



COMMONWEALTH OF AUSTRALIA

SENATE

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CORRECTIONS

This is a **PROOF ISSUE**. Senators may suggest corrections to their own speeches within 15 non-sitting days by contacting the Hansard office

BY AUTHORITY OF THE SENATE

PROOF

Excerpts related to prosecution of Witness K and Bernard Collaery.

Video available at <https://www.youtube.com/watch?v=U0zCjCariWY>

National Security

Senator PATRICK (South Australia) (14:31): My question is to the Attorney-General, and relates to whistleblowers. The Prosecution Policy of the Commonwealth provides a two-stage test that must be satisfied before a prosecution is commenced. There must be sufficient evidence to prosecute the case and it must be evident from the facts of the case and all of the surrounding circumstances that the prosecution would be in the public interest. When asked about the impact of the prosecution of Bernard Collaery and witness K on the relationship between Australia and East Timor at estimates, the acting CDPP said that it would be, 'a step beyond the scope of the matters that we normally consider'.

So it's clear that hasn't been considered properly. Attorney-General, can you please provide this chamber with an explanation as to why it is in the public interest to prosecute Bernard Collaery and witness K for calling out unlawful activity?

Senator CASH (Western Australia—Attorney-General, Minister for Industrial Relations and Deputy Leader of the Government in the Senate) (14:32): I thank Senator Patrick for the question. This matter is currently before the court. In fact it is in the court today, so I will be very cautious in the comments that I make to Senator Patrick.

Senator Patrick, you did ask questions at Senate estimates and you were provided with the responses that you have referred to. What I can now say in relation to your question is this: the Commonwealth Director of Public Prosecutions considered the brief of evidence and made an independent decision that a prosecution was the appropriate course of action in relation to this case. As you have stated, this was done in accordance with the Prosecution Policy of the Commonwealth that requires the CDPP be satisfied that the prosecution would be in the public interest.

Mr Collaery was charged with an offence of conspiracy to communicate Australian Secret Intelligence Service information, contrary to section 11.5 of the Criminal Code Act 1995 and section 39 of the Intelligence Services Act 2001, with further offences of communicating Australian Secret Intelligence Service information, contrary to section 39 of the Intelligence Services Act 2001. You would also be aware that witness K has been charged with an offence of conspiracy to communicate Australian Secret Intelligence Service information, contrary to section 11.5 of the Criminal Code Act 1995 and section 39 of the Intelligence Services Act 2001.

As I said, this is an independent decision that the CDPP made in terms of— (*Time expired*)

The PRESIDENT: Senator Patrick, a supplementary question.

Senator PATRICK (South Australia) (14:34): I understand witness K has actually pleaded guilty in the ACT Magistrates Court to conspiring to reveal classified information. Clearly the government has worn witness K down over the years—including the removal of his passport in 2013 so that he could not leave this country. He of course took that matter to the AAT. What's the current status of his passport? Will he have his passport returned to him?

Senator CASH (Western Australia—Attorney-General, Minister for Industrial Relations and Deputy Leader of the Government in the Senate) (14:35): In the first instance, Senator Patrick, you have provided commentary in relation to this matter. That is merely your commentary. The government does not agree with what you've stated. In relation to the issue of the passport, that is a matter, Mr President, more appropriately dealt with by the Department of Foreign Affairs and Trade, and my understanding is that they would not normally comment on the status of a person's or an Australian's passport.

The PRESIDENT: Senator Patrick, a final supplementary question.

Senator PATRICK (South Australia) (14:35): So we've got the government prosecuting whistleblower David McBride after he revealed war crimes in Afghanistan, which of course have been the subject of the Brerton report. There's no question what he claimed did occur. We also know of Richard Boyle, who called out the improper use of garnishee notices. He blew the whistle and he is being prosecuted. What is the public interest in prosecuting these whistleblowers?

Senator CASH (Western Australia—Attorney-General, Minister for Industrial Relations and Deputy Leader of the Government in the Senate) (14:36): As I have already stated in my answer to Senator Patrick's first question, these matters are all currently before the court. What I will say, though, in relation to the two further matters that Senator Patrick has raised is that the prosecutions, as you are aware Senator Patrick—you asked questions at estimates—have been brought because the Commonwealth Director of Public Prosecutions made an independent decision that the prosecutions are in accordance with the Prosecution Policy of the Commonwealth.

MOTIONS

Timor-Leste

Senator PATRICK (South Australia) (16:34): I move:

That the Senate—

(a) notes that:

(i) in 2004 Australia, during 'good faith' sea boundary negotiations with Timor-Leste, one of the poorest countries in the world, spied on their negotiating team with an aim to forcing them to surrender most of the revenue from the Greater Sunrise resource project,

(ii) Mr Bernard Collaery and Witness K have been charged for blowing the whistle on the unlawful conduct,

(iii) the spying has blemished Australia's reputation in Timor and undone much of the good will that stemmed from assisting the nation gain independence,

(iv) the alienation of Timor has the potential to damage Australia's diplomatic and national security interests, and

(v) at the 27 May 2021 estimates hearing of the Legal and Constitutional Affairs Legislation Committee, the Commonwealth Director of Public Prosecutions advised that the impact these prosecutions could have on Australia's relationship with Timor was beyond the scope of the matters they included in their public interest considerations; and

(b) calls on:

(i) the Federal Government to recognise that the prosecution of Mr Collaery and Witness K is not in the public interest, and

(ii) the Attorney-General to decline to proceed further with the prosecutions as per section 71 of the *Judiciary Act 1903*.

I'm very pleased that the Attorney-General has joined us in the chamber to listen to this debate. It is a very important discussion that we're going to have. I'm going to talk about betrayal—betrayal of a country and then betrayal of whistleblowers. Australia's relationship with Timor-Leste has been a long history of betrayal on our side of the ledger. In 1942 the Timorese people paid a terrible price for supporting Australian commandos fighting the Japanese in occupied Timor. Yet, at the end of the war Australia was content to see the Portuguese military regime resume control of Timor, which was left as an impoverished colonial backwater.

In the 1970s Prime Minister Whitlam gave a wink and a nod to President Suharto's plans to invade East Timor. He put good relationships with Jakarta ahead of international law and basic decency. Prime Minister Fraser's government then watched the Indonesians invade and turned a blind eye to reports of the most terrible massacres and atrocities. The governments of Prime Minister Hawke and Prime Minister Keating then embraced Suharto and scabbled to negotiate a deal with Indonesia to get the lion's share of oil and gas wealth in the Timor Sea. We can all remember foreign minister Gareth Evans clinking champagne glasses with foreign minister Ali Alatas whilst flying in a VIP jet high above the Timor Sea.

We then go to the negotiations that took place after the independence of East Timor. We must remember that John Howard was initially very reluctant to assist in supporting the Timorese in their independence call and, indeed, only after international pressure and public pressure did we send in Australian troops. The East Timorese people triumphed, so did Australian activists such as Sister Susan Connelly, who so long championed for the cause of East Timor. I was up in Timor for the 20th anniversary and other people were honoured as well, including Michele O'Neil from the ACTU for a lot of work that she'd done in this area. Lots and lot of Australians got involved.

Then what happened was we then entered into negotiations over the sea boundary between Timor-Leste and Australia. Importantly—and we need to understand this—we entered into good faith negotiations as was required by international law. But what did we do? We sent ASIS officers disguised as aid workers into the cabinet rooms

of the Timor government and bugged the negotiating team. People might think that I'm revealing some sort of secret here but I'm not. We have Bernard Collaery and Witness K appearing in the courts here in the ACT, not because there was some fictitious operation but because there was a real operation. Anyone who wants to take the time, the trouble, to look at the ICJs website and have a look at Timor-Leste's memorial in relation to its proceedings against Australia, when the Australian government broke into the lawyers of Timor-Leste, raided their offices and took all of their legal documents—which ultimately they had to return, with the Hague ordering, an unusual order, that Australia was not to spy on East Timor. So let's not pretend this didn't happen. It was unconscionable. It was not the way Australians expect us to treat almost our nearest neighbour, a neighbour that helped us throughout World War II, a neighbour that is actually quite an important neighbour to us, noting its geographical location. We duded them. That's what we set out to do. We duded them. Then, when someone called them out, what did we do? We went after them.

I understand that Witness K may have pleaded guilty to charges in the ACT court today. That's not been confirmed. We saw that at question time. But in the event that that is what has happened, or will happen, we need to understand that witness K didn't go to the media. He went to the Inspector-General of Intelligence and Security and made a complaint. He raised the issue through the appropriate authorities and was then authorised to talk to a lawyer who was approved by IGIS to deal with these sorts of matters; he went to talk to Mr Bernard Collaery. He did everything properly. He called out misconduct and then, when he did it properly, he ended up in the ACT courts.

He has been under extreme pressure. We know that in 2013 the Australian government took his passport from him so that he couldn't travel. This is a gentleman who had served his country. This is a gentleman who was of the highest calibre and who had never presented a problem in terms of anything that he had done, and he had his passport taken from him. Of course he's been fighting that in the AAT, to try to get it back. Those proceedings have been interrupted by the charges that were then laid against witness K. Of course, the prospect of a charge originally sat with former Attorney-General Senator George Brandis, who refused to deal with it. He knew that this was not proper. So it sat on his desk until there was a change of Attorney-General to Christian Porter, who then authorised the prosecution, in a poor lack of judgement.

These are not the only judgements that we call into question with the former Attorney-General, Christian Porter. He approved these prosecutions, he approved the prosecution of David McBride and he approved the prosecution of Richard Boyle. Those were all bad calls. This was the Attorney-General who censored an Auditor-General's report and refused to let the parliament see the conclusions of the Auditor-General's report on the basis of national security. I then had to go to the AAT to get a ruling that said: 'Do you know what? It's not sensitive.' So it has now been made available to the parliament. That's poor judgement, poor judgement, poor judgement. And we have two whistleblowers suffering for this, both witness K and Collaery.

I give credit to Senator Carr for pursuing this at estimates. What is the public interest in this prosecution? These are gentlemen who called out misconduct—an abhorrent breach of good faith with the country of East Timor. I've been to Timor; I've sat and talked with the Timorese and I've had a meeting with the chief of staff of the president. They all consider witness K and Bernard Collaery to be heroes, and they're disgusted with Australia's prosecution of their two heroes. They're disgusted to the point that they're minded to cooperate with countries that we might consider not to be in our interests for them to cooperate with. When I went to the southern plateau of Timor-Leste I could see 32 kilometres of a dual-carriageway freeway that had been built by the Chinese. I saw the power lines that have been built by the Chinese and I saw the ports that are being built by the Chinese. It turns out that the Chinese are a much better friend to East Timor than Australia is, as anyone who looks through the lens of this prosecution would reasonably determine.

Senator Carr asked this question of the CDPP: what is the public interest in prosecuting these two gentlemen? As a supplementary, I asked whether or not our relationship with East Timor had been considered in that public-interest determination. And the answer was that it hadn't been. So we haven't considered this properly. Let's set aside the fact that these two people are heroes; we haven't considered what this is doing to our relationship with Timor-Leste. It is not in the public interest to proceed with this prosecution. It hasn't properly been considered. As I called for in my motion, I think the Attorney-General needs to exercise her powers under section 71 of the Judiciary Act to decline to continue this prosecution.

Now, of course, the answer from the Attorney-General is: 'Well, this power has never been used before.' That's not a reason not to use it properly. It was put in the act because the parliament expects the Attorney-General to have responsibility to the parliament as to prosecution. We give the Attorney-General these powers, and there are times when the Attorney-General should exercise these powers—not simply say, 'The powers have never been used before, so I'm too afraid to use them'. Sure, it might be the fact that it calls for an exceptional set of circumstances. In the case of Richard Boyle, we even got Senator Scarr asking pertinent questions of the CDPP as

to whether this was an exceptional case, and getting the answer: 'Yes, it is,' and yet the Attorney-General was still not willing to exercise those powers.

We need to understand: this is not in the public interest. There's a requirement, if you are going to prosecute someone, to establish that there is public interest in doing so. Yet, when Senator Carr has asked the question, and when I asked the question in question time today, no-one could tell the public what that interest is. We've got a public interest that's so secret the public can't even know about it. And that is a problem.

So this government should clearly state what the public interest is in the case of witness K and Collaery—and also in the case of David McBride and that of Richard Boyle. They should clearly state that. I'm calling on the Attorney-General to exercise her power to decline to continue this prosecution, because it serves no public good.

Senator FAWCETT (South Australia) (16:47): I, too, rise to speak to this motion. I wish to just pick up on a couple of points that Senator Patrick raised. He talked about the IGIS and he talked about the processes that are in place, so I'd like to touch on a couple of those and then move on to talk a bit about our relationship with East Timor and the very strong basis Australia has in that relationship.

The issues around disclosure were well explored in the report by the Parliamentary Joint Committee on Intelligence and Security on the impacts of national security legislation on freedom of the media. Whilst it is not directly on this case, it goes to many similar issues, and I would encourage anyone who has an interest in these issues, and in why there are some matters that are not placed into the public domain, to read that report and understand many of the considerations which executive government—whether the Labor Party or the coalition—has in deciding what is or should be made public. So that's one fact.

There is another fact for governments—and this is recognised by all governments around the world; it's even recognised by many of the civil society players who came and gave evidence, including evidence about media freedoms given by members of the media. There is information which a government should hold secret, and there is the protective framework around protecting information that gives information certain levels of classification. Now, if that is going to have effect, what that means is that people who are officials of the Commonwealth have a higher duty than people in, perhaps, the media or the general public to protect that information to which they are given privileged access, because if they don't fulfil that obligation of protecting that information then the framework and the basis upon which government can hold information classified is compromised. And so, importantly, is the trust of allies, who are prepared to cooperate with Australia on the basis of the fact that we have a system to protect information that is sensitive and classified and may go to national interest issues. If that system is not upheld and protected, then our own government and our own national interest are compromised, but so too is our relationship with, and the trust from, other partners who we work with. As a member of the Parliamentary Joint Committee on Intelligence and Security, and also someone who served in Defence for over 22 years as a full-time officer, I recognise the incredible importance of trusted relationships with allies. So all of that goes to having frameworks which are effective and have integrity because they are maintained.

We recognise, though, as a country, that there are times when either individual or collective things happen which the Australian public would think are not appropriate. There is a method; Senator Patrick mentioned this. Through the Inspector-General of Intelligence and Security, people who work within our intelligence agencies have the option under the Public Interest Disclosure Scheme to highlight, to an independent authority who has the ability to investigate, actions that they believe are disclosable incidents. Section 29 of the Public Interest Disclosure Act gives a long list of things, which I won't run through here, that are disclosable. It then talks about things that are not disclosable just because somebody disagrees with a policy or an action et cetera of government—again, the list that people can refer to is laid out there. But the important part that I think needs to be highlighted here is that, once an eligible person makes a disclosure to a proper authority, they are provided with legal protection from reprisals that result from that disclosure. So there is a process. If the process is followed and if everything is in accordance with the requirements of the legislation as to what can be disclosed and why, then they are provided with legal protection. Without commenting on the court case that is occurring at the moment, I just want to highlight the fact that action has been taken. The legislation is designed so that someone who has a valid concern and has abided by the process will be provided with protection. I will leave my comments there on that matter.

I think it's important that the Australian public have confidence that people who work within our agencies, whether Defence, ASIO, ASIS or the Australian Signals Directorate—a range of bodies who work on behalf of the Australian population dealing with sensitive issues—are charged with an obligation to protect. There are criminal penalties that they are liable to if they make unauthorised disclosures. But we do provide avenues, whether through the Ombudsman for some or through the IGIS, the independent Inspector-General of Intelligence and Security, for people in relevant agencies whereby they can make those disclosures. If they make those disclosures and they have not done anything else, then they are protected legally.

In terms of East Timor, I think it is appropriate that we highlight the fact that Australia has a deep partnership with East Timor at a range of levels, at person-to-person as well as government levels. I think the visit by Prime Minister Morrison and Foreign Minister Payne in August 2019, to celebrate the 20th anniversary of the referendum that led to their independence and also to bring the Maritime Boundary Treaty into force, opened a new chapter in Australia's relationship with Timor-Leste. There is a high level of engagement. There is a focus on cooperation, including ongoing humanitarian support—whether that's in things like the floods that were there in April or in supporting Timor-Leste with the response to COVID-19. Australia continues to fund a range of humanitarian and other support as well as providing goods in the humanitarian effort in relief supplies, including medical things such as oxygen during the COVID crisis as well as fresh water and evacuation centres, and facilitating and funding access by NGOs like the World Food Programme to assist those people who are affected.

So there are a range of measures that Australia is taking in the current environment, particularly renegotiating the bilateral boundary, which I think has been an important reset in that relationship with Timor-Leste. Timor-Leste ministers and officials have publicly acknowledged and thanked Australia for our support, and Timor-Leste's appreciation has been conveyed to our Minister for Foreign Affairs by their minister for foreign affairs. As well their Prime Minister has expressed his thanks to our Prime Minister for that ongoing support. They recognise that the prosecutions here are a matter for Australia under our law. But those prosecutions have not prevented the substantial improvement in the bilateral relations which have taken place in recent years.

Senator KIM CARR (Victoria) (16:55): This question today gives rise to serious conversation about what we mean by our international reputation and what we mean by our concern when we provide advice to the world about our moral standards when it comes to human rights and our attitudes when it comes to the rules based order. We are only too happy and very quick off the mark to offer advice to authoritarian regimes about our moral superiority in international relations. Therefore, if we are to do that, I think that we have to ensure that in our own activity—that is, Australia's activity—such as the matters that have just been referred to by Senator Fawcett in terms of questions of trust, matters about questions of integrity, questions that go to the deep partnerships with our allies, we have to actually demonstrate those things in practice ourselves. It strikes me that the circumstances that have arisen in regard to Witness K and the prosecution of Witness K's lawyer, Bernard Collaery, raise serious doubts about just what levels of legal protection are, in fact, available to officers that draw attention to what they believe to be the inadequacies of our diplomacy and our international behaviour in terms of those benchmarks.

The allegations that ASIS had bugged the East Timor government's cabinet room in 2004 have, in fact, outraged many Australians, and so they should. But so should the prosecution of two men who revealed what I think, if true, is nothing short of shameful conduct. These prosecutions have been largely conducted in secret. They are prosecutions of people who claim to be whistleblowers, people who thought they had the protection of the legal mechanisms that Senator Fawcett has referred to, making allegations of serious misconduct which involved criminal behaviour not just by Australian government agencies but possibly by senior ministers in the Howard government as well. The possibility of that involvement by ministers might explain why the Morrison government has insisted on a cloak of secrecy around these very prosecutions even though the offence that Witness K and Mr Collaery have alleged occurred 17 years ago.

We don't know why the former Attorney-General, Christian Porter, has actually authorised the prosecutions. I want to emphasise that—he's authorised the prosecutions. What we do know is that his predecessor, George Brandis, on several occasions declined to do so. Nor do we know why it is, as publicly explained, Mr Porter has instructed his lawyers to intervene in the pre-trial proceedings against Mr Collaery on several occasions to seek even greater secrecy on the way in which the trial is conducted.

Mr Porter had always refused to explain why it was in the public interest to prosecute these men, who had revealed what was, in their minds, shameful conduct by the Australian government. Mr Porter's successor, Senator Cash, who's here today, hasn't provided any explanation either. In fact, she said in question time, as I understood her, that this was a matter of independent action by the CDPP. This has at all times been a highly political trial, and at all times it has involved the actions of the Attorney-General. We don't know why the Commonwealth has gone to such extraordinary lengths and such incredible expense to conduct these secret prosecutions. From the letter to me from the Attorney-General's Department, we now find out it's in excess of \$4 million, for a prosecution against two men whose real offence is to reveal some very, very dark aspects of Australian diplomacy.

The claim about the bugging by Australia of a friendly government, that of one our poorest neighbours, is a very serious claim. The Howard government was very proud to be able to make, finally, the assertion that it had helped that country obtain its independence. Australia played a very positive role, particularly in leading an international peacekeeping force there in September 1999. We'd like to think that Australia and East Timor did have a special relationship. The Howard government was very keen to encourage us all to say so. Well, it is

extraordinary that that special relationship did not preclude spying on that country's cabinet, and I find that remarkable given that what was at stake was international commercial negotiations about resource allocation and how to carve up an extraordinarily lucrative oil and gas resource in the Timor Sea. It would appear that the Howard government wanted to ensure that the newly independent, impoverished nation of Timor-Leste received as small a share of that resource as was possible. We know that an equitable division of the Greater Sunrise oil and gas field happened only after East Timor commenced proceedings in the International Court of Justice and the Permanent Court of Arbitration. A revised treaty on the oil and gas fields was signed in 2018. That's when Australia behaved honourably.

This shameful behaviour was revealed by Witness K and later shared with the media by, it would seem, Mr Collaery. This has led a former President of East Timor to describe Witness K and Mr Collaery as heroes, as I think has been pointed out. Mr Ramos-Horta said:

The people of Timor owe a massive debt to Witness K.

In this country, however, the government has chosen to prosecute these men. The activity of these men did not involve a matter of national security. East Timor is hardly a threat to Australia. What these men alleged to have occurred was not espionage directed at a hostile nation; it was an attempt to obtain an unfair advantage in a commercial negotiation. Nothing in this does credit to Australia. With regard to the secret prosecution of witness K and Bernard Collaery, I can't see how any of it does credit to Australia either.

It has been said, 'Oh, well, it's not really secret; it's just that portions of the proceedings are not in public.' That's the sort of line that we get from the A-G's department. It's the classic Sir Humphrey answer. The fact is that portions of the proceedings that the Australian public would wish to know have been closed. In plain English: the proceedings have been largely kept in secret. And we don't know why they're in secret. It means that an integral part of justice is not being done in a way that can be seen to be done.

I have often said that I am no lawyer, but what I do understand is this: our judicial system is distinguished from many others in so far as it is open and it is clearly different from the way in which authoritarian regimes operate. All governments in Australia have clearly been trying to distinguish themselves as the bearers of democracy. How can we do that if we behave in this manner? How can we offer ourselves as a moral authority from a rules based model when we invade people's civil liberties, invade lawyers' offices in the way that we have and in the way in which we treat people in these types of arrangements?

Of course, it's understood that witness K may well be pleading guilty to part of these proceedings. But in regard to other matters, Mr Collaery has taken the matter up through the various parts of the court. Mr Collaery is contesting the charges laid against him and, in fact, needs access to the information so that the courts can actually proceed to assess his claim. He is prevented from doing that. I remind senators that Mr Collaery is 76 years of age and that he has had a distinguished legal career. He is a former deputy chief minister and A-G, if I have that right, of the Australian Capital Territory. This is the man who we are prosecuting. I just can't see what is in the public interest and, more importantly what is in the national interest, to prosecute this man in this way. The officers before the Senate estimates committee could not explain that to us either.

The zeal with which the government is pursuing him is evident from the proceedings in the Australian Capital Territory's Court of Appeal. Lawyers acting for Mr Collaery challenged the order made last year in the ACT Supreme Court to accept an application by the then Attorney-General, Mr Porter, to invoke the National Security Information Act. That act, of course, prevents access to the information. The act requires courts to give greater sway to the A-G's views on the security implications of a case. It just highlights the problem here: the act is being used to undermine transparency and open justice in Australian courts. We have no indication of what the national security information might be and we don't have any indication as to what the national interest is that is being served by this prosecution.

The longer the Australian public is kept in the dark about this matter then the more questions are being raised here and internationally about the role of the Howard government and ministers in the events of 2004. Those questions will not go away no matter how much effort is put into the suppression of information concerning witness K and Mr Collaery. The proceedings that we have before us in the courts in the Australian Capital Territory are highlighting a very dangerous shift towards greater and greater emphasis on security over accountability in the government of this country. We've seen a rapid escalation in the misuse of the legal system to suppress people's rights, and I can only suggest that this is a stark reminder of how far this government will go to destroy the credibility of whistleblowers and undermine open justice. This whole matter ought to be reviewed by the new Attorney-General, and we should go back to the position that Senator Brandis presented when he was in that post.

Senator WHISH-WILSON (Tasmania) (17:10): Many Australians were shocked this week that the Prime Minister would step away from a G7 meeting—a meeting ostensibly about tackling the greatest challenge of our time, climate change, and about nations decarbonising through a green led recovery from COVID—and do a personal address to the APPEA, the Australian Petroleum Production & Exploration Association in Perth, where over 2,000 companies in the fossil fuel sector were meeting. He addressed this conference personally from London and issued 80,000 square kilometres of new ocean acreage for these companies to carve up and profit from, putting our oceans at risk.

If Australians are shocked at the influence of the oil and gas industry on this government then they will be especially shocked and outraged at the story and the matter that we are debating in the Senate today, which relates to Bernard Collaery—an Australian lawyer, who I'll talk about in a minute—and a whistleblower, witness K. Unfortunately, we don't know his name. In fact, we know very little about this courageous man except that he stepped forward with moral conviction and blew the whistle on something he thought was wrong and in the public interest.

I want to read from an article that anyone can access online. It's from redflag.org and is titled "Gangsters for capitalism: Downer, Woodside and 'Witness K'". It says:

In 2004, then foreign minister Alexander Downer presided over an Australian Secret Intelligence Service (ASIS) operation to install listening devices in the offices of the government of the newly independent, and desperately poor, nation of East Timor.

The operation, which was carried out under the cover of an aid project, aimed to give Australia an advantage in negotiations over a new maritime border between the two countries.

Among the main stakeholders in these negotiations was Australian oil and gas giant Woodside Petroleum. Woodside leads a consortium of companies with rights to exploit gigantic reserves in the Greater Sunrise oil and gas fields, which lie in the Timor Sea around 150km from East Timor and 450km from Darwin.

Senator Patrick has already gone into some of the history about East Timor and Australia and the toing and froing between the two nations. Essentially East Timor, as they would as a poor country, wanted to lay claim to these fields. It turns out that in negotiations, according to this article, Australia 'played hardball'. It says:

At one point in the negotiations, Alexander Downer reportedly shouted across the table "Your claims go almost to Alice Springs. You can demand that forever for all I care. We are very tough ... Let me give you a tutorial in politics—not a chance".

Perhaps part of the reason why Downer could be so "tough" was that, thanks to ASIS—and the bugging of the Timorese cabinet—

he knew exactly what the Timorese negotiating strategy would be.

I differ slightly from Senator Carr. I know many Australians were outraged when they heard that we would bug the cabinet of a poor nation to get a national advantage. But I don't know, sadly, in this day and age, whether Australians would actually be that surprised or outraged that we might do that to a foreign country in our national interest. What I can absolutely assure you is that they would be deeply shocked and surprised if they knew that these negotiations were actually to get a commercial interest to favour a series of corporations and a large fossil fuel project.

It hasn't been pointed out yet in debate today that witness K, an intelligence analyst, came forward to blow the whistle on this when, in 2008, four years after Alexander Downer authorised this bugging of the Timorese cabinet, Alexander Downer left the government and got a job at Woodside Petroleum. The revolving door between politicians and Woodside Petroleum is on the public record, and it is a significant cause for concern. Woodside are one of the biggest donors in this place, giving \$1.4 million to the coalition and to Labor. But when Witness K, a man who'd served our country, saw that the man that had presided over this had personally benefited from his role as a senior minister in bugging the East Timorese cabinet and aided and abetted the highway robbery that occurred on behalf of Woodside Petroleum and other fossil fuel interests, he blew the whistle. Do you know why? It was probably because he thought it was corrupt. We may never know exactly what he thinks, because these trials are going to be held in secret. But this revolving door between senior ministers and profit-seeking corporations who they have just exerted influence over is seen by many in the community as corruption, if not personal corruption then institutional corruption—a corruption of the institutions of our democracy. That is an important distinction that I would like to make and another reason why we continually push for an independent commission against corruption.

It's also been outlined in the debate today that Witness K, this brave whistleblower, sought legal advice and went through the correct channels to do so. It turns out that his lawyer, Bernard Collaery, has now also been dragged into this. He's been charged by the Australian government, by the Attorney-General, and faces up to 10 years imprisonment for representing a client. I want to take the opportunity today to say some words about

Bernard Collaery, because, while many people have read his name in the paper and have read about Witness K, they probably don't know much about the man Bernard Collaery. As I highlighted, we'll probably never know much about Witness K.

Three words describe Bernard Collaery: courageous, honourable and compassionate. In fact, the depth of this man's compassion is endless, and to many people he is a true hero. Let me tell you why. Over the years, as a lawyer, he's taken on countless pro bono human rights cases. He's advised the East Timor resistance for over 30 years. He represented plaintiffs in the Thredbo landslide, Canberra bushfires and Royal Canberra Hospital implosion cases. He founded the Immigration Reform Group. He represented West Papuan refugees and Vietnamese boat people over many decades. He drafted the discrimination act as Attorney-General of the Australian Capital Territory. He is an honorary solicitor for Aboriginal health services, the Australian Bravery Association, the National Brain Injury Foundation—and the list goes on and on. He was awarded the 2020 UK's Blueprint for Free Speech prize, which is awarded to whistleblowers in recognition of bravery, integrity and commitment to the public interest. He was awarded the 2018 Australian Lawyers Alliance Civil Justice Award, which is awarded to an individual who has made a significant contribution to the pursuit of civil liberties in Australia. What justice is being served by this prosecution? What is it about this man that sounds like he's a criminal? He is not. He is not a criminal. Yet this government is treating him and Witness K like criminals. It goes without saying that the acts they exposed certainly raised very serious questions, including, at the senior levels of the Howard government, about criminality. While the rest of the country, even the world, celebrates this man's courage, bravery, integrity and commitment, the Australian government is continuing to prosecute him and to drag out this prosecution and make his life a misery.

This prosecution is one of the gravest acts of this government and one of the greatest threats to freedom of expression in this country right now. The world is on the side of Bernard Collaery, and the Australian government is on notice. This debate today is just one of many things that will be happening in relation to this. It's on notice that those who speak up for justice and for the rule of law in this country will not be silenced.

I will finish up, because I understand that there are other speakers. But I would like to acknowledge Chloe Preston, who has worked as a staffer in my office, in Rex's office and Senator Xenophon's office. Chloe Preston was a young barrister who was working for Bernard Collaery when his office was first raided by the Federal Police in relation to these charges. Chloe had to represent Bernard in court while he was overseas. As someone who had only been in the job for a few weeks she was well and truly thrown in at the deep end. She has maintained an abiding interest in and friendship with Bernard Collaery, Senator Patrick and a number of people over the years, and she feels very deeply about this issue. I've reflected her words in the Senate today, and I'm very proud to have read them into *Hansard* on her behalf and on behalf of all those Australians who deeply care about this issue.

Senator WATT (Queensland) (17:20): Unfortunately, due to a lack of time, I won't be able to say quite as much as I had hoped on this—and I know Senator Green was hoping to make a contribution as well, which time will probably prevent as well. But I will say as much as I can to put a few more things on record on behalf of Labor and our position on this. I would like to thank Senator Patrick for moving this motion, as it raises a number of important matters that go to the heart of how the justice system within a robust democracy such as ours should operate. In particular, the matters addressed in this motion relate to the principle of open justice, which is a fundamental principle for all justice systems in democratic nations. It is a principle summarised in the adage that 'justice must not only be done; it must be seen to be done'. In addition, the subject matter of this motion as well as the motion itself are directly relevant to how the doctrine of separation of powers operates or should operate at a federal level.

First, let me address some of the background that led to the current situation in which two men, Mr Bernard Collaery and a former intelligence officer known only as Witness K, are being prosecuted for offences in circumstances that have caused concern to many Australians, including many members in this place. The factual background to the matter relating to events that are alleged to have occurred in 2004, during the period of the Howard government, remains a matter of contention. Given that it is relevant to the prosecutions now underway, it is not appropriate for me to revisit those matters now by discussing in detail now what has already been discussed extensively in the media over a number of years. However, Labor has been deeply concerned by the manner in which these contentious and highly sensitive matters have been mishandled by this Liberal government since shortly after they took office in 2013.

On 3 December 2013, only three months after becoming Attorney-General, in the first of a disastrous succession of failures that was the Abbott government, Senator George Brandis issued a media release proudly announcing that he had authorised ASIO to raid the offices of East Timor's lawyer based in Australia and a former Attorney-General of the ACT, Mr Bernard Collaery. Mr Collaery's files were seized during this raid. In addition,

Witness K's passport was seized. This public raid and announcement occurred just two days before hearings were due to start in East Timor's case against Australia at the Permanent Court of Arbitration in The Hague. This arbitration was to settle an extremely sensitive dispute between East Timor and Australia regarding the treaty on certain maritime arrangements in the Timor Sea.

Labor expressed our concern at the time that these raids were likely to damage Australia's relationship with East Timor as well as Australia's regional and international reputation. Specifically, we expressed concern that, instead of resolving our legal dispute and helping to normalise relations with East Timor, which was already strained by the subject matter of the arbitral proceedings, the timing and ham-fisted public handling of the raids by then Senator Brandis only further exacerbated tensions.

Immediately after the raids, on 4 December 2013, Timor-Leste's then Prime Minister, Xanana Gusmao, issued a statement called on Australia to explain its actions. He said:

The actions taken by the Australian Government are counterproductive and uncooperative. Raiding the premises of a legal representative of Timor-Leste and taking such aggressive action against a key witness is unconscionable and unacceptable conduct. It is behaviour that is not worthy of a close friend and neighbour or of a great nation like Australia.

As a consequence of these raids, in March 2014, Australia was brought before the International Court of Justice, accused by East Timor of breaching its sovereignty and related principles of international law. The Abbott government contested these allegations but the International Court of Justice ruled against Australia for the first time in our nation's history, in a comprehensive and humiliating manner. The International Court of Justice even took the rare step of refusing to accept undertakings made by former Senator Brandis regarding the materials seized from Mr Collaery in the raids, and instead made a series of orders against Australia. Not only was this embarrassing to Australia in our region and in the wider international community; it compromised Australia's hard-earned reputation as a country that conducts itself as a responsible global citizen and that respects the international rule of law.

The key matters that had been the subject of the dispute between Australia and East Timor were finally resolved, with a new treaty signed between our nations in March 2018. However, for reasons that remain unclear to this day, in June 2018—only three months after the new treaty arrangements were agreed—former Senator Brandis's replacement as Attorney-General, now the former Attorney-General, Christian Porter, personally authorised the prosecution of both Mr Collaery and witness K. While the Commonwealth DPP recommended the prosecution of Mr Collaery and witness K, because the prosecution relates to alleged breaches of section 39 of the Intelligence Services Act, a prosecution can only proceed with the approval of the Attorney-General. Labor has been calling for the Morrison government to explain why it suddenly authorised these prosecutions, given the charges relate to events alleged to have occurred in 2004 and alleged to have involved senior members of the Howard government. To date the Morrison government has refused to provide the public with an explanation for the decision by its former Attorney-General to authorise these prosecutions.

Labor has also expressed concern at reports that Mr Porter instructed his lawyers to intervene in the pre-trial proceedings against Mr Collaery on multiple occasions in order to press the court to cast a greater cloak of secrecy over the trial. This has reportedly led to considerable further delay and cost, and in so doing increased the stress and financial hardship to the accused. In June 2020 the Morrison government admitted that they had already spent over \$2 million on the prosecutions, even though they had not even progressed to the trial stage. By estimates hearings in October last year the government were forced to admit that more than \$3 million had been spent on these prosecutions. The figure has continued to go up and up and up; time doesn't permit me to go into great detail, but it's likely now that we are at more than \$4 million of taxpayers funds—and a date for the trial has still not been set.

In estimates last month Labor senators asked a number of questions around how these prosecutions are in the public interest. We raised a number of points, such as the lack of progress in these two prosecutions; the enormous cost to the taxpayer in funding them; the fact that the prosecutions relate to events that are alleged to have occurred 17 years ago; and the fact that there has been no suggestion of either of the accused posing any threat to the public. We are still waiting for answers from this government about how these prosecutions serve the public interest.

I also want to acknowledge the concerns raised by many Australians that, far from serving the public interest, these prosecutions may in fact be contrary to the public interest. Both Mr Collaery and witness K claim to be whistleblowers. If that is in fact the case, then it is very difficult to see how the Morrison government's attempt to prosecute them can be in the public interest. To the contrary, the prosecution of whistleblowers for revealing wrongdoing is likely to intimidate those who would reveal wrongdoing, and, in so doing, can only encourage corruption and undermine transparency, accountability and the rule of law. Unfortunately, the Morrison government has a track record of responding to revelations of corruption in government by attacking those brave

enough to reveal it rather than investigating the allegations and holding wrongdoers to account. We have seen this again and again as the Prime Minister has sought to sweep under the carpet scandal after scandal involving his own ministers.

In April this year former New South Wales DPP Nicholas Cowdery said that these prosecutions in fact undermine confidence in the justice system and that the Commonwealth prosecutors were wrong to deem that these prosecutions were in the public interest. He said that the wrong parties are being prosecuted. My colleague in the other place the member for Fenner has been active on this issue, and has pointed out that the government has an unexplained decision to spend millions of dollars on these prosecutions and that the trials are being conducted in secret.

Mr Collaery and the former intelligence officer known as witness K are, like all other Australians, entitled to a fair trial before a court of law. Even though we understand witness K has just today pleaded guilty, that in no way lessens his right to due process, including in relation to sentencing. Moreover, Labor strongly supports the principle of open justice, which dictates that judicial processes should be conducted in public unless the presiding magistrate or judge determines there are compelling reasons to close the court. We in Labor do not consider that embarrassing the Prime Minister or other members of the Liberal Party is a compelling reason to close the court.

Secret trials are not something the Labor Party or indeed any Australian who values our democratic values and heritage should countenance. While we acknowledge that there may be national security or privacy reasons for certain parts of a trial to be held behind closed doors, this government has shown that it seeks to act behind a cloak of secrecy at every opportunity for every scandal it is involved in. Many Australians are concerned about the prosecutions, which is why I welcome the opportunity to speak on the motion. For the reasons I have outlined today, it's more important than ever that the Morrison government provide a detailed explanation as to why the prosecutions are in the public interest.