

Australia only digging deeper hole by pursuing East Timor spying case

By Gareth Evans in the Sydney Morning Herald - Opinion, June 23, 2021

The Age was right to call not only for an open trial of Bernard Collaery in the East Timor bugging case, but for the Commonwealth to abandon its prosecution altogether in its [editorial](#) earlier this week. As a former attorney-general and foreign affairs minister—responsible in my time for both ASIO and ASIS – I well understand the argument that absolute institutional discipline must be maintained in relation to our intelligence agencies.

But every case is context-dependent, which is why prosecutorial discretion always exists in criminal cases, and there multiple grounds for its exercise here.



Lawyer Bernard Collaery is being prosecuted for allegedly helping his then client, Witness K, reveal aspects of an alleged secret bugging operation against East Timor. *Credit: Alex Ellinghausen*

They include the evident motivation of Collaery - like his client, the former intelligence officer “Witness K” - as being not to aid an enemy or adversary of Australia but to call out ill-advised or unconscionable official activity. There is also the limited nature of the public disclosures in question, not naming any individual intelligence officers, or identifying any non-routine operational methodology and the very long delay involved in bringing these cases to trial.

But above all they include the serious damage to Australia’s international reputation. That which has been done already by our acknowledgment, in the Permanent Court of Arbitration (PCA) proceedings in 2013, that espionage activity was conducted against East Timor in the context of the essentially commercial oil and gas negotiations.

That which was further done by the order in the [International Court of Justice](#) in 2014 prohibiting use of ASIO-seized material in the PCA case. And that which will inevitably be done, if the trial proceeds, in reopening old bilateral wounds between Australia and East Timor.

George Brandis as Attorney-General was acutely aware of all these realities and, wisely if not very bravely, at least chose the path of inaction. Christian Porter chose to ignore them and set the prosecution in motion, and his successor, Michaelia Cash, has not so far reversed course. In Australia’s national interest she should.



Protesters supporting Witness K's former lawyer Bernard Collaery in front of the Law Courts in 2019. *Credit: Alex Ellinghausen*

If the Morrison Government remains stubbornly insistent that the Collaery case go to trial, the very least it can do is not add to the international damage bill by assaulting the integrity of the Australian judicial system as well – as will be the case if the case continues to be pursued with the extreme secrecy that has characterised it so far.

The centrality of open justice to the credibility of our judicial system has been clearly articulated by, among many others, the former Chief Justice of Australia Robert French: “An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts.”

It is not inconsistent with the principles of open justice for some kinds of trial evidence to be kept secret: familiar examples are the names of witnesses who are children, or of women who have been abused. In the Collaery case, as with “Witness K”, no one could seriously object to evidence relating to intelligence personnel identity or operational methodology being kept from the public domain.

But keeping effectively almost the entire case secret, as has been the situation so far, and the position the Government seems intent on maintaining, is a very different, and much more worrying, matter. On the material available in the public domain, there seems to be no compelling reason why, if it proceeds, the Collaery trial should not be overwhelmingly conducted in open court.

What is absolutely certain, if secrecy overwhelmingly prevails, is that that this will expose the Government to credible claims that it is being employed, in the words of Justice David Mossop of the ACT Supreme Court (describing the risks associated with over-reliance on the National Security Information Act) “as a cover to protect from disclosure in a trial material which is merely politically embarrassing to a government or to avoid legitimate scrutiny of its conduct”.

While it is never easy for any government to reverse course in a high-profile issue, the statesmanlike course, and one that would be widely seen as being to the Government's credit, would be for it to not just accept the need for an open trial, but abandon it completely. As ever, when you are in a hole, the wisest course is to stop digging.

Gareth Evans was federal attorney general from 1983 to 1984 and foreign minister from 1988 to 1996.