

‘Entirely undemocratic’: Bernard Collaery to challenge secrecy orders

By Anthony Galloway in the Sydney Morning Herald, May 14, 2021

Lawyers acting for Bernard Collaery will next week challenge a court order requiring large parts of his trial to be held in secret as the long-running case continues into his alleged efforts to expose a secret Australian operation to bug East Timor’s government.

The ACT Court of Appeal will hold a two-day hearing on Monday and Tuesday into an order made under [national security laws](#) to hold the trial largely behind closed doors.



Lawyer Bernard Collaery and Witness K allegedly revealed Australia bugged East Timor’s cabinet during tense oil and gas negotiations. *Credit: Alex Ellinghausen*

Mr Collaery, the former lawyer for an ex-spy known as Witness K, is challenging an order made by the ACT Supreme Court last year to accept former attorney general Christian Porter’s application to invoke the National Security Information 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.

Mr Collaery, a barrister and former ACT attorney-general, is facing the prospect of jail for allegedly helping his client 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.

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. The Witness K case is being held up by disagreements over whether he can access his affidavit that was used by East Timor in international proceedings in the Hague, which his lawyers argue need to be before the court for his sentencing.

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.

Human Rights Law Centre senior lawyer Kieran Pender said there was no public interest in prosecuting Mr Collaery and Witness K.

“The Commonwealth Director of Public Prosecutions has the power to discontinue a prosecution at any time. They should exercise that power,” he said.

“The Attorney-General’s use of secrecy in this case is entirely undemocratic: it enables the government to concede in closed court that Australia spied on Timor-Leste while continuing to refuse to admit this publicly. The NSI Act should be reformed to better safeguard the principles of openness and transparency that are at the heart of our judicial system.”

Mr Pender said the cases of Mr Collaery and Witness K were part of a wider trend - alongside the prosecutions of tax office [whistleblower Richard Boyle](#) and defence [whistleblower David McBride](#) - which were part of a “dangerous chilling effect”.

A spokesman for Attorney-General Michaelia Cash said the Commonwealth Director of Public Prosecutions had applied the NSI Act to “protect national security information in the criminal proceeding”.

“As this matter is currently before the courts, it would not be appropriate to comment further,” the spokesman said. “The NSI Act enables the court to make orders to protect national security information in criminal and civil proceedings. It provides a framework for the court to balance the public interests in protecting national security, maintaining the accused’s right to a fair trial, and the principle of open justice.”

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. The Independent National Security Legislation Monitor last year launched an inquiry into a “unique set of circumstances” which led to Witness J being tried, sentenced and jailed in secret.