

Whistleblowing and the high cost of speaking up

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Three men are presently before Australian courts charged with revealing information about the inner-workings of government agencies or the conduct of our armed forces. Such prosecutions say plenty about the lack of protections afforded to whistleblowers – yet what is the price for our democracy? Why a change of government must signal a new approach for Australia’s treatment of whistleblowers.

Right now, three courageous Australians are on trial for telling the truth – for speaking up about wrongdoing perpetrated by our government. The names of these three have become synonymous with whistleblowing in this country. And yet at the time of writing, they remain on trial. For telling the truth.

There are several ways that these undemocratic prosecutions of whistleblowers in Australia might come to an end. It might be that by the time you read this, the new Attorney-General, Mark Dreyfus QC, has dropped the prosecutions of Bernard Collaery, David McBride and Richard Boyle. That would be a commendable act. But whatever happens in the weeks and months ahead, a close examination of how we got to this juncture, and what lies ahead, is overdue, for the prosecution of three whistleblowers is a symptom of a wider affliction, rather than the disease itself.

The new Albanese government must act swiftly to treat Australia’s secrecy syndrome. That starts with dropping the three prosecutions, but by no means does it end there.

Let’s start with the prosecutions. Collaery is a distinguished Canberra lawyer and former ACT Attorney-General. Together with his client, Witness K, Collaery was charged in 2018 with secrecy offences. The backdrop to the case is Australia’s espionage against Timor-Leste in the early 2000s, when Australian intelligence officers allegedly bugged the Timor cabinet office to gain an upper-hand in energy negotiations with the newly-independent nation. Witness K pleaded guilty and was given a suspended sentence; Collaery, charged with a greater number of offences (mostly relating to disclosures to ABC journalists), maintains his innocence.

Collaery has endured four years of interlocutory litigation, predominantly over how much secrecy should shroud his ultimate trial. A trial date has been set for this October, although with several appeals pending, that seems unlikely. The case has to date involved almost a hundred court hearings and over a dozen judgments. Every point has been contested by the Attorney-General of the prior government, including, in one particularly Pythonesque moment, going to the High Court to keep secret a judgment that said no to a secret trial. That judgment, from the ACT Court of Appeal last October, refusing a secret trial, still remains unpublished (although a judgment summary noted “a very real risk of damage to public confidence in the administration of justice” if the trial was held in secret, and the importance of open justice in deterring “political prosecutions”).

The purpose of all this secrecy is to maintain the government’s position of not publicly admitting the espionage. To successfully prosecute Collaery, the spying will have to be conceded in court to the jury – it is not an offence to make up an intelligence operation, and tell journalists about the

fiction. But despite renegotiating a treaty with Timor-Leste after the nation sued Australia in international courts, a tacit admission, Australia has continued to refuse to admit the spying publicly. Thus the desired shroud of secrecy; as Justice David Mossop summarised in one judgment, “by this mechanism the Attorney-General hopes to maintain a position of ‘neither confirm nor deny’ in relation to the subject matter of the [redacted].”

Unless the prosecution is dropped, Collaery’s path to trial has two parts. First, the secrecy question remains unresolved. While the ACT Court of Appeal emphasised that the trial should be largely held in open court, it remitted the question to the ACT Supreme Court. Justice Mossop was required to consider whether the Attorney-General should be allowed to submit additional secret, judge-only evidence to influence the determination of the secrecy question – in March, his Honour agreed to accept the secret evidence (which Collaery cannot see).

Justice Mossop now faces the difficult task of balancing the ACT Court of Appeal’s forthright defence of open justice, which overturned his own earlier ruling that the trial should go ahead in closed court, with this new, secret evidence. Whatever position his Honour reaches will likely be appealed, possibly all the way to the High Court. The secrecy of Collaery’s trial hangs in the balance.

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The other outstanding question is whether Collaery can subpoena documents from the federal government relating to the authorisation of the espionage operation. Collaery had advanced an interpretation of the secrecy offence provision that meant, to be convicted, the underlying intelligence operation must have been within the scope of the *Intelligence Services Act* (2001). This was used to justify the subpoenas, arguing, in effect, that if the Timor-Leste operation was not properly authorised, then the offence provision would not be engaged. In mid-May, Justice Mossop rejected this interpretation and set aside the subpoenas. A headline in the *Canberra Times* neatly encapsulated the decision: “Judge rules spying lawfulness not relevant”. Collaery has indicated his intention to appeal. As and when these two issues are resolved, he will finally go on trial.

Next there is David McBride. During his time as an Australian Defence Force lawyer, McBride twice served in Afghanistan. He raised concerns internally about Australian conduct in Afghanistan, before ultimately blowing the whistle to the ABC. The “Afghan Files” reporting revealed multiple incidents of troops killing unarmed men and children and was later vindicated by the war crimes allegations made in the Brereton Report. But the ABC was raided over the publication of the files and McBride was charged with theft and secrecy offences in 2018 and 2019. He has pleaded not guilty. Like Collaery, McBride’s case has been shrouded in secrecy. In both cases, that secrecy has flowed from the Attorney-General’s invocation of national security law.

McBride’s case will commence in October, with his defence under the *Public Interest Disclosure Act* (2013) (*PID Act*), the federal whistleblowing law for public servants. If he succeeds in showing that his whistleblowing was authorised by the *PID Act*, which expressly allows for whistleblowing to the media in certain circumstances, he will be immune from prosecution. If he fails, he will face trial, likely next year. In a cruel twist, McBride’s *PID Act* defence and Collaery’s trial are scheduled to begin on the same day in late October.

Finally there’s Richard Boyle, who blew the whistle about misconduct within the Australian Taxation Office (internally at first and ultimately to the ABC). Boyle alleged that the ATO was misusing its enforcement powers through unethical debt recovery practices. He has been vindicated – several independent inquiries, including by the Senate, have confirmed his

allegations. Yet Boyle was charged in 2019, initially with an astonishing 66 counts (later downgraded to 24). Like McBride, Boyle is pleading a *PID Act* defence. His case is up first – with a hearing set for late July in Adelaide. It will be the first-ever *PID Act* criminal defence. If Boyle is unsuccessful, he will face trial in early October.

October, then, is shaping up as an important month for Australian whistleblowers. But it does not have to be. None of the prosecutions are in the public interest. All three have a dangerous, undemocratic chilling effect. They serve as a malign warning to prospective whistleblowers – that prosecution is the cost of courage, the price of speaking up.

The public interest is the touchstone for prosecutorial action. The cases should never have been commenced by the Commonwealth Director of Public Prosecutions (CDPP), as they are not in the public interest. The CDPP, Sarah McNaughton SC, retains the authority to exercise her discretion and discontinue these cases at any time.

If she does not, the Attorney-General must act. Under common law and the *Judiciary Act* (1903), Attorney-General Dreyfus can intervene to drop the prosecutions. That would be the appropriate course of action. In the Collaery case, some supporters have called for the new Attorney-General to withdraw the consent required under the *Intelligence Services Act* (2001) for the offence to be prosecuted – issued at the time by Christian Porter. There remains an open legal question about whether this statutorily-required consent can be withdrawn – it is probably the better view that it cannot, but this is immaterial given Dreyfus' authority to end the prosecution.

The anticipated shake-up of the wider federal integrity framework, including the establishment of a federal anti-corruption commission, will be an important development. It must be designed carefully, adequately funded and given the ironclad independence required.

It is worth reiterating: Collaery, McBride and Boyle are on trial for telling the truth about government wrongdoing. No-one really denies what they blew the whistle on – Australia's immoral alleged espionage against Timor-Leste, the potential war crimes committed by our special forces in Afghanistan, misconduct at the tax office. All three whistleblowers have been vindicated, in one way or another – a revised treaty following international legal proceedings, the Brereton Report and ongoing criminal investigations, a Senate inquiry. And yet all three face imprisonment for telling the truth.

In these circumstances, the right thing to do is for all three unjust prosecutions to be discontinued immediately. These are brave Australians who did the right thing by speaking up about wrongdoing. While the change of government comes too late for Collaery's client, Witness K, Attorney-General Dreyfus should also issue a pardon for the ordeal the former spy has faced. All four whistleblowers should receive compensation for the psychological harm inflicted and any legal expenses incurred.

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If one or all of the cases drag on, it would only serve to further undermine transparency and integrity in Australia. McBride and Boyle could win their *PID Act* defences, and thereby be immune from prosecution, but these would be pyrrhic victories. The personal cost and the chilling effect of these prosecutions mean that even vindication in court would feel bitter sweet for the pair.

The same is true of the possibility of acquittal, for all three whistleblowers (Collaery does not have a *PID Act* defence available, as intelligence information is exempted from public disclosure under the law, and so his only hope is to be acquitted by a jury). Findings of not-guilty would be

symbolic, but would come at a high price – far, far too high. The even more chilling possibility is that Collaery, McBride and/or Boyle are found guilty and imprisoned.

These, then, are the various ways that the whistleblower prosecutions could end. The right way for these undemocratic prosecutions to end is for the Attorney-General to intervene to swiftly bring to an end this stain on our democracy. It would be the start of what needs to be a concerted effort to address a wider malady in Australia's system of transparency and accountability.

If dropping the prosecutions is the first step, urgent legislative reform must be the second. Australia was once at the forefront of legislative reform to protect whistleblowers, with Queensland and South Australia both enacting whistleblower protections in the early 1990s (at the time joining the United States as the only jurisdictions with such laws). But we have since fallen behind our international peers. While every state and territory now has standalone public sector whistleblowing laws, and federally there are separate regimes covering public servants, those in the private sector and union whistleblowers (plus a few other narrowly-targeted schemes), much work remains to be done.

The *PID Act* was enacted in 2013, spearheaded by Dreyfus during his first stint as Attorney-General, in the last days of the Gillard government. It was always intended to evolve with practical experience; a three-year review was built into the legislation. That review, the Moss Review in 2016, found that the experience of a public servant whistleblower under the *PID Act* was “not a happy one”. The Moss Review made almost three dozen recommendations. They were subsequently overlooked. In late 2020, the Morrison government finally accepted most of the Moss Review's recommendations, but made no legislative progress towards amending the *PID Act*. This decision was all the more alarming given comprehensive reform to the private sector whistleblower protections, which took effect in 2019. Corporate whistleblowers currently have significantly stronger protections than federal public servants in Australia.

PID Act reform should therefore be a priority for the new Attorney-General. The Moss Review amendments are no longer enough – in the six years since they were made, new shortcomings have been exposed and the wider landscape changed by the *Corporations Act* (2001) protections and innovative whistleblowing laws enacted by the European Union. A reverse onus of proof for establishing retaliation and easier pathways for lawfully blowing the whistle to the media should be priorities.

Making the law simpler, and thereby more accessible, will also be critical. In a case several years ago, *Applicant ACD13/2019 v Stefanic*, a Federal Court judge criticised the *PID Act* in no uncertain terms. “The legislation might more accurately be described as technical, obtuse and intractable,” noted Justice John Griffiths. “[The *PID Act*] is largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy.”

The new Attorney-General should also consider a wider overhaul of federal whistleblowing law, and movement towards national harmonisation. The current patchwork quilt is undesirable, and the presence of standalone whistleblower protections in multiple separate laws at a federal level means that undesirable inconsistency will remain.

The Witness J case offers an alarming example of where a secrecy regime with insufficient safeguards can lead. Before the prosecution came to light, via a series of by-no-means-inevitable coincidences, it would have been absurd to suggest that secret trials were taking place in Australia. Except one did. What safeguards do we have to be confident another isn't taking place right now?

The use of the corporations power in the *Constitution* to support the *Corporations Act* means that the whistleblower protections umbrella has a few holes. A small but nonetheless important

minority of the private sector workforce are not covered, because they are employed by employers outside the scope of the corporations power (such as employees of partnerships, or non-trading charities). This might be addressed by legislating more holistically, and engaging multiple constitutional heads of powers (including external affairs, as a number of anti-corruption treaties to which Australia is a signatory reference whistleblower protections).

Beyond law reform, whistleblower protections need to be made accessible in practice. Research led by Professor AJ Brown found that up to four in five whistleblowers suffer some form of professional detriment for speaking up. And yet whistleblowing laws are infrequently litigated, and whistleblowers very rarely succeed in litigation. There has not been a single successful compensation claim under the *PID Act* in the nine years since it was introduced. Greater availability of practical legal assistance for whistleblowers will ensure they can speak up safely and lawfully, and take action when they suffer retaliation.

An end to the prosecutions and stronger whistleblower protections are just two pieces of a broader transparency puzzle that needs to be addressed by the new Albanese government. Let's consider three additional aspects: judicial secrecy, freedom of information and the wider integrity apparatus.

The Collaery, Witness K and McBride prosecutions have all been shrouded in secrecy by virtue of the operation of the *National Security Information (Criminal and Civil Proceedings) Act (2004) (NSI Act)*. That law, enacted in the wake of a botched spy trial and an increase in terrorism prosecutions post-9/11, takes much of the discretion out of the hands of courts in appropriately balancing the tension between national security and open justice. In Collaery, for example, all of the many hearings relating to the level of secrecy to be applied to the ultimate trial took place behind closed doors (I know all too well – as an observer, I was frequently asked to leave the court-room). This blanket opacity was the consequence not of the considered decision of a judicial officer but the mandatory operation of a provision of the *NSI Act*.

The determination of whether Collaery would be tried in secret is left for the bench, but the *NSI Act* requires the trial judge to give “greatest weight” to the submissions of the Attorney-General in relation to national security. The scales are therefore tilted in favour of secrecy and away from transparency; a constitutional challenge to this statutory intervention was unsuccessful, in the earlier case of *Lodhi* (2007). This makes it all the more remarkable that the ACT Court of Appeal provisionally held last year that Collaery should be tried in largely open court, even having given the greatest weight to the Attorney-General's position.

The logical extension of these draconian secrecy provisions is a dangerous erosion of open justice. Take the case of Witness J (also known as “Alan Johns”), a former spy who was charged, pleaded guilty and ultimately sentenced to a term of imprisonment in *complete secrecy* via another part of the *NSI Act*. Witness J was in prison for over a year before the public was aware that he had been charged and sentenced. Even the ACT justice minister, with responsibility for the facility where Witness J was detained, did not know of his existence.

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The Witness J case is currently before the Independent National Security Legislation Monitor (INSLM), Grant Donaldson SC. A final report following on from the INSLM's inquiry is due imminently; in submissions to the inquiry, the Human Rights Law Centre has called for greater oversight and minimum standards of open justice that cannot be waived. The INSLM has also

signalled his intent to consider the operation of the *NSI Act* more generally following the conclusion of the McBride and Collaery cases. That review, and subsequent reform, should be expedited to ensure better open justice safeguards.

The freedom of information regime is at the heart of open government, providing a critical mechanism for transparency and accountability, and playing an important cultural role within the public service. But Australia's freedom of information regime is in disrepair, hampered by legal loopholes, insufficient oversight and enforcement, and a government that for the past decade was actively hostile to requests.

Labor should reform the *Freedom of Information Act* (1982), making simple but critical changes – such as those identified by Grata Fund in its 2021 *FOI Litigation Hitlist*, including the accountability gap whereby the resignation of a minister leaves their records inaccessible. A funding boost for the Office of the Australian Information Commissioner to robustly fulfil its freedom of information functions is also necessary.

The anticipated shake-up of the wider federal integrity framework, including the establishment of a federal anti-corruption commission, will be an important development. It must be designed carefully, adequately funded and given the ironclad independence required. During the establishment of the federal ICAC, consideration must be given to its intersection with whistleblower protections. Practice varies in different jurisdictions, but most state integrity agencies have the ability to receive disclosures from whistleblowers and some form of oversight of, or involvement in, whistleblowing law.

During its 2017 inquiry into whistleblowing, the Parliamentary Joint Committee on Corporations and Financial Services recommended the creation of a “one-stop shop Whistleblower Protection Authority”, covering both public and private sector whistleblowing. Independent MP Helen Haines' draft federal ICAC legislation, which has been hailed as the most substantive proposal to date, and a potential starting point for consideration by the new Albanese government, contains a whistleblowing authority within it.

A culture of secrecy – the prosecution of whistleblowers, ineffective whistleblowing laws, raids on journalists, disrespect for freedom of information requests and more – has been undermining Australian democracy for years now. The new government can, should, and must address this as a matter of urgency. There is no time to waste.

The landmark establishment of a federal integrity agency therefore provides an opportunity to create such a body, which would not only aid the effectiveness of the integrity agency but also oversee the application of whistleblower protections more generally. With appropriate powers and adequate funding, the establishment of a Whistleblower Protection Authority could prove the most consequential development for Australian whistleblowers since standalone protections were first introduced.

These are just three other aspects of the wider transparency movement that should be pursued by the new Australian government. This list is by no means exhaustive. Two parliamentary committee reports into press freedom following the ABC and News Corporation raids offered abundant recommendations for safeguarding the media and addressing sweeping secrecy. Most of those recommendations have not yet been implemented – they should be. One important recommendation was a review of secrecy law, which is complex and often draconian and only made more so by the Turnbull government in early 2018. That should be undertaken promptly.

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I have been advising whistleblowers for some time now. Some come to me at the beginning, before they have spoken up, wanting to know how to do so safely and lawfully. Whistleblowers want to make a difference – that is why they are contemplating speaking up about wrongdoing. Their predicament can raise a tension: balancing risk mitigation with impact. The way to achieve positive change, to ensure the wrongdoing is addressed, is not always – indeed not often – the strategy that comes with the least risk.

More frequently they have already spoken up, internally or publicly (sometimes both), and are suffering retaliation. Some have already lost their jobs; others fear being dismissed. The prospect of financial ruin, mental health challenges and immense personal upheaval loom large. I have known whistleblowers to lose their livelihoods, lose their homes, lose their partners and their families, all because they made a fateful decision to speak up.

But a consistent theme among the dozens of whistleblowers I have advised, formally and informally, is that they did not intend to become whistleblowers. No-one does. They spoke up because it was the right thing to do. They spoke up because they thought they were just doing their job. They spoke up because they could not continue to look past the wrongdoing, of whatever nature, that was occurring on their watch.

Sometimes I try to put myself in their shoes. I ask: “What would I do, if I saw something wrong at work?” I know all too well the price that whistleblowers often pay, the cost of their courage. Would I still speak up?

We know about so many instances of wrongdoing and injustice because brave people spoke up. The wrongdoing exposed by three of these brave people have been detailed above – immoral alleged espionage against an impoverished neighbour for commercial gain, potential war crimes in Afghanistan, unethical and aggressive debt recovery practices at the tax office. There are a thousand more examples.

When we know, we can demand justice and change. But without transparency, there is no accountability. And what don't we know, because of the chill in the air? Whistleblowers make Australia a better place. But right now, too many prospective whistleblowers are staying silent.

That is the bottom line – why we need to end the prosecutions, reform whistleblower protections and work towards a transparent and accountable culture within our institutions and organisations. No Australian should feel afraid about doing the right thing. If we fail to foster a culture where Australians feel empowered to speak up, wrongdoing will continue to go unchecked.



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