

‘Witness K and Bernard Collaery are heroes’: how Australia made two men pay for its dirty secrets

Decision by new government to abandon prosecution prompts widespread relief from lawyers and supporters in Australia and Timor-Leste

By Christopher Knaus in The Guardian, 8 July 2022

Whenever young law clerk Chloe Preston was under pressure, her boss, Bernard Collaery, had some sage words of advice.

“He would say to me, ‘Chloe, only stress if you’re being shot at,’” Preston recalls.

That advice held firm until the day Australian spies turned up at the office.

It was the summer of 2013 and Preston, one week out from being admitted as a solicitor, was sitting alone in the practice run out of Collaery’s suburban home in Narrabundah, Canberra, when the doorbell rang around 9am.

She answered to find a group of 10 officers, including members of the Australian Security Intelligence Organisation (Asio), brandishing a heavily redacted warrant.

Less than 24 hours earlier, Collaery had flown to the Hague to prepare an incendiary case on behalf of [Timor-Leste](#), an impoverished nation still recovering from a bloody occupation.

Timor-Leste was alleging that Australia, using the Australian Secret Intelligence Service (Asis), planted listening devices to spy on its negotiating team during talks to split oil and gas reserves in the Timor Sea.

Timor-Leste’s key witness, a veteran Asis officer known only as Witness K, was preparing to join Collaery in the Netherlands when authorities turned up on his doorstep too, seizing his passport and preventing him from telling the world about what Australia had done to a war-torn country to further the commercial interests of itself and its corporate partners.

It was the [start of an ordeal](#) – sordid and interminable – that would redefine Collaery’s notion of stress.

There may not have been bullets. But for more than eight long years, he would find himself with the collective might of Australia’s law enforcement, intelligence services and justice system pressing down on him. It would ruin his legal practice for years and see his friend and client, Witness K, suffer greatly, his mental health deteriorating under the pressure.

For Collaery, it finally ended on Thursday, when the new federal attorney general, Mark Dreyfus, [announced an end to the prosecution](#), prompting widespread relief from lawyers, human rights groups and his supporters, who have been steadfast in their resolve, despite the case dragging on at huge expense since 2018.

Collaery said it was “a good decision for the administration of justice in Australia” that would allow him to “move forward with [his] life and legal practice”.

For Preston, it has restored at least some faith in government and the rule of law that she lost as a young impressionable law clerk.

She cried when she first read the news.

“This decision has ended more than eight long years of uncertainty, frustration and betrayal by the Australian government,” she said.

Petitions and protests

In August 2019, about a year after the government signed off on Collaery's prosecution, the then prime minister Scott Morrison and foreign minister Marise Payne touched down in Dili for a momentous occasion.

Timor-Leste was [celebrating 20 years since it voted for independence](#) from Indonesia, a brutal occupier which oversaw the deaths of an estimated 150,000 people – a quarter of the population.

Morrison and Payne hoped their presence would help heal a wound still festering since the bug-ging operation.

They planned to sign off on a new deal on the maritime boundary between the two countries, which split the oil and gas reserves in the Timor Sea. The revised deal was far more favourable to Timor-Leste, which was now expected to reap between 70% and 80% of revenue.

The visit didn't go entirely to plan. Protesters, incensed at the prosecution of Collaery and Witness K, took to the streets. "Viva Bernard Collaery," they chanted, wearing shirts printed with his face.

A staggering 10,000 people – many of them young university students, future leaders of Timor-Leste – signed their names and phone numbers on a petition likening Australia's conduct to that of Indonesian dictator Suharto. They called for the cases to end.

Shirley Shackleton, the 87-year-old widow of slain Balibo Five journalist Greg Shackleton, attempted to hand one of three binders to Morrison. The prime minister was rushed past her.

"I'm not a lawyer, but I know what is right and wrong," Shackleton said at the time.

The former intelligence officer and Timor-Leste expert Clinton Fernandes, now at the University of New South Wales, said the petitions and protests were the biggest civil mobilisation, outside of general election campaigns, since Indonesian forces left in 1999.

It was a clear sign to Australia of the damage their pursuit of Collaery was causing to relations with a key neighbour. It did nothing to dissuade them.

Fernandes said Thursday's decision to drop the case will help to mend the rift. It will also help Labor give the appearance of a wider foreign policy reset in the region.

"It's noteworthy that the press release announcing the decision was jointly issued by foreign minister Penny Wong as well as by Mr Dreyfus," he said. "That's because the government understands the way parliaments and governments in the region feel.

"Spying on a devastated post-conflict country like Timor for commercial purposes was bad enough. Prosecuting Bernard Collaery added insult to injury."

Secrecy and delay

On Friday, the morning after Dreyfus's announcement, a small group of Collaery's supporters gathered outside the Australian Capital Territory's court building, rugged up against the mid-winter cold.

They've been there, without fail, for every twist in the protracted case.

Charges were first brought way back in mid-2018. There have been at least 50 appearances since then, some of them [hidden or restricted from public viewing](#).

It took almost four years for the courts to even set a trial date.

Much of the delay was caused by drawn-out battles over the extraordinary level of secrecy the commonwealth wanted to cast over the case.

Successive Coalition attorneys general intervened using the National Security Information (NSI) Act, which allows the government to effectively restrict how courts deal with classified information.

The powers are designed to stop highly sensitive details – the name of an intelligence officer, or evidence about capabilities or tactics – being made public through the courts, compromising national security.

But critics say the case is the latest example of a failure to properly balance open justice and the protection of Australia’s national security.

In Collaery’s case, reporters from the Guardian, ABC and Canberra Times, and observers like Kieran Pender, a senior lawyer with the Human Rights Law Centre, were routinely bundled out of the courtroom.

Large chunks of hearings were held out of public view. Collaery himself was prevented from viewing evidence the government relied upon to make out its national security arguments.

“The level of secrecy that has shrouded this case was inappropriate given the public interest at stake,” Pender told the Guardian.

Both Pender and the Law Council of Australia want a comprehensive review of the NSI Act.

But that’s not the only reform being contemplated in the wake of the Collaery case.

The plight of Witness K has shown clearly that Australia lacks any working mechanism for members of Australia’s intelligence services to report illegality or misconduct. In 2020, the retired diplomat Bruce Haigh [said that Asis officers](#) with objections to immoral or illegal operations simply have “no avenue ... to raise concerns”.

Calls for reform

The case, [according to Pender](#) and the Law Council of Australia, also further highlights the need for reforms to Australia’s whistleblowing laws.

Such reforms are well overdue. It’s now been six years since an independent review recommended an overhaul of the Public Interest Disclosure Act 2013.

The protections are expected to be further tested by two other whistleblowers facing jail time: Richard Boyle, who blew the whistle on aggressive debt recovery tactics at the taxation office, and David McBride, a military lawyer who leaked a cache of files to the ABC, which allowed it to report on alleged Australian war crimes.

“The Collaery case, and the ongoing prosecutions of David McBride and Richard Boyle, demonstrate that whistleblowing laws in this country are not working,” Pender said.

“Whistleblowers need to be empowered through practical legal support. The establishment of a whistleblower protection commissioner as part of the national anti-corruption commission would be a landmark step towards fulfilling the democratic promise of whistleblowing laws.”

For Witness K, all of this comes far too late.

The Vietnam veteran and decorated Asis officer was convicted last year and handed a three-month suspended jail sentence.

Preston, Collaery’s former law clerk, said it would have been “just” for Witness K to have also been spared a conviction.

But, she said, “the people of Australia and Timor-Leste know the true story – that Witness K and Bernard are heroes, who revealed a grave injustice at a great personal cost, and no court, judge or criminal charge can ever take away from that.”