

July 23, 2018 5:45PM EDT



Australia: Don't Prosecute for Exposure of Misconduct

Whistleblowing Former Spy, Lawyer Face Hearing for Revealing Bugging Operation



Barrister Bernard Collaery speaks at an event in Sydney. © 2017 Politics in the Pub

(Sydney) – Australian authorities should not prosecute a former Australian spy and his lawyer for exposing government wrongdoing, Human Rights Watch said today. The Magistrates Court in the Australian Capital Territory is scheduled to hold a hearing setting out next steps in the case against barrister Bernard Collaery and “Witness K” on July 25, 2018.

Collaery and Witness K were involved in legal disputes between the governments of **Australia** and **Timor-Leste** concerning entitlements to revenue from oil and gas fields in the Timor Sea. The two men are charged under section 39 of the Intelligence Services Act with conspiracy to communicate information from the Australian Secret Intelligence Service. Charges under that section, punishable by up to two years in prison, can only be brought by prosecutors with the consent of the **attorney-general**.

“Officials like Witness K who expose government misconduct play an important role in holding the authorities to account and need to be protected, not prosecuted,” said **Elaine Pearson**, Australia director at Human Rights Watch. “Instead, years after the events took place, the Australian government is pursuing a secretive Kafkaesque prosecution of the former spy and his lawyer.”

The Timor-Leste government filed documents with the International Court of Justice in the Hague in 2014 **stating** that in 2004, “Australia covertly spied on the Timor-Leste negotiating team by means of listening devices surreptitiously and unlawfully placed by Australian personnel in the Timor-Leste government offices. This enabled the Australian negotiating team to become aware of the private discussions of the Timor-Leste negotiating team and of its position in relation to various issues arising in connection with the 2002 Treaty and the attempt to amend it by the drafting of the 2006 Treaty.” The Australian government has not confirmed or denied the allegations.

Witness K, who was part of the Australian

bugging team, complained to Australia's inspector-general of intelligence about the legality of the operation in 2007 and subsequently, with the inspector-general's approval, sought legal advice from Collaery. Collaery was a legal advisor to the Timorese government.

In December 2013, when the case was going to be heard at the International Court of Justice, Australian Security Intelligence Organization agents raided Witness K's home and Collaery's office, seizing documents and data. They cancelled Witness K's passport, preventing him from traveling to the Hague, where he was due to give evidence. Timor-Leste then initiated **proceedings** against Australia regarding the seizure of documents, data, and other property that it said belonged to Timor-Leste or that Timor-Leste had the right to protect under international law.

Details of the charges against the two men were only made public on June 28, 2017, when a member of parliament, Andrew Wilkie, **used parliamentary privilege to disclose the prosecution**. That same day, parliament passed new espionage and national security laws that increase the penalties for unauthorized disclosures of information with a very broad definition of "national security."

The law passed without provisions for a strong public-interest defense across all offenses, though government officials have said that the attorney-general would have discretion about whether to prosecute the offenses.

Whistleblowers, and those like Witness K who reveal government misconduct through the

system, need protection from retaliation for disclosures that are made in the public interest, Human Rights Watch said.

If the court case proceeds, it should do so in open court, rather than in secret, Human Rights Watch said. Information at court hearings should not be kept from the public unless disclosing it is likely to harm a legitimate national security interest, and the harm from disclosure outweighs the public interest in knowing the information.

There is a strong public interest in knowing the reasons for these prosecutions in connection with the defendants' attempts to expose wrongdoing by the Australian government. Open court proceedings are vital to public confidence in the criminal justice system. Suppression orders should not be used to protect governments from criticism or embarrassment.

"The attorney general should not be bringing a case against Witness K and his lawyer for reporting on wrongful practices by the government," Pearson said. "This case combined with sweeping new laws criminalizing unauthorized disclosures could have a chilling effect on officials who see government corruption or wrongdoing and want to do something about it."