

Government's secret evidence against Bernard Collaery could lead to 'perpetual vortex' of delay, judge warns

Attorney general wants to introduce 'court-only' evidence against barrister in Timor-Leste spying case

By Christopher Knaus in the Guardian, 9 November 2021

The federal government is attempting to introduce new "super-secret" evidence against Bernard Collaery in the Timor-Leste spying case, prompting fury from Collaery and warnings from a supreme court judge that it may cause a "perpetual vortex" of delay and secrecy.

Collaery, a barrister charged for his alleged role in exposing Australia's bugging of Timor-Leste, won a [major victory last month](#), when the Australia Capital Territory's court of appeal overturned [orders shrouding](#) much of his looming trial in secrecy.

The court found the risk posed to national security by hearing the case in public was minimal, while open justice was crucial in deterring "political prosecutions", among other things.

On Wednesday, however, lawyers for attorney general Michaelia Cash told the ACT supreme court that they wanted to introduce "updated" evidence about the national security risks posed by hearing aspects of the Collaery case openly.

They argued the national security situation had changed significantly in the 20 months that it has taken for Collaery's appeal to be heard and resolved.

The government now wants to produce new "court-only evidence" – evidence only the judge can see, and not Collaery – on the security risks. It wants to appoint its own special counsel, paid for by the commonwealth, to examine the material on behalf of Collaery.

Collaery's barrister, Christopher Ward, SC, criticised the move as a "carte-blanche" attempt to reopen the case by leading fresh evidence.

"It's described gently as being updated evidence, but it's fresh evidence, your honour," he said.

The process that the commonwealth want to take to get the new evidence before the court would take months and may trigger another appeal, extending the timetable further.

Justice David Mossop questioned whether there would ever be an end to the case, if the attorney general wanted to continually produce new evidence updating the court on new developments in national security.

"Is there any prospect of this matter ever being completed? Or will we be stuck in a perpetual vortex of updating?" he said.

Outside court, Collaery slammed the move, saying he was wholly opposed to the commonwealth relying on new "super-secret evidence" that was kept from him and his lawyers.

"This takes the commonwealth's hypocritical obsession with secrecy to new heights when one considers recent events," he said.

"I strongly object to the court being given and relying on evidence we can't see. It's a shameful mockery of open justice."

The commonwealth will now make an application to reopen the case and lead the new evidence.

Human Rights Law Centre senior lawyer Kieran Pender said secret evidence, which is kept from the person on trial, has "no place in our legal system".

"The court of appeal warned that secret trials undermine public confidence in the court system and enable political prosecutions," he said. "The attorney general is now seeking to provide secret evidence to the ACT supreme court, to insist that the trial should be held in secret, despite the court of appeal's judgment saying otherwise."

Collaery is charged over his alleged role in disclosing information about an intelligence operation targeting Timor-Leste, an impoverished ally, during oil and gas negotiations in 2004.

He and his client, former intelligence officer Witness K, helped Timor-Leste take a case against Australia to the international courts, where they argued it had negotiated in bad faith due to the spying. It eventually struck a fairer deal with Australia over the oil and gas reserves in the Timor Sea.