The court case Australians are not allowed to know about: how national security is being used to bully citizens

By *Richard Ackland* in The Guardian, 11 April 2020

In the Witness K case, a closed court is also very useful in covering up the alleged wrongdoing of a previous Coalition government

It must have been six years ago or so that an anxious barrister knocked on the door of my cave-like office in Sydney's CBD with news about Asio's raids on a former intelligence agent known as Witness K, and Canberra lawyer Bernard Collaery.

No sooner had he started to pick through the entrails, involving confiscated computers, files, documents, a USB stick and a passport, than he stopped midsentence. "Bugger, I shouldn't have brought my mobile phone with me." He dashed outside and left his phone on a ledge in the corridor – convinced the spooks were monitoring his whereabouts and his conversations about Collaery and Witness K.

It was my first inkling of the furtiveness and paranoia surrounding Collaery, his work for Timor Leste and the bugging in 2004 of its ministerial offices by operatives of the Australian Security Intelligence Service. Witness K, acting on instructions from Asis head David Irvine, helped to plant remote-switch listening devices in the Timor Leste cabinet room.

Collaery had straddled positions both as a lawyer for Witness K in an employment dispute with Asis and for the Timor Leste government – working for the bugger and the buggee. The aim of the eavesdropping was to maximise Australia's position at the negotiations over boundaries in the Timor Sea and who got the lion's share of the loot from the oil and gas resources.

In June 2018, Collaery and Witness K were summonsed to appear on charges alleging breaches variously of the criminal code and the Intelligence Services Act – conspiracy to communicate Asis information – and, in Collaery's case, also communicating Asis information to journalists at the ABC.

The brief of evidence from the Commonwealth DPP had been sitting on the desk of former attorney general George Brandis for over two years. The AG's consent to the prosecution is required under the legislation. It was not until Christian Porter, red in tooth and claw, got his feet under the AG's desk that, with an amount of dispatch, the consent was signed.

When he announced the prosecution on 28 June 2018, Porter said, hopefully: "I would also encourage any member with an interest in this case to be conscious of the fact that the priority must be to allow the judicial process to be conducted without commentary which would impact on the fairness and regularity of those proceedings."

You might wonder what planet Porter was orbiting when he signed off on that. Ever since, there have been protests outside the court in Canberra while countless preliminary skirmishes took place. There has been mounting public condemnation of the Commonwealth's insistence that these prosecutions are of such great importance to national security that the court should be closed and the hearing conducted in secret.

And here we were thinking that it is the Howard-era government that is the real wrongdoer, defying international law to spy on a friendly and impoverished neighbour for commercial advantage.

Deceitful doesn't even come close.

Witness K has already pleaded guilty to agreed facts relating to his preparation of an affidavit for an in-camera hearing at the Hague. He faces further hearings in the ACT magistrates' court in April. Collaery has more hearing dates in April which are no longer listed on the ACT courts website. In all, there have been 30 or so scheduled hearings since the charges were laid, most of them conducted in secret.

Political teeth marks are all over these prosecutions, with Porter issuing a certificate that proceedings be held in closed court in the interests of national security. Yet the extent to which the court is closed is up to the presiding judge, David Mossop, of the ACT supreme court.

No doubt he will weigh the principle of open justice and the danger to the rule of law if justice is shrouded, where reasons for findings of guilt or otherwise cannot be published, and as we've seen in the case of Witness J, citizens can be secretly jailed, Stalin-style.

The case against closing Collaery's court hearings was put in an amicus curiae submission to the judge by Ernst Willheim, a former senior officer of the Attorney General's Department and now a visiting fellow in the college of law at the the Australian National University. He also prepared a similar submission for the Witness K case.

Willheim submitted that the parties to the proceedings were unlikely to press arguments about open justice. Indeed, in the Collaery case it's understood there have been consent orders relating to secrecy, but not for the trial itself. He pressed the point that there needs to a non-party helping the court on the "fundamental importance of openness in judicial proceedings".

Should Collaery be convicted in a closed court, where the defendant's lawyers and the jury could not see all the evidence, then public confidence in the administration of justice would take a damaging turn for the worse.

As it is, confidence is already a delicate flower. Judges and courts only have authority and community acceptance if justice is seen to be done, if reasons are explained openly and if fairness is the guiding principle.

The Soviets were good at obtaining guilty verdicts in secret, which then were conveniently used for propaganda purposes because no one knew what really went on.

Needless to say, Willheim's amicus submissions in both the Collaery and K cases were rejected by the courts – partly on the ground that the commonwealth is a "model litigant". This is not a good omen, for if Covid-19 doesn't derail the proceedings in the short to medium term, Porter's submissions on the sanctity of national security could well hold sway with the same outcome in the long term.

There is another powerful reason for openness. Collaery could call former prime minister John Howard and former foreign minister Alexander Downer to give evidence and it would be a calamity if the public couldn't hear their explanations for the bugging.

None of which is to say that the accused are entirely without protections. There's section 80 of the Constitution, which requires trials for offences against any law of the Commonwealth to be tried by jury.

A jury trial could be a worthwhile safeguard – then we could know whether representatives of the community gauge these proceedings as an overreach of prosecutorial and executive power. The former NSW DPP Nicholas Cowdery QC is of the view that in bugging the Timor Leste ministers, Asis was acting beyond its statutory power.

There is also the contention that a law that prohibits the disclosure of an illegal act by a public authority may infringe the freedom of political communication.

The defence had filed affidavits from former minister for foreign affairs and trade Gareth Evans, former chief of the defence force Admiral Chris Barrie and former senior diplomat John McCarthy.

Two other defence affidavits were from former presidents of Timor Leste, Xanana Gusmao and Jose Ramos Horta. The affidavits themselves are not yet public but justice Mossop told the court those affidavits were intended to directly challenge assertions by the attorney general that there would be a risk of prejudice to Australia's national security if certain information was disclosed publicly during the substantive criminal proceedings.

There are other concerns that surround the cases. Witness K was due to give confidential evidence in proceedings at the international court of justice in the Hague where Timor Leste was seeking to set aside the treaty arrangements which it now knew to be tainted by Australia's bugging and eavesdropping.

Shortly before he was expected to travel overseas for this purpose, his home was raised by Asio and his passport confiscated, and it remains confiscated. In normal court proceedings, it would be a contempt of court or a prejudice to the administration of justice if a witness is prevented from giving evidence.

Likewise, when Bernard Collaery's office was raided in December 2013, the security services took his brief relating to Timor Leste's arbitration proceedings.

Undertakings were made by Brandis that, of course, Australia wouldn't stoop so low as to access the contents of this seized material – an undertaking that did not persuade the international court of justice.

The court, instead, preferred to make binding orders to ensure that Australia did not use the material to disadvantage Timor Leste. There were 16 judges on the ICJ panel and with the exception of one of them, they agreed with the findings and orders.

The dissenting voice was the former Australian jurist Ian Callinan, a Howard-era "Capital C" conservative appointed to the High Court in 1989.

In his amicus curiae submission, Ernst Willheim said those undertakings to the ICJ left open the prospect that the ACT supreme court also might not be satisfied by assurances made by the attorney general about national security.

Here is a case where we find national security is being played as a card to bully citizens, cast them in the role of "terrorists" and cover-up the wrongdoing of a previous Coalition government, of which the current attorney general is in a direct line of succession.

In June 2018, Porter was anxious to emphasise that what he called “the judicial process” should, in the interests of “fairness”, be conducted without commentary.

Can a secret trial, where evidence is suppressed, be a fair trial? It could be that the moment justice Mossop rules that slabs of the proceedings be closed, then the accused would be off to the High Court seeking a ruling that secrecy is an abnegation of fairness.

The attorney general wanted speed and silence; instead, he will get a case that has the potential to run on and on, accompanied by mounting public disgust.

- Richard Ackland publishes the law journals Justinian and Gazette of Law and Journalism. He is a Gold Walkley winner and a former host of Media Watch and Radio National’s Late Night Live