tenants of our justice system, that people have a right to a fair and open trial”.