



Government sat on Witness K prosecution for years despite advice

Exclusive by Steve Cannane, ABC Investigations

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Former attorney-general George Brandis was asked to approve the controversial prosecution of an Australian spy and his lawyer more than two years before consent was finally granted, a document obtained by the ABC has revealed.

The ex-spy, known as "Witness K", and his lawyer Bernard Collaery are facing charges under the Intelligence Services Act 2001 for allegedly conspiring to communicate secret information to Timor-Leste's government sometime between May 2008 and May 2013.

Mr Collaery is also accused of sharing information with ABC journalists about an operation which saw Australia bug Timor-Leste's cabinet room in Dili during negotiations over oil and gas reserves worth an estimated \$40 billion.

There has been much speculation about why the Government has suddenly moved to prosecute Witness K and Mr Collaery, almost four-and-a-half years after ASIO raided their homes.

Some such as former Victorian premier Steve Bracks and independent MP Andrew Wilkie have questioned whether it is linked to a recent deal signed over oil and gas, something the Government has emphatically denied.

According to a letter sent to senator Rex Patrick by the current Attorney-General Christian Porter, the Commonwealth Director of Public Prosecutions (CDPP) sent a request for "consent to prosecute" to Mr Brandis on September 17, 2015, more than two-and-a-half years before approval was finally granted.



PHOTO: Bernard Collaery previously described the case as an attack on freedom of speech. (ABC News: Nick Haggarty)



PHOTO: There are calls for the case to be dropped to avoid a "chilling effect" on whistleblowers. (ABC News: Ian Cutmore)

Mr Brandis asked then-CDPP Robert Bromwich to provide written advice on the prosecution, which was finalised on October 1, but Mr Brandis did not act.

It was another 10 months before Mr Brandis asked the new CDPP Sarah McNaughton if she could "consider the Bromwich advice and provide her opinion".

About a month later Ms McNaughton provided her opinion, but again approval to prosecute was not given.

The letter states in February 2017, almost six months later, Mr Brandis sought further advice from the solicitor-general, Stephen Donaghue QC.

That legal opinion was provided to the attorney-general in May 2017.

Seven months later the CDPP received that advice on December 19.

A day later Mr Brandis stood down as attorney-general to become Australia's high commissioner in London.

Mr Porter was sworn in the same day.

The letter states the CDPP then received external advice on the matter on March 15 this year from a barrister who has not been named.

Two weeks later the CDPP wrote to Mr Porter seeking his approval to prosecute, and that was granted in May.

In cases like this, the Attorney-General is required to consider whether any such prosecution is in the public interest.

Mr Bracks, a long-term adviser to Timor-Leste, has previously told the ABC he believes the approval was delayed until after Australia signed a deal with Timor-Leste over new maritime boundaries in March.

The Attorney-General's office has been contacted for comment.

He has previously insisted the finalisation of the new treaty had no influence on his decision, saying in a statement to the ABC:

"The decision was based on my consideration of the CDPP's independent assessment of the evidence.

"External factors played no part in my consideration of the matter."

Senator Patrick said the time it took for Mr Brandis to act "stood out".

"I don't understand why he sat at each stage for so long and did not do anything," Senator Patrick said.

"The major concern I have here is that justice delayed is justice denied."

Mr Brandis told the ABC: "I am not at liberty to comment on matters concerning national security nor on legal advice to the government."

Secret prosecution sought

Mr Porter's letter also revealed the prosecution is seeking to have the case against Witness K and Mr Collaery heard under the National Security Information (NSI) Act.

"It means the prosecution is seeking orders to have almost the entire case heard in secret," University of New South Wales international and political studies professor and former army intelligence officer Clinton Fernandes told the ABC.

The NSI Act was introduced in 2004, which Professor Fernandes said was at the height of the risk of terrorist attacks in the region from Jemaah Islamiyah.

"The NSI Act was enacted in circumstances where the prosecution of terrorists and the protection of ASIO officers and intelligence personnel and certain evidence was justified as requiring the highest level of protection," he said.

"It was never mentioned that a trial like this would ever be brought in [under these orders]."

If the prosecution and the defence cannot agree to the highly secretive orders under the NSI Act, it may well fall on Mr Porter to decide whether they can be used during the trial.

The next hearing is due in the ACT Magistrates Court on October 29.

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PHOTO: Senator Patrick says "the major concern I have here is that justice delayed is justice denied".
(ABC News: Gary-Jon Lysaght)