

Australia: Lawyer Bernard Collaery's War Against Secret Trials

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*In terms of labyrinthine callousness and indifference to justice, the treatment of lawyer **Bernard Collaery** by the Australian government must be slotted alongside that of another noted Australian currently being held in the maximum-security facility of Belmarsh, London. While Collaery has not suffered the same deprivations of liberty as publisher extraordinaire **Julian Assange**, both share the target status accorded them by the national security state. They are both to be punished for dealing with, and revealing, national security information compromising to the state in question.*

Assange's case is notorious and grotesque enough: held in Belmarsh for three years without charge; facing extradition to the United States for a dubiously cobbled indictment bolted to the Espionage Act of 1917 – a US statute that is being extra-territorially expanded to target non-US nationals who publish classified information overseas.

Collaery's is less internationally known, though it should banish any suggestions that Assange would necessarily face much fairer treatment in the Australian justice system. The barrister is being prosecuted under section 39 of the [Intelligence Services Act 2001 \(Cth\)](#) for conspiracy to reveal classified information. He was consulted by now convicted former intelligence officer Witness K, who was responsible for leading a 2004 spying operation conducted by the Australian Secret Intelligence Service (ASIS) that led to the bugging of cabinet offices used by the East Timorese government.

The operation was instigated in the [predatory spirit of corporate greed](#): Australia was involved in treaty negotiations with Timor-Leste regarding access to oil and gas reserves at the time and wished to privilege its own resource companies through spying on their counterparts. Former attorney general of the Australian Capital Territory (ACT) Collaery came onto the scene after Witness K, on being involved in a workplace dispute in 2008,

revealed that he had directed the bugging operation. After going to the Inspector General of Intelligence and Security, the ethically agitated Witness K consulted the ASIS-approved lawyer.

The bureaucrats of secrecy were hoping that things might have been contained. Instead, a juggernaut of information began to leave the terminus of secrecy. Collaery considered the spying operation [a violation of ACT law](#). In 2013, both men made themselves available for the East Timorese cause in testifying at the Permanent Court of Arbitration in the Hague. Australia's illegal operation, and bad faith to a neighbour and purported friend, was being given an unwanted airing. The case being made against Canberra was that the treaty, because of the bugging, had been rendered void.

An unimpressed Commonwealth responded by raiding the Canberra premises of the two individuals. Nothing, however, was done till 2018, when the new and zealous **Attorney General Christopher Porter** commenced prosecutions against the pair. The Kafkaesque clincher in the whole affair was the effort by Porter to make most of the trial proceedings inaccessible to the public. Porter also [imposed a national security order](#) without precedent, preventing the parties from divulging details of the prosecution to the public or press.

Witness K, after pleading guilty, received a three-month suspended sentence and was placed on a 12-month good behaviour bond. Collaery has been left to [counter five charges](#) alleging that he communicated information to various ABC journalists prepared by or on behalf of ASIS and allegedly conspired with Witness K to communicate that same information to the Government of Timor-Leste.

In assessing the ongoing prosecution against him, Collaery [observed in an interview](#) with Sydney Criminal Lawyers, that he had been charged with conspiracy for giving "frank and fearless advice". The charge against Witness K meant that it was "a crime to report a crime. Think about it. That's Australia at present."

Since then, Collaery has waged a relentless campaign against efforts by the Australian government to muzzle proceedings to conceal both embarrassment and blatant criminality. In June 2020, he had a stumble before the first judge, who made orders under the *National Security Information (Criminal and Proceedings) Act 2004* (Cth) to prohibit the disclosure of compromising evidence that might be adduced by Collaery during the trial. The court found that Collaery's right to a fair hearing would not be compromised by the nondisclosure orders, and that the need to protect national security outweighed the desirability of conducting proceedings in public.

In October, ACT appeals court reversed the decision, finding that six "identified matters" in the Commonwealth case against him should be made publicly available. The court [found](#) that the risk of damage to public confidence in the justice system was outweighed by any risk posed to national security. The open hearings of criminal trials "deterred political prosecutions" and permitted "the public to scrutinise the actions of prosecutors, and permitted the public to properly assess the conduct of the accused person."

While a [summary of the decision](#) was made available, the full reasons for the decision have not. The current Attorney General, the otherwise invisible **Michaelia Cash**, has attempted to suppress the full publication of the judgment. The ploy being used here is a particularly insidious one: that the case involves "court-only" evidence which Collaery and his defence team [are not entitled to see](#). The ploy, dressed up as an effort to update the evidence, is an

attempt to introduce new material via the backdoor. The Commonwealth, in its desperation, is running out of ideas.

In March, ACT Supreme Court Justice **David Mossop** [found](#) that the court could receive such evidence through the office of an appointed special counsel who might be able to access the documents. The appointee would be able to advocate for Collaery thereby reducing “the disadvantage to the defendant arising from the non-disclosure of the material”.

This month, federal **Solicitor-General Stephen Donoghue** [argued](#) in the High Court that this modest compromise would not do. Not even a special counsel should cast eyes over such evidence in the name of protecting national security. “If this isn’t stopped, the (earlier ACT) judgment could be released without the redactions we need.”

The three High Court justices hearing the case did not conceal their puzzlement. **Justice Michelle Gordon** [observed](#) with some tartness that this was “a fragmentation of proceedings at its worst”. **Justice James Edelman** [was bemused](#). “What you say is the error is that the [ACT] Chief Justice didn’t make the orders you wanted.” Donoghue’s feeble reason: that publishing the full ACT judgment should be delayed till the dispute on “court-only” evidence could be resolved.

This charade now continues its ghastly way back to the ACT Supreme Court. Even now, dates of the actual trial, times and so forth, have yet to be set. This will no doubt give prosecutors further time to cook up something. All rather galling coming from a government which has the [temerity to complain](#) about the way secret trials are conducted in other countries against its citizens.

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Featured image: Senator Nick Xenophon with Bernard Collaery and Nicholas Cowdery QC in 2015 calling for a royal commission into the Australia-East Timor spying scandal. (Licensed under CC BY-SA 4.0)

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