

# Richard Ackland

# Bernard Collaery

# and Witness K

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In Franz Kafka's book *The Trial* the accused, Josef K, manages to arouse the court's anger by loudly complaining about the absurdity of the proceedings and the accusation itself, if he could only understand it.

The book is alternatively macabre and comical – much like the Commonwealth's case against our own K, Witness K, and his former lawyer, Bernard Collaery.

For anyone who hasn't been living on Pluto, the essential issues are well rehearsed.

The state, in the form of the former attorney-general Christian Porter and the Commonwealth Director of Public Prosecutions (CDPP), brought charges of conspiracy against Collaery and K, while the former is additionally charged with breaches of the Intelligence Services Act.

These charges followed an alleged tipoff to ABC journalists about Australia's government spying operation in the ministerial offices of Timor-Leste. This followed the seizure of Collaery's brief of evidence for arbitral proceedings at The Hague.

The fact that the same information also came to a journalist at *The Australian* is not part of the prosecution case.

Witness K, acting on orders from the then head of the Australian Secret Intelligence Service (ASIS), David Irvine, assisted in planting the remote-switch listening devices while supposedly working on an Australian aid project.

Collaery had been approved by the Inspector-General of Security and Intelligence to act for Witness K over allegations about his mistreatment by ASIS. He has also acted for Timor-Leste in proceedings at The Hague. In effect, Collaery had acted for the bugger and the buggee.

Australia's illegal eavesdropping operation has been described by Nicholas Cowdery, QC, the former New South Wales Director of Public Prosecutions, as a "conspiracy to defraud" a poor nation struggling to get on its feet. Its purpose was to leverage Australia's negotiating position over boundaries in the Timor Sea and the oil and gas

prize underneath the waves.

The bugging happened in 2004, during the Howard era. The charges were brought in June 2018, in the Turnbull era, and here we are in June 2021 and Collaery's trial is not in sight.

The past three years have been occupied by at least 50 preliminary hearings, delays and the imposition of state secrecy on the process.

Porter lamely said when announcing the prosecution that "the priority must be to allow the judicial process to be conducted without commentary". The government's lawyers have persuaded a judge that the utmost secrecy is essential to the proceedings, yet outside the court there's been a prodigious outpouring of anger at what is accepted as a perversion of criminal justice.

Collaery and K are being bullied by the state for their role in allegedly bringing to light the clandestine and reprehensible behaviour of successive governments; they have been strung up as enemies of the people, subject to anti-terrorism legislation, and a closed-shop court – a process of purging that would have made Lavrentiy Beria warm and fuzzy.

For his part, Collaery has been honoured by lawyer organisations and parliamentary motions of support. An organisation has been launched, the Alliance Against Political Prosecutions, to draw attention to government sieges against public interest whistleblowers.

Already about \$4 million has been lavished by the government on internal and external lawyers prosecuting Collaery and K. For the accused it has been beyond money – Collaery's life has been turned inside out, his legal practice stymied, his energies poured into defending himself against an apparatus hell-bent on crushing him.

Witness K, a former military veteran and public servant, has meanwhile agreed to plead guilty to a set of agreed facts and is due to be sentenced shortly. Under unrelenting stress, he just wants it to be over.

Justice David Mossop in the ACT Supreme Court has ruled that large tracts of evidence in Collaery's trial should be suppressed, a decision that's gone on appeal with a judgement pending.

Whatever that outcome, it is likely to go to the High Court. Once again we could see the absurdity of the Last Chance Saloon closing its doors in accordance with the strictures of the National Security Information Act, a suppression invention of the swivel-eyed Howard epoch.

At least Mossop's judgement offered a tiny peek at the consequences of an overegged security and intelligence apparatus and the process by which secret trials are legitimised.

His judgement, which holds that large parts of Collaery's trial be held in camera on pain of jail for anyone who makes a disclosure, was itself heavily censored. The word "redacted" appears 44 times.

The relevant evidence was contained in a "classified prosecution brief" subject to a "criminal non-disclosure certificate", which said that everything highlighted in yellow by the attorney is national security information.

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# *judicial process that cannot be witnessed by citizens the state claims to be protecting.”*

The National Security Information Act is as paranoid as they come, requiring the courts to give the attorney's certificate the "greatest weight" – leaving no wriggle room. Consequently, Collaery could only partly resist the attorney-general's application. He used a blue highlighter to indicate what parts of the brief should be disclosed.

Later, in the hearing before Mossop, Collaery's defence conceded that most of the brief be suppressed but argued information on a few important issues should be released. The exact nature of those issues was redacted from the judge's reasons.

Mossop had to contend with a flurry of affidavits from both sides. For the attorney-general, kingpins of the security apparatus signed on the dotted line: Mike Pezzullo from Home Affairs; Frances Adamson from Foreign Affairs; Mike Burgess, head of the Australian Security Intelligence Organisation (ASIO); and Paul Symon, the director-general of ASIS.

All claimed Australia's security would be imperilled if any of this stuff percolated to the public.

For Collaery, there were affidavits opposing the regime's cone of super-strength secrecy from Admiral Chris Barrie, former head of the Defence Force; Gareth Evans, former foreign minister; John McCarthy, former ambassador; Anthony Whealy, chair of the Centre for Public Integrity and former appeal judge; and Timor-Leste politicians Xanana Gusmão and José Ramos-Horta.

Because they are still close to the coalface, the prosecution's witnesses were preferred by the judge as they are "acutely conscious" of imminent risks. Those speaking for the defence, he said, had "former" occupations and were not confronting risks daily.

Mossop admitted that disclosure of the clandestine material would not be "catastrophic" and that the risk to Australia would, if anything, only amount to "incremental prejudice".

Nonetheless, he considered there was a possible risk of reputational harm if Australia's Five Eyes intelligence partners got the idea that we couldn't prosecute a secrecy offence without secret details being spilled.

Further, he thought Australia's enemies might be advantaged if they got to hear about the sensitive stuff, or they might do a "mosaic" analysis of the information. Even more unthinkable, others might be encouraged to blow the whistle.

Open justice is all well and good, but the judge accepted the attorney-general and Director of Public Prosecutions (DPP) submissions that the court could depart from it in national security cases.

These are the steps taken to rationalise secrecy where the government demands it.

The Law Council of Australia this week urged reform of the National Security Information Act to "strike a better balance between secrecy and open justice".

The overarching matter that ultimately will have to be resolved by the High Court is whether it is possible to have a fair trial that is secret – not just an unreportable trial, but a judicial process that cannot be witnessed by citizens the state claims to be protecting.

Another question that goes begging is just what are the security implications at stake? Since it is not a requirement under the Intelligence Services Act that national security must be damaged with a leak of information, what then is the real risk?

Kieran Pender, a lawyer with the Human Rights Law Centre, put it starkly when he said the secrecy regime allows the government to admit privately in court that it spied on Timor-Leste while refusing to admit it in public.

There is another interesting wrinkle forgotten amid the Sturm und Drang. Timor-Leste ultimately got a more advantageous share of the Greater Sunrise gas field as a result of revelations that Australia cheated on the boundary negotiations in 2004.

Now Indonesia is wanting its sea boundary with Australia redesigned so that it lines up with Timor-Leste on the median line.

Foreign affairs observer and journalist Hamish McDonald promptly reminded everyone that there is an ASIS precedent with these seabed arrangements. During the negotiations for the 1972 maritime boundary treaty with Indonesia, Australia's spooks got hold of the Indonesian position papers – “presumably by bribery”.

Public integrity and anti-corruption policy guru Professor A. J. Brown at Griffith University says whistleblowers inevitably are charged whenever national security *might* be invoked.

It means any fraud, corruption or criminal behaviour, however vaguely connected to intelligence agencies, cannot be revealed to the public, for fear of prosecution and imprisonment – even when the information from whistleblowers does no harm to our security or intelligence interests.

The Collaery and Witness K cases are among those prompting the creation by the Human Rights Law Centre of a dedicated Whistleblower Legal Service.

It might conveniently be asked at this point, what is the “public interest”? It is a requirement of the DPP's policy that a prosecution can only be commenced if there is evidence to sustain it and it is in the public interest.

The acting CDPP, Scott Bruckard, was having trouble with the public interest when pressed at senate estimates late last month. He could not give a coherent response to Labor Senator Kim Carr's question: How do the prosecutors define the public interest?

Apparently, it is a broad set of criteria but, in any event, it can't be disclosed because to do so might touch on secret evidence.

Nor could it adequately be explained why this case is a DPP priority chewing up swaths of time and resources.

Senator Rex Patrick told the DPP man that the prosecution was really on the nose with the East Timorese, who regard Collaery and K as heroes for their role in exposing Australia's perfidious behaviour.

So much so that the small nation is looking to China for assistance and investment. The prosecution therefore could not be in our national interest if the consequence is a threat to Australia's geopolitical interests.

Bruckard blinked and said that political considerations were not part of the DPP's determination of the public interest.

The Collaery and K cases are unsettling reflections of where Australia is today. A nervous, hyped-up nation, battling its demons with laws that undermine fairness and open process, that bring the justice system into odium, use national security to menace citizens and cover up government deceit, and impose the spectre of prison on journalists who have a nose for the story.

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**Richard Ackland** is *The Saturday Paper's* legal affairs editor.

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