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Australia Whistleblower Relief: Dropping the Collaery Case

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The Anglo-Australian legal system has much to answer for. While robed lawyers and solemn justices proclaim an adherence to the rule of law, the rule remains a creature in state, more fetish than reality. Had the farcical prosecution of former ACT ***Attorney General Bernard Collaery*** *gone on, all suspicions about a legal system slanted in favour of the national security state would have been answered.*

Collaery, a sagacious and well-practiced legal figure, has been the subject of interest under section 39 of the Australian *Intelligence Services Act 2001* (Cth), which covers conspiracies to reveal classified information. It all began when he was, in the natural order of things, consulted by former intelligence officer Witness K. Witness K has been convicted for revealing the existence of a 2004 spying operation conducted by the Australian Secret Intelligence Service (ASIS) that led to the bugging of cabinet offices used by the Timor-Leste government.

The operation was instigated at the behest of Australia's corporate interests. At the time, Canberra was involved in treaty negotiations with Timor-Leste on the subject of accessing oil and gas reserves. East Timor's crushing poverty and salivating need for hard cash did not interest Australia's own resource companies and the desk bureaucrats in Australia's capital.

In 2013, both men lent their services to the East Timorese cause before the Permanent Court of Arbitration in the Hague. Australia's illegal operation was finally going to make it into international law proceedings, thereby invalidating the original agreement reached between Dili and Canberra.

Alarm bells sounded and raids in Canberra made, though the nothing stirred the prosecutors till 2018. Wishing to stake his claim to protecting national security, Attorney General Christopher Porter, in contrast to his predecessor, thought it appropriate to commence legal

proceedings against Collaery and Witness K. As matters proceeded, Porter's fascination, and obsession with secrecy, became evident. Attempts were made to hold the trials in utter secrecy and out of the scrutinising mischief of the press. The Attorney General also imposed a national security order that prevented the parties from divulging details of the prosecution to the public or press.

With Witness K's conviction, Collaery was left standing to counter five charges alleging that he communicated information to various ABC journalists prepared by or on behalf of ASIS and allegedly conspired with Witness K to communicate that same information to the Government of Timor-Leste.

The efforts against Collaery began to resemble those of a smug and doltish inquisition keen to draw out proceedings and fritter away accountability. There were efforts made to restrict the accused from actually seeing the evidence that might be used against him in trial. There were attempts to prevent the release of the full published reasons of the ACT appeals court, which found that various "identified matters" in the Commonwealth case against Collaery should be made available to the public. Open justice can be such a nuisance.

Lawyers and observers covering the case noted how the proceedings against the barrister had descended into a charade. Kieran Pender of the Human Rights Law Centre, attending the sessions with almost religious dedication, compared it a "lottery – would I be permitted into court today, or would the secrecy shrouding the case win out?"

With the election of the Albanese government, a change of approach was aired. Australia's new Attorney-General, Mark Dreyfus, decided to call an end to matters. "I have had careful regard to our national security interest and the proper administration of justice," he claimed in making the decision. The "decision to discontinue the prosecution was informed by the government's commitment to protecting Australia's national interest, including our national security and Australia's relationships with our close neighbours."

Dreyfus did all he could to suggest that this case was not a sign of future leniency to whistleblowers. It was "an exceptional case. Governments must protect secrets and our government remains steadfast in our commitment to keep Australians safe by keeping secrets out of the wrong hands."

Independent MPs who had protested against Collaery's treatment expressed relief. Rebekha Sharkie, in welcoming the decision, condemned the previous Attorney General for pursuing a "politically-motivated prosecution" which was "an embarrassment to the rule of law in Australia."

East Timorese notables long enchanted by the good grace of Collaery and Witness K were relieved by the decision. Xanana Gusmão, in a statement, commended the decision to discontinue the prosecution. Collaery had been "prosecuted for alleged breaches of Australian national security laws by disclosing that the Australian intelligence services bugged Timor-Leste's cabinet room during oil and gas negotiations." Such bugging for commercial purposes had been "illegal and unconscionable."

The Dreyfus decision does not end the matter. Prosecutions against whistleblowers in Australia, encouraged by weak and vague protections, remains current fare. The whistleblower David McBride, who revealed the extent of alleged war crimes by Australian special forces in Afghanistan, still faces the prosecutor's brief. As does Richard Boyle, the

Australian Tax Office whistleblower who revealed ill-doings at the tax office.

Pender suggests that these prosecutions should also be dropped. For the sake of the rule of law, his arguments are hard to fault. But the national security state clings and claws, preventing reforms. Even Dreyfus finds it hard to escape its embrace.

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