

Intelligence branch

By [Sam Vincent](#)

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Bernard Collaery eagerly awaits his national security trial, energised by the prospect of highlighting the government’s misdeeds

Bernard Collaery is offering me an olive branch. You might think he’d be a worthier recipient: the lawyer, alongside his former client Witness K, stands accused of revealing a spying operation against Timor-Leste, a charge that could land the two men in jail. But there’s a fine *Olea europaea* already growing in Collaery’s front garden, and I get the impression he offers to take a cutting for anyone who compliments it.

It’s a few days after Christmas, and Collaery has just returned from visiting family near Wollongong to the Canberra home he built himself (“I grew up around tradies”) and from where he runs his legal practice. When Collaery bought his block in 1972 here in the inner-south suburb of Narrabundah – meaning “bird of prey” in Ngunnawal – it was an eagle’s eyrie: a windswept hillside abutting a nature reserve called Rocky Knob.

He’s turned it into a small farm. Beehives sit jumbled out the front, their occupants hanging about like cartoon depictions of a bad smell. Plum trees, quinces, loquats and olives line the driveway. And in a new take on the old carol, a peacock roosts in a pear tree. “They moved in years ago and never left,” says Collaery of the neighbourhood flock. He points down the garden path, where two peahens and their chicks are upturning mulch.

Collaery’s trial will be held in the Supreme Court of the Australian Capital Territory later this year, but no date has been set. In November 2019, Attorney-General Christian Porter intervened to give the Crown more time to prepare.

How’s Collaery holding up?

“Good. No different,” he says. “The stress of being a trial lawyer has gone, largely, because I can’t do my trial work. I’m not preparing all the time as I was for a trial. I’ve become a little bit less occupied.”

Witness K intends to plead guilty to the charge of breaching section 39 of the *Intelligence Services Act 2001*, in contravention of the Criminal Code, by having communicated classified information obtained in the course of his duties as an agent for the Australian Secret Intelligence Service (ASIS). His plea hearing is set for April.

In 2004, during a pause in negotiations between Canberra and Dili to fix a maritime boundary in the resource-rich Timor Sea, Witness K, whose identity is classified, used the premise of an AusAID-funded refurbishment to install covert listening devices inside the cabinet offices of Timor-Leste.

When the negotiations resumed, Australia had real-time access to Timor-Leste’s strategy, likely including its bottom line. The resulting treaty, signed in 2006, split the Greater Sunrise oil and gas field 50–50 between the two countries even though it lies 150 kilometres from Timor-Leste and 400 kilometres from Australia.

The spy consulted Collaery in 2008 after taking a moral grievance about the bugging operation to Australia’s intelligence watchdog, the Inspector-General of Intelligence and Security. Then Collaery himself was landed with a charge of conspiring with Witness K to disclose information to the Timor-Leste government related to the “functions” of ASIS, and separate charges of acting alone in disclosing ASIS’s role in Dili to five ABC journalists. It has now been more than four years since the Commonwealth Director of Public Prosecutions (DPP) first sought government permission to press charges, as it must in matters of “national security information”. Collaery intends to fight the accusations.

At 75, he looks fit and relaxed. He has a full head of silver hair, an elfin face and the broken cheek veins of a lifelong gardener – and of a lifetime prosecuting legal arguments from the bar. Most people his age would be slowing down; Collaery had no plans to reduce his caseload, until his prosecution “wound things back a bit”.

But, he says, if the government’s approval for the DPP to press charges in 2018 was “designed to take me off their back, it’s done the opposite. I’m now increasingly focused on the misdeeds in government and the need for reform. Particularly in the intelligence area.”

Can he elaborate? The living room we are in falls silent. The cries of peacocks waft up from downstairs. Collaery is the subject of a national security order preventing him speaking publicly about the prosecution of both himself and Witness K; he’s gagged from even repeating past public comments about it. He maintains that all he did was provide professional legal advice and has characterised the charges as a “determined push to hide dirty political linen under the guise of national security imperatives”.

Unanswered questions include: Does Witness K’s forthcoming guilty plea suggest he succumbed to pressure? Was he played off against Collaery? Was their prosecution delayed until the maritime boundary was finally resolved in 2018 to avoid another diplomatic incident? Any time I veer close, Collaery cuts me off: “I can’t comment on *anything* that relates to Witness K’s case.”

Because the prosecutions concern national security information – the definition of which has expanded, since the September 11 attacks, from security, defence or political violence to now include all political and economic relations with other countries – they fall under the *National Security Information (Criminal and Civil Proceedings) Act 2004*. The Act allows certain evidence to be heard in secret; defendants and their lawyers can be unaware of the case against them. Andrew Wilkie, the independent MP who in 2018 revealed the prosecutions under parliamentary privilege, tells me Collaery’s counsel have “one arm behind their back”.

For Collaery’s trial, Christian Porter has issued a secret certificate that likely directs the suppression of evidence relating to the ASIS operation in Dili. A taste of what’s to come took place last December. In a hearing to discuss admissible evidence, journalists were required to surrender their phones at the door, to be locked inside a safe. A plastic bag had been placed over the courtroom’s security camera and its microphones were switched off. “National security” was the response of a sheriff when asked why it was difficult to hear. Then the NSI Act was invoked to close the court.

Witness K’s chosen lawyer had a history of Timorese advocacy. Collaery’s professional mentor was a former commando who operated behind enemy lines in Japanese-occupied Timor. The veteran, says Collaery, “spoke well of the Timorese – before I knew where the island was”. In 1975, Collaery watched on with disgust as Indonesia, with Australia’s “collaboration”, annexed the Portuguese colonised eastern half of the island. For the duration of the occupation, Collaery, whose living room exhibits a traditional Timorese *tais* weaving and a framed photograph of guerrilla-statesman Xanana Gusmão, provided legal support to the independence movement.

Dili learnt of the bugging operation in 2012, and in 2013 commenced dispute resolution at the Permanent Court of Arbitration (PCA) to scrap the maritime boundary on the grounds it had been negotiated in bad faith. Collaery acted for Timor-Leste, and arranged for Witness K to testify. But that December, while Collaery was preparing in The Hague, his Narrabundah home was raided by the Australian Security Intelligence Organisation and the Australian Federal Police. Witness K’s passport was seized before he could travel. The International Court of Justice (ICJ), to which Timor-Leste referred the matter of the raids, ruled that Australia could not use material so obtained for their PCA defence. The maritime boundary was eventually dissolved.

A new boundary, granting 80 per cent of the Greater Sunrise oil and gas field to Timor-Leste if processed in Australia, and 70 per cent if pumped to Timor (which currently doesn’t have the facilities to process it), was signed in 2018 and ratified last year. But only after Timor-Leste dropped its ICJ case about the raids. Wilkie says this is why the charges against Collaery and Witness K followed. “So long as East Timor were accusing Australia of spying, and Australia was denying it, they could hardly prosecute K and Collaery ... They were hamstrung,” he says. “But now with this new deal with East Timor, it’s time to bury the bodies.”

Collaery tells me Australia’s “sordid, immoral” conduct towards Timor-Leste “is just one illustration of the manner in which we’ve abandoned our historical purpose”. From a nation that once pursued and upheld democratic values and ideals, he says, “we became, somewhere in the early ’60s, certainly under [Minister for External Affairs Garfield] Barwick, and worse still under Whitlam, an opportunistic country determined to secure as much of the riches of

our near north as we could. Not just in the Timor Sea, but in Bougainville, Rio Tinto, Ok Tedi... We have shown ourselves to be nothing better than a neocolonialist power.”

Were we ever a regional exemplar of democracy?

“I will tell you this: I don’t think Curtin, Chifley or Menzies would have done the things that recent politicians have done. I say that with confidence. I don’t think my former bosses, wherever I worked – no comment – would countenance any of the issues going on at the moment.”

Collaery started his career in the diplomatic service and was attached to Australia’s embassy in Paris as first secretary. He later became a trusted legal contractor to the Australian intelligence community. But in a statement provided to reporters outside court in August 2019, Collaery said: “In providing Witness K with advice it became apparent that the misconduct complained of was a culture unrelated in any way, and, in fact contrary to Australia’s national security interests. It was a cheating culture motivated by commercial interests and an abuse of process to utilise our service men and women in its implementation.” The foreign minister at the time of the buggings was Alexander Downer. He would later act as an adviser to Woodside Petroleum, which operates Greater Sunrise.

Critics of Collaery and Witness K argue we wouldn’t have an intelligence service if agents were free to divulge orders they disagreed with. And if those orders are illegal? The *Public Interest Disclosure Act 2013* grants protection to whistleblowers in the public service, but, in what Wilkie tells me is a “glaring gap”, this excludes intelligence officers. Even in circumstances where a spy reveals egregious misconduct, and in the public interest passes it on to a journalist or member of parliament, they can be prosecuted in secret. Witness K will argue his sole breach was to prepare an affidavit for the arbitration at The Hague; he will argue he broke Australian law to uphold international law.

“I don’t think our earlier judicial figures would’ve countenanced one bit the manner in which our court processes have been attacked,” says Collaery. “How the independence of the judiciary has been attacked, via, for example, the NSI legislation. Earlier generations would never have permitted that ... We’ve *dis*-unveiled our democracy, and it’s the thin edge of the wedge.”

Collaery has spent much of the past few years in the United Kingdom. Has he ever considered abandoning the project of Australian democracy?

“Of course! It is awful to come back to this country, to see the quality of its governance. It’s an awful experience. It’s dreadful – and I don’t say that because I’m being prosecuted. In many respects, I’m not going to let them get away from this. They need to face this trial. I want an open hearing. I want to face them. That’s what’s required in this country: we cannot allow them to govern secretly.”

Still, he admits with the first smile of our chat, it is nice to come home to his garden.

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