Bernard Collaery trial is a highly unusual criminal prosecution

After nine months of hearings, seven judgments, and government spending of $2 million, we still know too little about the prosecutions of Bernard Collaery and Witness K.

Ian Cunliffe – *Australian Financial Review* – 14 August 2020

https://www.afr.com/policy/foreign-affairs/bernard-collaery-trial-is-a-highly-unusual-criminal-prosecution-20200812-p55kzb

Nothing is usual about the ongoing criminal prosecutions of lawyer Bernard Collaery and former senior intelligence officer "Witness K" in the ACT.

After nine months of hearings and seven judgments, we recently learned for the first time that four of the five charges against Collaery are that he communicated to ABC journalists that the Australian Secret Intelligence Service had bugged Timor-Leste's cabinet room during the negotiations with Australia over resources in the Timor sea – that revelation was broadcast on *4 Corners*, *7.30 Report*, *Lateline*, and on ABC Radio – and that the information in question "was prepared by or on behalf of ASIS in connection with its functions or related to the performance of its functions". The fifth charge is that Collaery communicated such information to the government of Timor-Leste.

There are many disturbing aspects of the Collaery prosecution. The Commonwealth has spent more than $2 million on it so far. Collaery is in his mid-seventies without access to such resources. He is not getting legal aid. The presiding judge, Justice Mossop, has reportedly called it a war between the two sides. In resource terms, that war is as one sided as those negotiations between Timor-Leste and Australia in the early 2000s.

In contending for a largely secret trial, the Attorney-General deployed his biggest guns. He certified that disclosure of information in the trial "is likely to prejudice national security". The heads of ASIS, ASIO, the Office of National Assessments (ONA), the Department of Homeland Security, and the Department of Foreign Affairs and Trade, as well as ASIO's Deputy Director, and a former head of ONA apparently thought so too.

The judge acknowledged that the bugging allegation has been widely reported. Is that harming our national security? The published judgement gives no transparent clue as to how or why admitting the bugging would be so damaging. But Justice Mossop did confirm that an important issue at the trial is likely to be whether the bugging allegation is true.

He took comfort that any reputational harm from the trial being largely secret would be discounted by "the general perception that Australia has an independent and fair judiciary." The judge seems unduly sanguine on that point. Australia's reputation is being seriously tested by Canberra's secret trials.

Justice Mossop quoted the splendid exposition on the need for open trials by the former Chief Justice of Australia, Robert French: an essential characteristic of courts is that they sit in public, that to maintain public confidence, court proceedings need to be subject to public, and professional scrutiny; and that, under the Constitution, courts must at all times be and appear to be independent and

impartial tribunals. However, Justice Mossop did not otherwise advert to those considerations. If they are in play in any case, they are in Collaery's trial.

Justice French gave examples which might justify suppressing some evidence. But he said the list of exceptions will not lightly be extended, adding:

Where "exceptional and compelling considerations going to national security" require that the confidentiality of certain materials be preserved, a departure from the ordinary open justice principle may be justified.

His words are very cautious and guarded –"exceptional and compelling", "require", "may be justified". By stark contrast, Justice Mossop seems much more gung ho:

Where, as in this case, what is being prosecuted is an alleged unlawful disclosure of sensitive information, it would be contrary to the proper administration of justice to compel the prosecution to disclose to the world the sensitive information which the law required to be kept secret.

Justice Mossop made orders for secrecy substantially as sought by the Attorney-General. However the judge's conclusion that secrecy was required seems remarkably insipid and unconvincing, and a quite inadequate basis for ordering a non-public trial, especially as the risk of prejudice to Australia's national security "is neither immediate nor catastrophic", and precisely how those risks will manifest themselves is not possible to determine based on the redacted judgment that has been released.

Justice Mossop seems to have erred legally by confounding "a risk of prejudice to Australia's national security if disclosure occurred", with the likelihood to prejudice national security.

Justice Mossop acknowledged "the risk that an assertion of prejudice to national security in the very broad sense that it is defined in the Act may be used 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". Collaery's supporters argue vehemently that that is exactly what is happening – the Government is punishing its enemies and wants to do so out of the public spotlight. Disappointingly Justice Mossop did not say anything as to why that risk did not lead him to a different conclusion on the secrecy issue.

We all know that ASIS did the bugging. If it wants Collaery's head on a platter, the Commonwealth should be required to acknowledge its own crime in open court, and to defend its actions.

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