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## Secret Trials Down Under: Witness J, Witness K And Bernard Collaery

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There are a few more spiteful things in political life than a security establishment attempting to punish a leaker or whistleblower for having exposed an impropriety. Such a tendency has no ideological stripe or colouring: it is common to all political systems. In Australia, it has become clear that secret trials are all the rage. The disclosure of their existence tends to be accidental, and trials held partly in secret are also matters considered necessary by the current attorney general.

Last year, [the case of Witness J](#) made its way into the press like a threatening menace, a reminder that Australian authorities do not shy away from holding trials without scrutiny or public record. A former military intelligence officer had been prosecuted in the courts of the Australian Capital Territory and jailed under a cloak of secrecy so heavy it even eluded the ACT's justice minister. Had it not been [for separate proceedings](#) arising from the penning of his draft memoir, no one would have known.

For all the generously scattered propaganda about Australia being a devotee of open justice, the converse is closer to the mark. As the Attorney-General, Christian Porter, [told the ABC last year](#) regarding Witness J, "The court determined, consistent with the Government submission, that it was contrary to the public interest that the information be disclosed and the information was of a kind that could endanger the lives or safety of others."

Such trials are invisible affairs. They repel scrutiny. They repudiate the very idea of legal accountability. All the running is made by government prosecutors. Law Council Arthur Moses [describes](#) it in rather mundane fashion. "The details of the case will not be found on the court website, or on the noticeboard with the list of all the other cases."

There are other troubling cases, two of which are taking place in the Australian capital: that of former Australian Secret Intelligence Service agent Witness K and his lawyer, Bernard Collaery. The largely secret prosecution of both men concerns a generally venal affair: the conduct of an ASIS operation in 2004 against diplomats of the impoverished state of Timor-Leste in their negotiations with Australia regarding the continental shelf rich in oil and gas. Using [the cover of an aid project](#), ASIS agents installed listening devices in the Timor-Leste cabinet office in Dili.

The hope was to furnish the Australian government, then led by John Howard, a robust advantage in negotiations. It was predatory, commercially minded, and indifferent to the plight of a country still crippled by the effects of Indonesian occupation. Witness K, with the assistance of Collaery, subsequently blew the lid on the operation, though they did so, ironically enough, through legal channels. The Inspector General of Intelligence and Security (IGIS) was informed. Permission to retain the services of Collaery was sought and granted. Armed with such information, Collaery proceeded to assist Timor-Leste in mounting their 2013 case in The Hague against the validity of the treaty that had arisen out of the compromised negotiations. During that time Collaery's home was raided by the Australian Security Intelligence Organisation (ASIO) and Witness K detained. Charges were duly laid, but only after the final treaty's conclusion in March 2018.

The whole affair left a stinging impression. "It was outrageous," [fumed](#) chief negotiator for the Timor-Leste government Peter Galbraith. "I'd taken protective measures against Australian espionage, which I thought would be based on cell phones and internet, but I thought it was pretty crude to be bugging the prime minister's offices."

The Collaery case is now making its way through the channels of secrecy, and we are none the wiser for it. It is troublingly odd, not merely for its clandestine nature, but also for the fact that [he was ever charged](#).

Last week, reporters gathered in the public gallery in Canberra awaiting Collaery's pre-trial hearing. It was a speedy affair. Those gathered were told to leave, doing so with a [statement](#) furnished by Collaery. "I am unable to say much and you are unable to report much. This is the state of our now fragile democracy."

But prosecuting the wily lawyer is something that the Morrison government should be wary of. As the *Australian Financial Review* [notes](#), Collaery "is expected to instruct his legal team to issue subpoenas to have former Australian prime minister John Howard and former foreign minister Alexander Downer summoned to give evidence." In open court, Collaery [has already announced](#) his wish to call former Timor-Leste presidents Xanana Gusmão and José Ramos-Horta, former Australian foreign minister Gareth Evans and former chief of defence Chris Barrie.

The presiding judge, David Mossop, is also to be petitioned to make the proceedings public, though he is juggling with government arguments based on the [National Security Information \(Criminal and Civil Proceedings\) Act 2004](#). The justice must now deliberate over what, exactly, is appropriate to warrant shielding from the public. This is a rather delicate exercise, given that legal staff, not to mention the judge himself, [might face the prospect of jail](#) for any inadvertent breaches of secrecy arrangements.

Porter is attempting to normalise the entire matter, giving this disturbing case the gloss of tolerable banality. "There are court cases all the time where some matters are not made public," [he explained](#) on the ABC's *Insiders* program. "This is an argument about what matters may be heard inside the court, and what matters may be heard publicly."

For its part, the government is pursuing a strategy that [neither confirms nor denies](#) that the surveillance operation against Timor-Leste officials ever took place. Farcically, it contends that Collaery unlawfully communicated information of such surveillance, irrespective of whether it took place or not. Such

witch-burning logic should be laughed out of court, but is being treated with utmost seriousness.

Collaery is certainly [rolling out the ammunition](#) with tenacity. “This is Coalition dirty linen. There’s a multibillion-dollar restitution issue to do with the helium [extracted] from Bayu-Undan Field in the Timor Sea being treated as waste gas and being given away for nothing to the contractors.” But that is not all. So much of the operation in 2004 reeks, be it from the perspective of undermining a supposedly friendly state in the name of commerce, or the prioritisation of intelligence resources. As Clinton Fernandes of the Australian Defence Force Academy [has pointed out](#), the bugging operation was executed even as an attack on the Australian embassy in Jakarta was taking place. It is a scandal that remains impervious to parliamentary review, as that body is barred by the *Intelligence Services Act 2001* from examining intelligence-gathering operations of the agencies.

All that is left are the courageous efforts of a few troubled by conscience in what the services of their country do. Should patriotism ever have any meaning beyond its otherwise cowardly assertion, it will be found in such acts as those of Collaery and his client, Witness K.

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