

ACT Court of Appeal rules in favour of open justice and journalistic freedom

Former ACT attorney general, Bernard Collaery, recently won his bid for an open trial, as he faces five charges of revealing national security information to ABC journalists and conspiring with witness K. The charges are related to allegations that ASIS bugged an East Timor Government building in order to gain an advantage in oil and gas negotiations.

The ruling was an important victory for Australia's democracy because open justice allows the court to be open for public observation and scrutiny. It was also a victory for Australian journalism, as journalists will now be able to report on important aspects the case, playing their fundamental role in maintenance of the public sphere.

"There was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed," Chief Justice Murrell said in delivering the outcome on the 6th of October 2021.

The judgement is significant because it overturns an ACT Supreme Court ruling made under the National Security Information Act in 2020. The ruling would have required most of the court hearings to be held behind closed doors and was considered by many as a violation of transparency.

The National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act) provides a framework for how national security information is disclosed and protected in criminal and civil proceedings. Buried in this law is section 32 (8). The provision provides that in making orders under the National Security Information Act, the court "must give greatest weight" to the views of the Attorney-General on prejudice to national security. This allows the Government to tilt justice away from transparency and into secrecy.

After winning his bid for an open trial, Mr Collaery spoke to ABC journalists outside the ACT Court of Appeal.

"National security is always a balance. If you knew my background, you would know how much I support the concepts of national security," Mr Collaery said.

“But it has to be issues to be issues of true national security, not issues of embarrassment or publicity.”

The Australian Government insisted on a secret trial because they believed the evidence provided in court would compromise national security. However, an alternate view is that Australia did not act in good faith towards Timor Leste and are attempting to cover up the incident.

As journalist Lukas Coch said in a Conversation article in 2020, there is an “Alice in Wonderland quality” about this case. That being, everything has been turned upside down. The two people who acted in national interest by disclosing alleged unlawful activity by Australia’s Intelligence Services have become the defendants. The Australian Government, who initiated the alleged unlawful activity, has become the persecutor.

On the 16th of October 2020, an interview with Mr Collaery was posted by the Lawyers Weekly Podcast Network. In the interview, Mr Collaery provided host Jerome Doraisamy with an update on proceedings.

“There are worrying and troubling signs that the Federal Government believes it is above the ordinary law of the land,” Mr Collaery said in the podcast.

In 2012, Australian Attorney-General George Brandis ordered the confiscation of Witness K’s passport to prevent him giving evidence in court and ordered that Mr Collaery’s chambers were to be raided by ASIO. In this process, Mr Collaery’s documents and brief on the case were seized. The seizing of these documents was scandalous, and a violation of legal professional privilege.

In light of these circumstances, it appears as though the Government is operating under a patronising level of secrecy. It is important for journalists to ensure authority provides accountability and transparency for their actions.

“The media is entitled to report on court proceedings is ‘a corollary of the right of access to the court by members of the public,” according to section 10.47 of the Australian Law Reform’s Open Justice Principles.

This means that the right to report on court proceedings is an extension of the right to physically attend. However, with this right comes responsibility. There is no fair and accurate report or public interest defence that would allow a journalist to breach a suppression or closed court order. If majority of the case had been closed to the public and

therefore the media, it would have been very difficult for journalists to report on case proceedings. Under the subjudice rule, journalists are not permitted to report on any information detailed outside of court whilst the case is ongoing, as this may influence the outcome of the trial.

While Mr Collaery has won his bid for many important aspects of the case to be open, it is still important for journalists to consider the balance between journalistic freedom and doing no harm. It is true that the Government must be held to account for their actions, but everyone has a right to a fair trial, and Mr Collaery's case must not be compromised by clumsy reporting.

There are no laws to protect journalists in Australia, they are instead guided by a series of ethics and values. Journalists should "avoid causing or contributing materially to substantial offence, distress or prejudice, or a substantial risk to health or safety, unless doing so is sufficiently in the public interest", according to section six of the Australian Press Council Statement of Principles. People often have different interpretations about what information is in the "public interest" which leaves a blurred line for journalists. This is particularly difficult for inexperienced journalists to navigate as they begin to write articles that have serious ethical implications.

In the forementioned podcast, Mr Collaery said the only thing he was guilty of was "working to his best endeavours". However, the Australian Government said he has breached national security. Journalists must ensure that the case is heard, but also allow the court to make their decision from the evidence alone.

References

Coch L 2020, *The Conversation, Why Bernard Collaery's case is one of the gravest threats to freedom of expression*, viewed 15 October 2021, <<https://theconversation.com/media-companies-on-notice-over-traumatised-journalists-after-landmark-court-decision-112766>>

Australian Law Reform Commission 2015, *Open Justice*, viewed 16 October 2021, <<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/10-fair-trial/open-justice/>>

Australian Encyclopedia of Law 2017, *The Subjudice Rule*, viewed 17 October 2021, <<https://australialaw.org/subjudice-rule/>>

Media Watch 2021, Australian Broadcasting Commission, *Victory for justice*, viewed 13 October 2021, <<https://www.abc.net.au/mediawatch/episodes/collaery/13580006>>

Australia Government Attorney-General's Department 2021, *National Security Intelligence Act*, viewed 16 October 2021, <<https://www.ag.gov.au/national-security/national-security-information-act>>

Australian Press Council 2011, *Statements of Principles*, viewed 16 October 2021, <<https://www.presscouncil.org.au/statements-of-principles/>>

Byrne E 2021, Australian Broadcasting Commission, Court of Appeal rules in favour of Witness K lawyer Bernard Collaery's bid for open trial, <<https://www.abc.net.au/news/2021-10-06/witness-k-lawyer-bernard-collaery-has-win-in-bid-for-open-trial/100517818>>