ANU College of Law Webinar (Secrecy and Spying: The Trials of Bernard Collaery and Witness K)
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Thanks to Professor Rubenstein for the kind introduction and to the ANU College of Law for hosting this important and timely event. I wish to begin by acknowledging the Traditional Owners of the land on which I speak to you today, the Ngunnawal People, and pay my respects to their Elders past, present and emerging. Sovereignty was never ceded. I also think it is important, given the context of tonight's discussion, to acknowledge the role of the legal system in establishing, entrenching and continuing the oppression and injustice experienced by First Nations peoples.

It has been almost three years since the Commonwealth Director of Public Prosecutions filed charges against Canberra lawyer Bernard Collaery, and his client, a former intelligence officer known only as 'Witness K'. In the time that has subsequently elapsed, we have had a dozen interlocutory judgments in these proceedings. As we will spend much time tonight discussing, these prosecutions have been shrouded in secrecy. Indeed it was only as a result of former whistleblower, and current member of parliament, Andrew Wilkie revealing the charges under the protection of parliamentary privilege that we came to know about them in the first place.

Witness K is being prosecuted for, and has pleaded guilty to, a summary offence for breaching the *Intelligence Services Act.* Collaery is facing, and has contested, five charges in relation to breaches of that same *Act*. The prosecutions arise against the backdrop of allegations that Australia, via its intelligence service, undertook espionage activities against friendly neighbour Timor-Leste to gain an upper hand in oil-and-gas negotiations in the early 2000s. While Witness K will shortly be sentenced, Collaery's trial is unlikely to take place anytime soon. The outgoing Attorney-General, Christian Porter, had sought a secrecy order to cast opacity over the prosecution. This was granted mid last year and is currently under appeal. It will be years before a substantive trial commences.

With that context in mind, I wish to make three substantive points to commence tonight's discussion, regarding the legality of espionage under international law, the Morrison Government's desire to use secrecy to lie to the Australian people, and the implications of these prosecutions for whistleblowers.

1. There are strong grounds to say that Australia's alleged actions against Timor-Leste – espionage against a friendly neighbour during peacetime – contravened international law. The relevance of that is twofold. Firstly, it underscores the unlawful nature of the wrongdoing exposed and the importance of the Australian public knowing about these actions being undertaken in our name. If our democratically-elected government wants to break international law, we deserve to know about it. Secondly, it raises concerns about the prosecutions because of a longstanding legal rule that there can be no secrecy or confidence preventing the disclosure of wrongdoing. The law should not, and, traditionally at least, has not, allowed confidentiality and secrecy to shield wrongdoing from scrutiny.

2. That underscores the significance of my second point. To successfully prosecute Collaery, the Prosecution will, in effect, be required to prove that Australia spied on our neighbours in Timor. That places the Morrison Government in an interesting position, given the illegality of that action under international law, and its repeated failure to concede that reality to the Australian people. Hence Porter's secrecy application. As the trial judge observed in granting that application: '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].' In other words, the Morrison Government wants to actively deceive the Australian people by admitting in court that it spied on Timor but denying that position publicly. That raises profound constitutional and democratic concerns.

3. Finally, these prosecutions have a chilling effect on those in Australia who witness wrongdoing and consider speaking up. The complete exclusion of intelligence whistleblowing from external scrutiny under federal whistleblowing law allows wrongdoing to go unchecked. In different context, recent events in federal Parliament have underscored the ability of courageous individuals to speak up against inappropriate and unlawful conduct and spark systemic change. In the intelligence context, there is no such ability. Say an intelligence officer came to know that, in the course of an intelligence operation, a fellow officer had committed gross human rights violations. That prospective whistleblower would have no legally protected avenue to raise these concerns with the public. None. They could report internally, or to the Inspector-General. But if those avenues don't sufficiently resolve the matter, they reach a dead-end. The failure of federal whistleblowing law to adequately protect intelligence whistleblowers, and the message the Morrison Government sends to all whistleblowers when it prosecutes Witness K and Bernard Collaery, is chilling. Don't speak up, this Government says. When whistleblowers suffer, our democracy suffers.