

Court rules key parts of Bernard Collaery trial to be held in secret

Christopher Knaus in The Guardian, 26 June 2020

Essential parts of Bernard Collaery's trial will be held in secret after a court ruled in the government's favour on Friday, prompting warnings that "laws designed to protect Australians from terrorism" are being used to erode open justice.

The Australian Capital Territory supreme court on Friday ruled against Collaery following a pre-trial hearing designed to establish which parts of his trial could be heard in open court.

It is not clear how much or what specific parts of the Collaery trial will be held in secret.

But the Gilbert and Tobin partner Christopher Flynn, speaking on behalf of Collaery, said the ruling would cause "essential elements of the trial" to be closed to the public.

"This hearing was all about whether Bernard Collaery will get an open trial or a secret trial," Flynn said outside court.

"It is very disappointing that the trial will not be more open and that essential elements of this case will not now be heard in public.

"Open justice is an essential part of our legal system, the rights of defendants and of our democracy. This case should be heard in public."

Collaery is [facing trial for communicating protected intelligence information](#) and conspiring with his client, former Australian Secret Intelligence Service officer Witness K, to do so.

The pair [helped expose](#) Australia's bugging of Timor-Leste during sensitive negotiations over oil and gas reserves in the Timor Sea.

The [Guardian revealed](#) on Friday that the prosecution of Collaery and Witness K had so far cost the government \$2m well before even reaching trial.

Last month, Collaery faced a pre-trial hearing designed to determine which parts of the case could be heard in open court, and which must be kept secret.

The hearing was triggered by the intervention of the attorney general, Christian Porter, who invoked the National Security Information Act (NSI Act), a suite of powers introduced in 2004 to better control how sensitive information is dealt with by the courts.

The powers were enacted in the heightened national security environment following the 9/11 terrorist attacks, but the main trigger was the [collapse of an earlier prosecution](#) of a defence intelligence organisation officer due largely to problems handling sensitive material.

Transparency campaigners, former judges, lawyers and academics have all voiced concern that the NSI Act is failing to properly balance open justice with the need to protect classified and sensitive information.

Flynn said that, in the Collaery case, the view that national security required the trial to be secret was “hotly contested”.

Flynn said strong evidence was heard in Collery’s favour during the pre-trial hearing, including from Gareth Evans, a former foreign minister, admiral Chris Barrie, a former chief of the defence force, John McCarthy, a former diplomat and ambassador to the United States and Indonesia, and Anthony Whealy, a former judge and expert in national security laws. It also heard from former Timor-Leste leaders Xanana Gusmao and Jose Ramos Horta, Flynn said.

“Yet that strong evidence was not enough in the face of our restrictive laws to place a premium on security, secrecy, over all other considerations,” he said. “Laws designed to protect Australians from terrorism should not be used to close courts in this kind of case.”

“What a shame for Australians if the laws that were meant to defend and protect us ended up eroding the very things that we mean to protect and defend.”