

High Court judges delay considering whether to release secret evidence in Bernard Collaery conspiracy trial

Elizabeth Byrne, ABC News, 13 April 2022

The High Court has put off considering whether details of an alleged Australian spying operation in Timor-Leste should remain secret during a criminal trial.

Key points:

- The ACT Supreme Court has ruled it can hear secret evidence related to Australian espionage in Timor-Leste
- However, the Commonwealth argued in the High Court today that access to the documents must be blocked to protect national security
- The High Court has now referred the case back to the ACT courts to resolve other matters first

Bernard Collaery, a barrister and former ACT attorney-general, is accused of conspiring to reveal classified information about Australian espionage in Timor-Leste — also known as East Timor — during sensitive oil and gas negotiations two decades ago.

But the years-long criminal case still has no trial date, as the parties battle over what evidence should remain hidden from the public.

The dispute covers two types of secret evidence: general prosecution evidence, which the Commonwealth says should not be heard in public, and so-called "court-only" evidence, which the Commonwealth argues should not even be shared with Mr Collaery or his lawyers.

The federal government has also argued that the highly classified "court-only" material should not even be heard by a court.

Last month, ACT Supreme Court Justice David Mossop [found the court could receive this evidence](#) by appointing a special counsel, who had access to the documents, to advocate on Mr Collaery's behalf.

But in the High Court on Wednesday, federal Solicitor-General Stephen Donaghue argued against that decision, saying the information must remain unseen, even by a special counsel, so as to protect national security.

"If this isn't stopped, the [earlier ACT] judgement could be released without the redactions we need," Mr Donaghue said.

The three High Court judges hearing the matter asked Mr Donaghue whether he was simply asking for a stay.

Justice Michelle Gordon also noted the case's protracted history.

Another judge, Justice James Edelman, suggested the Commonwealth had failed to identify the ACT court's error.

"What you say is the error is that the [ACT] Chief Justice didn't make the orders you wanted," Justice Edelman said.

Mr Donaghue told the court he was not asking it to "plunge" into the secret material, but rather to delay the publishing of the ACT court's reasons, until the separate issue of "court-only" material was resolved.

Appeal court doubted 'significant' risk to national security

The case has been preceded by years of hearings and appeals, mostly over how a court should handle the evidence involved.

Last year, the ACT Court of Appeal noted that [disclosing some issues in the case might risk prejudicing national security](#).

But, in a summary of its judgement, the court expressed doubt that any "significant risk ... would materialise".

"On the other hand, there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed," the summary read.

However, the court's full judgement was not made public, because the Commonwealth said it wanted the High Court to rule on its publication.

On Wednesday, the High Court justices suggested the federal government set aside the case until the matter of "court-only" evidence was resolved.

As a result, the case will now return to the ACT Supreme Court.

Mr Collaery's co-accused, known as [Witness K, pleaded guilty last year and was given a three-month suspended sentence](#).

Canberra lawyer Bernard Collaery is fighting conspiracy charges.*(ABC News: Nick Haggarty)*

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Posted 14 hours agoWed 13 Apr 2022 at 2:54am, updated 35 minutes agoWed 13 Apr 2022 at 5:05pm