

Explained: the show (non)trial of Bernard Collaery

As another chapter in the complex and long-running case of the Canberra barrister begins, we go back to the start of this Kafkaesque affair.

By Kishor Napier-Raman in Crikey.com Nov. 10, 2021

The Bernard Collaery case is back in court today, as lawyers for Attorney-General Michaelia Cash try to introduce more secret evidence against him. It's the latest in a never-ending, Kafkaesque attempt to prosecute the barrister and former ACT attorney-general for offences stemming from the disclosure of information about Australia's bugging of the Timor-Leste government.

It's a complex case mired in secrecy, where successive attorneys-general have tried to bury Collaery and his client, former intelligence officer "Witness K", who revealed Australia's spying on Timor-Leste. Here's a quick refresher unpacking the long-running case.

How it began

In 2004 Australia and newly independent Timor-Leste were locked in negotiations over a treaty that would decide the fate of lucrative offshore oilfields between the two countries. During those negotiations, the Australian Secret Intelligence Service (ASIS), posing as AusAID workers, entered TimorLeste's government offices in Dili and bugged them.

The discomfort felt about the bugging by Witness K, an ASIS officer, led to him seeking advice from the Inspector-General of Intelligence and Security (IGIS) when he sought compensation for ASIS effectively sacking him.

He retained Collaery as a lawyer, who was also acting as a legal adviser for the TimorLeste government in its attempts to take Australia's bugging to the Permanent Court of Arbitration in The Hague.

In 2013, revelations about the bugging were made public, first through a quiet media release by then Labor ministers Mark Dreyfus and Bob Carr in response to a confidential letter from Timor-Leste's then-prime minister Xanana Gusmão, and later reported more widely in *The Australian*.

Later that year ASIO executed a search warrant issued by new attorney-general George Brandis and raided Collaery's offices and Witness K's home, using powers granted to them in post-9/11 anti-terrorism legislation.

The prosecution

By 2018, five years later, the maritime dispute between Timor-Leste and Australia had been resolved. Collaery and Witness K were treated like heroes in Timor-Leste, but faced years of harassment by intelligence services here.

Then later that year the Commonwealth Director of Public Prosecutions [charged Witness K and Collaery](#) with conspiring to disclose intelligence information about the Timor-Leste bugging under section 39 of the *Intelligence Services Act*.

Three years of delay, obfuscation, secrecy and cost blow-out followed.

The Commonwealth has spent \$3.7 million on the prosecution — and has left Collaery's legal practice in tatters. And it's a prosecution that has endured despite a change in attorney-general.

Cash's predecessor, Christian Porter, played a key role in the case against Collaery. New in the job, someone in Porter's office was backgrounding favoured journalists about the "very strong recommendation" from the CDPP to urging a prosecution.

The proceedings have been held back at every turn. Porter's department used national security powers to restrict leading silk Bret Walker SC joining Collaery's legal team, ultimately slammed as "unfair" by ACT Supreme Court justice John Burns. In 2019 Witness K indicated he'd plead guilty, but delays meant he wasn't able to enter it until June when he was eventually given [a three-month suspended sentence](#).

Those delays have been in part because of the government's stubborn insistence in conducting as much of the trial as possible under intense secrecy. Porter issued a certificate under the *National Security Information Act*, meaning large parts of the trial would be conducted in secret, drawing criticism from peak legal bodies.

Government lawyers have fought to maintain this secrecy. They invoked cabinet confidence last year to stop Collaery's team accessing papers relevant to the Timor-Leste bugging. Last year the ACT Supreme Court accepted Porter's certificate under the *NSIA*. That decision was reversed by the territory's Court of Appeal last month, in a judgment which means what the Coalition wanted to relegate to the shadows will now play out in open court.

The court cited the very real risk to public confidence in the administration of justice when delivering its decision on the Collaery case. But the government continues to push for secrecy. That judgment is still not published, and Cash's lawyers are in court arguing for it to be redacted. This morning, they're back in court trying to get [more secret evidence](#) in front of the trial judge that had previously been rejected.

There have now been more than 50 hearings in the case, which is nowhere near trial. Collaery, in his late 70s, has watched his legal practice shrivel. But Cash won't back down.