A win for transparency, but not yet justice

Kieran Pender

The sorry saga of the prosecution of Bernard Collaery, an eminent Canberra lawyer, has seen a number of unhappy chapters. His prosecution, for an alleged role in exposing Australia's espionage against friendly neighbours Timor-Leste, is profoundly unjust.

The Attorney-General's attempt to shroud the trial in secrecy has also been particularly egregious.

This week, the ACT Court of Appeal upheld the importance of open justice. In a landmark ruling, the court decided that important parts of the trial must be open to the public.

To fully appreciate the seismic significance of this judgment, it is instructive to consider a key provision in the National Security Information Act. Buried deep within this complex law, which governs the use of evidence relevant to national security in civil and criminal cases, section 32(8) tilts the scales of justice away from transparency and towards secrecy.

The provision provides that in making orders under the National Security Information Act, the court "must give greatest weight" to the views of the Attorney-General on prejudice to national security. Such prejudice is thus given paramount significance, deemed by the legislation to be more important than the defendant's fair trial rights, and open justice.

It was not particularly surprising then that, mid-last year, the trial judge in Collaery's prosecution granted the secrecy orders sought by the thenattorney-general Christian Porter. When the scales are weighted in favour of secrecy, those fighting for transparency have a mountain to climb. Collaery appealed but, given the legislative imbalance, it was hard to be optimistic.

Which makes the win for transparency this week all the more remarkable. Such was the importance of open justice, said the Court of Appeal, that it overwhelmed even the "greatest weight" that was necessarily applied to the attorney-general's views on national security.

Collaery's win is a positive step but there remains much work to be done in Australia to ensure open justice is protected and whistleblowers can speak up about wrongdoing without fear of prosecution. Most urgently, the prosecutions of Collaery, war crimes whistleblower David McBride and tax office whistleblower Richard Boyle should be dropped by the Commonwealth Director of Public Prosecutions.

These prosecutions are not in the public interest – each whistleblower spoke up about wrongdoing and now faces jail time.

Law reform is also urgent and long overdue. The law to protect public sector whistleblowers, the Public Interest Disclosure Act, is no longer fit for purpose. In 2016, an independent review provided the government with a road map for reform. Five years later, and despite accepting

most of the recommendations in 2020, the government has still not enacted amendments.

It is unconscionable that the Morrison government is overseeing the prosecution of whistleblowers (and, in the Collaery case, gave explicit consent) yet refuses to act on whistleblowing reform.

The National Security Information Act must also be overhauled. It tilts the scales too far in favour of secrecy. A law that permits fully secret trials has no place in our democracy.

While it is welcome news that Collaery's prosecution will not go ahead in secrecy, it should not go ahead at all. His prosecution, and those against whistleblowers McBride and Boyle, are profoundly unjust. The prosecutions should be discontinued, and the laws that gave rise to them must be reformed. Australians who speak up about wrongdoing should be protected, not punished.

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