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ABC Media Watch - **Secret trial**: Our interview with former ACT attorney-general lawyer Bernard Collaery who's at the centre of a secret trial the media can't cover.

June 15, 2020

Transcript: And talking of the courts, let's go to some important legal news you may have missed, concerning the secret trial of a former ACT attorney-general, Bernard Collaery, who spoke exclusively to Media Watch over the weekend:

BERNARD COLLAERY: I just sat there in court thinking, on occasion, are we in Moscow?

... This was a most important part of a trial being heard in, in camera, outside the gaze of the world and I felt this is not my country.

- Interview with Bernard Collaery, 13 June, 2020

So, what is this all about?

Well, if you switched onto Canberra's 7pm news on the 25th of May — which most of the country did not — you would have caught this brief explainer:

DAN BOURCHIER: A secret hearing has begun in the spy case against Canberra lawyer Bernard Collaery. Protestors who turned up to support Mr Collaery were undeterred by physical distancing rules. He's been charged with conspiring with former senior intelligence officer 'Witness K' to reveal details of an Australian spying operation in East Timor. The hearing will determine what evidence to be used against him in a future trial should remain classified due to national security concerns.

- ABC News (ACT), 25 May, 2020

That 30-second snippet was the only TV report on the first day of that secret hearing. And since then the ABC has not been back to check on progress.

Meanwhile, there's been nothing at all on Seven, Ten or SBS. And also nothing we can see in The Age, Sydney Morning Herald, Daily Mail, the websites of Nine, Seven and the ABC, and The Australian until this morning, although it was covered on ABC Radio.

Now, to be fair, the court was closed to the media. But surely that was worth reporting.

And Crikey, The Guardian and Canberra Times all did do so, revealing that Collaery had handed out a statement to journalists on the steps of the court to say:

"I am unable to say much and you are unable to report much. This is the state of our now fragile democracy."

- The Canberra Times, 25 May, 2020

This weekend, Collaery was a bit more forthcoming to Media Watch, telling me why he believes the government wants evidence in his case to remain secret:

BERNARD COLLAERY: ... I've said many, many times, I'm on trial and partly in camera because this is a Coalition government with dirty political linen and it needs that linen hidden.

- Interview with Bernard Collaery, 13 June, 2020

The law being used to hide Collaery's evidence is a powerful piece of legislation called the National Security Information Act 2004, which allows entire trials to be held away from public view.

And in another secret prosecution — of an intelligence officer known as Witness J, whose conviction was discovered only by chance — that is exactly what happened.

As The Guardian's Christopher Knaus told us earlier this month:

CHRISTOPHER KNAUS: ... every facet of this case was kept secret ...

You know, we don't know who he is, what his background is, we don't know the nature of his sentence. You know, we know that he was imprisoned in Canberra but we've only found that, out about that, after the fact. So, it was so secret that even the Justice Minister in the ACT ...

... just had no idea about this case whatsoever until it happened to become public ...

- The Full Story, The Guardian, 1 June, 2020

In the Collaery case, we do at least know he's on trial and what he's charged with.

And it all dates back to 2004, when Australia secretly and illegally bugged East Timorese government offices in Dili to gain an unfair advantage in negotiations about oil and gas in the Timor Sea.

A fact that Collaery revealed dramatically to The Australian in 2013:

"So it was a Watergate situation. They broke in and they bugged, in a total breach of sovereignty, the cabinet room, the ministerial offices of then prime minister [Mari] Alkatiri and his government. They placed clandestine listening devices in the ministerial conference room ..."

- The Australian, 29 May, 2013

Shortly after those revelations, and an interview on ABC Lateline, Collaery's home and office were raided by the AFP. As was the home of a senior ASIS officer, known as Witness K, who had complained about the bugging to the intelligence watchdog and then been sidelined. And who had engaged Collaery as his lawyer.

But it took another four-and-a-half years before both men were secretly charged with sharing classified information. And we only discovered that because Andrew Wilkie MP revealed it under parliamentary privilege in June 2018.

Now the NSI Act is being used to keep the trials of Collaery and Witness K secret too, which Attorney-General Christian Porter maintains is perfectly normal:

CHRISTIAN PORTER: Now, you know, there are court cases all the time where some matters are not made public. I mean, that in itself is not terribly unusual.

- Insiders, ABC, 31 May, 2020

But it is unusual. Indeed, former Supreme Court judge Anthony Whealy QC — who's an expert on the NSI Act — told Four Corners last year:

ANTHONY WHEALY: This could be, in a strange way, one of the most secretive trials in Australian history.

There are some obvious national security matters where protection is required, but where, where is the national security elsewhere in the proceedings?

And because that's being shrouded in secrecy, it becomes much more secretive than a terrorist trial or something of that nature.

- Four Corners, ABC, 26 August, 2019

Collaery says he has no intention of revealing names of spies or operational details in open court and he agrees that some evidence in the trial should be heard in secret:

BERNARD COLLAERY: If it becomes relevant, the identity of any of the players, techniques, dates, times, places, any of that matter can be suppressed ...

There's no issue there. This is not a proceeding where we're trying to bring information forward of any sensational nature, other than the core issue of what happened.

PAUL BARRY: Who would be embarrassed if it were to be made public?

BERNARD COLLAERY: I'm not able to traverse that because of the restrictions I'm under, under the national NSI Act. I can't answer that, of course, I would dearly love to.

- Interview with Bernard Collaery, 13 June, 2020

Collaery alleges that our government — and former foreign minister Alexander Downer — behaved improperly in the 2004 negotiations. And he wants the details to be canvassed in open court.

And one of Australia's leading advocates Bret Walker QC agrees that it is in the public interest that we know what's being tried:

BRET WALKER: ... and that's particularly so, where the whole case concerns, a supposed or alleged concern that there has been misbehaviour, maladministration or worse, by Australian authorities. Every Australian, I imagine, is interested to know that Australian authorities will be held to account. That's difficult to do if a trial, at the pointy end, will be held secretly.

- Four Corners, ABC, 26 August, 2019

Now, it is of course possible that Judge David Mossop could go against the A-G's advice and decide to hear all the evidence in Collaery's trial in open court, but he's required under Section 31 (8) of the NSI Act to, quote, "give greatest weight" to the A-G's arguments about national security.

So it's clear what side the law wants him to come down on.

What the arguments are we do not know. And the judge has yet to give a decision.

But Channel Nine was brave enough to file a 20-second report on day three of the hearing, identifying one of the witnesses:

PETER OVERTON: Former foreign minister Gareth Evans has given evidence in a secret trial in Canberra today.

- Nine News, 27 May, 2020

We don't know what Evans said. And we couldn't tell you if we did.

And others weren't so brave. Sydney law firm Xenophon Davis tweeted this photo of Evans coming to court then took it down after being warned they might be in breach of the law.

And The Guardian also decided not to risk naming witnesses, and simply reported:

Intelligence leaders, diplomats and former ministers lingered briefly in the waiting area of the oddly quiet ACT supreme court, before entering a room where journalists could not follow.

- The Guardian, 30 May, 2020

All in all, it's a bizarre state of affairs. But arguably also a scandal in which the government stands accused of using national security laws to avoid political embarrassment.

Now, we don't know if that charge is true. Because we're not being allowed to judge.

And the Attorney-General's office declined to answer detailed questions and merely stated it wants to see as much of the trial as possible — whatever that means — in open court.

Meanwhile, as a former chief law officer, Bernard Collaery appears to be a man of principle and integrity who is angry about the years of secrecy and baffled by the prosecution:

BERNARD COLLAERY: ... who and why is this being driven? We should know that. I should know that. We've just got a summons. It's faceless. Who is driving this?

... Who wants to jail me and why?

PAUL BARRY: And what's the answer?

BERNARD COLLAERY: I don't know. My family don't know.

... it's a bad dream. It's ruined my practise and everything I've worked for. It'd be different if I felt that I'd done something wrong. It's sheer, unadulterated, vindictive injustice, as far as I'm concerned.

- Interview with Bernard Collaery, 13 June, 2020

Response to ABC from the Attorney-General

15 June 2020

The AG has provided a certificate to the court under the National Security Information Act 2004 to say that trying Collaery in open court could prejudice national security. The purpose of the hearing was to decide what parts of the eventual trial, if any, should be held in open court. The hearing has now ended, but no decision has yet been made

We're hoping you can answer the following questions;

Has the AG requested the entire Bernard Collaery trial be held in closed court?

If not, what parts of the hearing has the AG requested be held in closed court?

Has the AG requested, for example, that evidence from former government ministers be heard in closed court? And if so, why?

Has the AG also requested that evidence about the 2004 oil and gas negotiations between Australia and East Timor be heard in closed court. And if so, why?

How are events that happened 16 years ago a threat to Australia's current national security?

Response from Attorney-General, Christian Porter:

As your enquiry notes, this matter is currently before the court. It is therefore not appropriate to discuss matters discussed in the court.

I can however, refer you to my previous statements regarding this case (and the former case of Witness K), including the attached expansive statement to 4-Corners in August 2019 in which I state clearly that my preference is that as much as possible of this case be heard in open court whilst balancing the need to protect national security information, where required, through the NSI Act.