SPEECH

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Questioner		**Responder**	
Speaker	Patrick, Sen Rex	**Question No.**	

Senator PATRICK (South Australia) (20:10): I rise to speak about the prosecution in the ACT courts of barrister and former Attorney-General of the ACT Bernard Collaery. The prosecution has proved very controversial for two reasons. The first is that the matter involves four charges of contravening section 39 of the Intelligence Services Act—that is, unauthorised communications of information relating the Australian Secret Intelligence Service—and one count of conspiring to do so.

The information in question relates to ASIS spying on Timor-Leste. Before and after a round of negotiations relating to the proposed maritime boundary between Timor-Leste and Australia took place in Dili, from 24 to 27 October 2004, Prime Minister Alkatiri and Secretary of State Jose Teixeira outlined to their cabinet colleagues the negotiating position of Timor-Leste and the importance of the issue affecting their country. The Australian government arranged for these cabinet discussions to be clandestinely monitored by listening devices surreptitiously and unlawfully placed by ASIS in the Timor-Leste government's cabinet meeting room. Working closely with elements of the Australian Embassy in Dili, ASIS recorded and transcribed the Timor government's internal deliberations. This enabled the Australian negotiating team to become aware of the private discussions of the Timor-Leste negotiating team and its position in relation to various issues arising in connection with the negotiation of what became the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea, signed by Australia and Timor-Leste.

It is scandalous and un-Australian that we would spy on a new, independent neighbour—the newest country in the world, an impoverished country and one that gave great assistance to Australian forces in World War II—in circumstances where we had agreed to negotiate with them in good faith. That someone who called out this immoral conduct is now being prosecuted for blowing the whistle is unconscionable.

The second reason for the controversial nature of Mr Collaery's trial is that much—indeed, almost all—of the proceedings are taking place in strict secrecy. In this country we have a system of open justice. Someone passing by a court should be able to wander in and hear what the charges are, what evidence has been laid out by the prosecution, what the witnesses have to say, what the defence's evidence is and what he or she may have to say. Importantly, an open court allows the public to keep an eye on the judge as well. Open courts go to the community's confidence in the courts, and the courts must be rooted in that confidence. Sadly, this trial is taking place behind closed doors—or at least it will unless the full bench of the ACT Supreme Court reverses the decision of Justice Mossop to close the court.

So what's it all about? Australians do have a right to know. As mentioned in my opening remarks, in the context of good faith negotiations, Australia spied on Timor-Leste in 2004. That's the first and dominant reason the Commonwealth want to close the court—they don't want to admit to the spying operation. Strangely, this is in circumstances where the government of Timor have acted in a manner consistent with the operation having taken place. Those words I read at the start come from Timor-Leste's memorial in The Hague. These are also circumstances in which the Australian government have themselves responded to these proceedings with a team full of lawyers and negotiators. They've prosecuted a former ASIS officer for conspiracy to reveal a bugging operation in an affidavit that was tendered to the Timor-Leste v Australia Permanent Court of Arbitration proceedings.

On that front, it's worth pointing out that on 2 April 2019 I asked the Secretary of the Attorney-General's Department, Chris Moraitis, whether he was aware of the allegations in respect of Australia spying on the negotiating team of the East Timorese. He replied:

I'm aware of that. There's a criminal case in the ACT. I'm well aware of it.

Now, interestingly, he made the link between the spying and the case in the ACT, and that's not unexpected, because it turns out that he was in the Australian negotiating team that would have been a recipient of the product

of the bugging activity. I went on to ask him if I would be correct in presuming most criminal cases were not launched on the basis of a fictitious operation. He responded: 'I would hope not.' So the dominant reason for the secrecy is to avoid having to publicly acknowledge the Australian government did the spying, when everyone knows—it's just plain—that we did it, and that it would be appropriate to acknowledge it, for the healing of East Timor and indeed so that Australians can rightfully ask why it was that it was done. Indeed, I understand public interest rests, in most cases, in neither confirming nor denying intelligence operations, but in this case it swings the other way.

What we know about what's happening right now is that there are confidential briefs flying around inside the court, and I'm going to give you some hints as to what they go to. The Commonwealth's position will be to say: 'There was an operation.' Behind closed doors, they will say: 'There was an operation in East Timor,' and that Mr Collaery disclosed it—that's what's going to be said. And Mr Collaery, by and large, will agree with that particular proposition, that there was a spying operation. They will, I understand, contest whether the operation was lawful and whether the operation was lawfully initiated. These are two different questions, but they go to our national interest and indeed our moral constitution. I have no doubt that it was neither legal nor initiated properly.

The question doesn't involve our national security sensitivities. It involves the sequence of events that led to the approval of the operation. As to the way in which these operations are approved—I'm not telling you anything that's classified; it's in the Intelligence Services Act—there's a sequence; there's a proper process. Firstly, one of the ways in which to initiate one of these operations is for the executive, the collective, the national security cabinet, to basically state a government requirement. That government requirement must centre on some pretty crucial principles: it must be in our foreign relations interests, our national security interests or our economic interests.

A reasonable question one can ask is: 'How can an executive government, in a democracy ruled by law, ever make an activity that would breach a solemn, signed undertaking to act in good faith, breach international law, cheat a fiduciary commercial partner and breach Australian criminal laws a government requirement?' It's likely that there's going to be difficulty in relation to that particular requirement, because the Commonwealth has opposed—and this is available in open court—the request or the subpoenas for cabinet documents. But there is a second pathway: a minister—particularly the foreign minister; in this case, Mr Downer—can make a decision, provided he is satisfied and has consulted with other relevant ministers, and they may have been Mr Howard, the Prime Minister; Mr Ruddock, the Attorney-General; Mr Hill, the defence minister; and perhaps Mr Minchin, who was the minister for science and industry and also Minister Assisting the Prime Minister. All of those ministers should have been asked and there should be a written directive. I understand there isn't—and that doesn't surprise me, after my national cabinet case, because the court was scathing as to the record keeping of the Commonwealth government. So I suspect that all of those people I've just named—all those ministers—will be on the subpoena list to give evidence.

We have specific controls placed on the intelligence services by this parliament, and my view is that they haven't been followed. My view is that this operation was instituted by Mr Downer, not properly authorised and done for the benefit of Woodside. We've seen in evidence before the parliamentary committees on treaties that the Commonwealth government has a view that Woodside's interests are the national interests.

So we need to watch this case. I hope the court opens up the case, because the only thing that's really secret that will be talked about, and it's not secret, is the fact that the operation took place. Disclosure of the basic fact that the operation was conducted and who did or did not authorise that action would go towards healing the rift between East Timor and Australia and satisfying the Australian people. *(Time expired)*