



COMMONWEALTH OF AUSTRALIA

SENATE

Hansard

WEDNESDAY, 11 AUGUST 2021

CORRECTIONS

This is a **PROOF ISSUE**. Senators may suggest corrections to their own speeches within 15 non-sitting days by contacting the Hansard office

BY AUTHORITY OF THE SENATE

PROOF

Treasury Laws Amendment (2021 Measures No. 1) Bill 2021**Returned from the House of Representatives**

Message received from the House of Representatives agreeing to the amendments made by the Senate to the bill.

COMMITTEES**Legal and Constitutional Affairs References Committee****Reference**

Senator PATRICK (South Australia) (18:14): I move:

(1) That the Senate notes that:

(a) a former officer of the Australian Secret Intelligence Service (ASIS), known as Witness K, provided the Government of the Democratic Republic of Timor-Leste with an affidavit that contained information relating to an intelligence operation carried out by ASIS in Timor-Leste;

(b) the Government of Timor-Leste stated in proceedings before the International Court of Justice that Witness K's affidavit 'describes the covert bugging in 2004 of the Timor-Leste Cabinet room on the instructions of the Australian authorities';

(c) the Australian Government informed the International Court of Justice that Witness K had served as an ASIS officer and that his affidavit contained information the disclosure of which would constitute an offence under section 39 of the Intelligence Services Act 2001; and

(d) in the Australian Capital Territory Magistrates Court, on 18 June 2021, Witness K was convicted of an offence under section 39 of the Intelligence Services Act 2001.

(2) That the following matters be referred to the Legal and Constitutional Affairs References Committee for inquiry and report by 21 October 2021:

(a) was the intelligence operation disclosed in Witness K's affidavit an activity authorised by a Minister in accordance with the statute;

(b) was the intelligence operation disclosed in Witness K's affidavit an activity authorised by the Director-General of ASIS in accordance with the statute; and

(c) in respect to the authorisation under paragraph (a) or (b) what legal and policy related due diligence was carried out as part of the authorisation process.

(3) That the Senate calls on the Australian Government, including the Minister for Foreign Affairs, the Director-General of ASIS and the Inspector-General of Intelligence and Security, to cooperate fully with the Legal and Constitutional Affairs References Committee inquiry.

(4) That the Senate further calls on the former Minister for Foreign Affairs, the Honourable Alexander Downer AC, and the former Directors-General of ASIS, Mr David Irvine AO and Mr Nick Warner AO, to cooperate fully with the Legal and Constitutional Affairs References Committee inquiry.

Notice of motion altered on 23 June 2021 pursuant to standing order 77

This is a really important inquiry referral, but before I go to the details of the referral I need to give some background. This is an important matter that goes back decades. It basically relates to Australia trying to get access to oil and gas in waters where typically we would not otherwise have an entitlement. It goes back to negotiations with Indonesia where Australia negotiated a boundary with Indonesia that wasn't on the median line and, in doing so, managed to gain access to additional resources, so we got a much greater economic exclusion zone from which to potentially extract resources.

Timor, which is straddled on both sides by Indonesia, was a Portuguese colony, and the Portuguese were not going to agree to such a term. That created a situation where we had what was called the Timor Gap. At some point in time the Timorese decided, 'Well, we want to become independent.' The Australian government had a different view, at least externally talking about the fact that Timor wasn't able to look after itself and that the best option would be for Indonesia to consume Timor from the Portuguese. We know that back in 1975 there was an invasion. Indonesia invaded East Timor. Sadly, five journalists got killed—the Balibo Five—in that operation, murdered by Indonesian military officers. Hundreds of thousands of Timorese died in a conflict with Indonesia.

Again, I'll just go back and say that the motive for Australia—because Australia was an ally; we were the only ones that wanted to support Indonesia in its annexation of Timor—was that we had our eye on the oil underneath the Timor Sea. We wanted to close the gap on either side of Timor, consistent with the Indonesian treaty that we had, such that we would get access to oil. It didn't happen. In 1999 independence was granted, not formally but through a vote. There were lots of terrible attacks on the Timorese, and the Australian Defence Force got involved and basically assisted INTERFET—and good on them, our armed forces assisting Timor. But of course that

worried people back in this building, and in particular it worried people like Mr Alexander Downer, who was the foreign minister at the time. He could see the repercussions of this in that they would have to start negotiations with the Timorese, and the Timorese were not likely to be inclined to adopt the median line, which was the case in international law.

In order to pre-empt the difficulties there, in March 2002 Australia withdrew itself from the jurisdiction of the ICJ in relation to maritime boundaries. We stepped away from our normally very strong position of an international rules based order and withdrew ourselves from the jurisdiction of both the ICJ and the International Tribunal for the Law of the Sea.

An honourable senator interjecting—

Senator PATRICK: I'm getting an interjection that Iraq is of a similar view to Australia, but I don't know the full story there. But we withdrew ourselves from the jurisdiction, and then we started to issue exploration licences. This was all in the lead-up to, essentially, what needed to happen, which was a treaty negotiation.

That leads us to what we now know as the famous bugging of the Timorese cabinet rooms. As the Timorese were sitting down to chat—they were going to negotiate with Australia back in October 2004. The Timorese were discussing exactly what their position was. Unbeknownst to them, ASIS had bugged their cabinet room. Am I revealing something that is outrageous and will harm our relationship with East Timor? The answer is no, because in actual fact anyone who wants to go and look at the memorial of Timor-Leste that was filed in the International Court of Justice—it's very clear that the Timorese are absolutely of that view. They filed in strong belief that ASIS had bugged their cabinet room. We had listened to the bottom line of what the Timorese were willing to do and then we proceeded to close off on the negotiation. Of course, Timor came out the worst for it.

People might say that countries spy all the time. I accept that we might monitor other countries to make sure that the government is stable, that there's nothing harmful that's going to happen to Australia. I accept that. That's what happens. That's no secret as well. We have an Intelligence Services Act that actually spells out some of the ways our intelligence-gathering operations are to be conducted. It's no secret that we do it. The difference here is that we went into good faith negotiations with Timor-Leste. We shook their hands and said, 'We are going to negotiate with you fairly and try and get a good outcome,' whilst spying on them. At the time Timor was the newest country in the world and one of the most impoverished countries in the world. But you know what? You don't want to stand between Australia and an oil field, no matter how much moral fortitude you have to break down.

We ended up in a situation where we did the spying. We were taken to the Permanent Court of Arbitration. That was a confidential arbitration. Timor went there and said, 'We have to cancel this treaty. It wasn't negotiated in good faith.' Part way along the way, and the reason we know of those proceedings, the Australian government decided they didn't really want to play fair in the justice system, and they raided the office of the attorney for East Timor, which was Bernard Collaery. They took all their legal documents.

That then got sent to the International Court of Justice. The International Court of Justice ruled against Australia and ordered Australia to hand back the legal documents of East Timor. That's where we understood what events were taking place in the Permanent Court of Arbitration, because that needed to be disclosed so that people could understand the context of why Australia had raided the offices of Timor-Leste's lawyers.

We haven't behaved well in any of this. There's no silver lining here. There's nothing good that we can say about Australia's conduct towards East Timor over the last three or four decades. Remember that Timor is a neighbour of ours. Timor will always be a neighbour of ours geographically. It's not going to move. We want them to be our friend. We've got to recognise that in World War II 40,000 Timorese died helping Australian servicemen, and that's the disgraceful thing about what has happened in relation to our attempts to get access to oil.

That's the backdrop. That's the story. Moving to the proposal around the inquiry, I think this parliament, this Senate, ought to look at the approvals for this particular operation that did take place. You don't have a court hearing down the road at the ACT Supreme Court for a fictitious operation. There's no question that this occurred. We need to understand how it was authorised, and we need to understand that because it is this parliament that sets the rules on how these operations are authorised. It's spelt out in the Intelligence Services Act.

It would appear—actually, I can't understand it, because I don't know the details. That's the point of the inquiry: we want to look at how that operation was actually authorised, because I can't imagine, if it had been properly considered, that anyone would have ticked off on that. My understanding is that, in the confidential briefs in the courts dealing with the Collaery matter, there is no authorisation in those files. There's no written authorisation, which is what is required by law. We might end up with Bernard Collaery, who's been persecuted for blowing the whistle on this, walking free of the court—I hope he does; the trial should never have taken place in the first

place—because, if indeed it was found that he revealed an operation, he would have revealed an unlawful operation. I don't think you can get charged for that.

We do need to look at this. This is really important. What happened as a result of this indiscretion, this awful, abhorrent conduct of Australia, is that we've put our neighbour offside. I know this because I went up there as part of a delegation and met with a bunch of Timorese people who feel quite annoyed at Australia, and understandably so. The revenue we took from the fields that we had access to as a result of the 2006 CMATS Treaty was about \$5 billion. We returned something of the order of \$1.4 billion, I think, to the Timorese. This is a robbery of \$3½ billion. You can understand what that could have done for the livelihoods of the Timorese—impoverished and struggling.

I've been up there, and I've seen the result of our actions. I've seen the Chinese building freeways on the southern plateau. I've seen the Chinese building powerlines. I've seen the port that the Chinese are building. If I were Timorese, I would look and say: 'Do you know what? Australia has never helped us, despite our assistance back in World War II, where we helped Australian troops. The gratitude was never repaid.' Part of the problem here is that we simply won't even admit what we've done. That's a truly disturbing set of circumstances. I refer people to the terms of reference. They simply look to say: 'How was this operation authorised? Was it authorised in accordance with law?'

I know Labor were considering supporting this if it went to the PJCIS. Unfortunately, the PJCIS is a committee established by statute, and the statute prohibits the examination of operations, so we can't send it to the PJCIS—as opposed to this referral, which goes to a committee of the Senate that is established by the Senate itself. It's not fettered in its ability to conduct this inquiry, and there's no reason the inquiry can't be conducted in camera as necessary. Of course, we always like to have these sorts of things dealt with openly, but, if necessary, we could go in camera and get to the bottom of what happened.

This is a very important issue. It's important to make sure that the Australian government has complied with the commands of the parliament in respect of collecting intelligence overseas, but we also need to understand how we got into this situation where we've done such a terrible thing to Timor-Leste.

Senator McKIM (Tasmania—Deputy Leader of the Australian Greens in the Senate) (18:29): This motion relates to the bugging by ASIS of the Timor-Leste cabinet deliberations during treaty negotiations in 2004 between the Australian government and the government of Timor-Leste. Let's be very clear: this bugging was conducted specifically to give Australia an unfair advantage during those negotiations, and, as it transpired, we did get an unfair advantage during those negotiations. That unfair advantage that was achieved by the blatant cheating tactic of bugging the Timor-Leste cabinet decisions ended up in the theft of billions of dollars by Australia from one of our closest geographic neighbours, in Timor-Leste, one of the most economically disadvantaged countries in the world and one of the newest countries in the world—a country that could have well used those billions of dollars to provide better health outcomes for its people and to build resilient infrastructure for its people, but who we ripped off shamelessly and mercilessly for our own commercial advantage. And I will argue later in this speech that there were other advantages gained by Australia and Australians as well as commercial advantages.

As Senator Patrick said, many of the people of Timor-Leste have suffered so badly. Historically, so many of their ancestors actually fought and died for Australia and in Australia's interests in wars in the last century. The fact that we would have acted towards them with such utter bastardry is one of the more shameful chapters in our country's story. There have been many shameful chapters in Australia's story, from colonisation and invasion of Europeans, through the stolen generations, a range of other terrible occurrences and, more recently, the way we've treated refugees and people seeking asylum, but this disgrace sits very comfortably in that list of shameful chapters in our country's story.

There is very little doubt in my mind that the instigation and parts of the commission of the bugging of the Timor-Leste cabinet deliberations by the Australian government were unlawful under Australian law, and those matters should be tested—I accept that—and the motion proposed by Senator Patrick would assist with the testing of that assertion. We should also be able to hear from people like Mr Downer, Mr Irvine and Mr Warner, and the inquiry proposed by Senator Patrick in the motion we are currently debating would also assist with hearing from those people. They could help us shine some light on what happened back when that bugging was authorised and allow us to shine a little bit of the disinfectant of sunlight on those events.

I want to make it clear that what I'm about to say next is no adverse reflection on the terms of this motion or its proposer. I completely understand what Senator Patrick is attempting to achieve here and I totally support him in that. But there are other matters relating to those treaty negotiations that also deserve a fuller inquiry and more investigation, and I would argue that, in the absence of the government taking those steps, it would be appropriate

for the Senate to consider those matters. Certainly, the surveillance of the Timor-Leste government during negotiations should be considered, and these terms would assist in that. Other matters that deserve scrutiny include the relationships between the Australian government and the corporate interests which benefited from the terms of the treaty and benefited from agreements and contracts associated with the treaty, and that is particularly in regard to the helium that was under the Timor strait—

Senator Patrick interjecting—

Senator McKIM: And I'll take Senator Patrick's interjection—'just an inert gas', he says. I suspect he knows as well as I do that helium is an incredibly important strategic element for Australia. Time won't permit me to go into the full ins and outs of the way helium was, and wasn't, covered by that treaty. But those are certainly matters that deserve further inquiry, as do the actions of the Australian government in cases relevant to the treaty in international tribunals and courts, including those in the International Court of Justice which are referred to in Senator Patrick's motion. We also need to better understand whether the terms of the treaty aligned with Australia's strategic and economic interests. I think that goes to matters including the way helium was, and wasn't, dealt with by this treaty and also to other matters such as the relationships between people who were involved in senior Australian government positions at the time, including Mr Downer, and the corporate interests that profited so massively from the terms of this treaty.

Another matter which needs to be further understood is, in fact, the decision of the Australian government to charge Mr Bernard Collaery and Witness K under the National Security Information (Criminal and Civil Proceedings) Act 2004 and the circumstances around that, because—and I've made this point previously to this chamber—there is just no chance that that was a decision made in the public interest; that was a political decision. That decision to charge Mr Collaery and Witness K had to be made by the Attorney-General. And, in the public interest, the Attorney-General should have decided not to charge Mr Collaery and not to charge Witness K because, in fact, Bernard Collaery and Witness K are Australian patriots of the highest order. We should have stamped some medals for them, not charged them under laws that relate to Australia's national security.

This has been a sordid and disgraceful chapter from start to finish. I genuinely believe that, if the truth came out, careers and reputations would be destroyed or, at the very least, highly compromised, but that is not a reason for the truth not to come out. We owe it not just to the people of Timor-Leste and the Timor-Leste government but also to the Australian people to inquire into the truth of these matters because the truth is important. Whether or not the bugging of the Timor-Leste cabinet deliberations was lawful under Australian law is absolutely critical because it is in the public interest that the Australian people have confidence in the intelligence agencies that are created and overseen by this parliament—

An honourable senator interjecting—

Senator McKIM: I will take that interjection as well: overseen in a very marginal way by this parliament and certainly, operationally, overseen to nowhere near the extent that they should be by this parliament. And I make the point that the PJCIS—which, I understand, was Labor's preferred committee for this inquiry—not only is unable to conduct it under the terms Senator Patrick has outlined but is also a closed shop, peopled only by senators and MPs representing the major parties in this place. The crossbench is explicitly ruled out of the people who can make up that committee. I won't go into the history, but there has been at least one exception to that.

Let's be clear about what this inquiry would allow us to do. It would allow us to advance our understanding of what went on at that time—of what went on in 2004, when we colluded to steal and conspired to steal from one of our closest neighbours and one of the poorer countries in the world. And it is not only we as a country who benefited financially from that; I suspect there was significant personal benefit for some of the players. Those matters ought to be inquired into, and they ought to be able to be understood. For those reasons and many, many more, the Australian Greens will be supporting the motion put forward by Senator Patrick.

Senator GALLAGHER (Australian Capital Territory—Manager of Opposition Business in the Senate) (18:41): Labor is not going to support this motion. We're not in a position to support the proposed inquiry at this time. We agree that these are significant issues and they do need to be examined, but we do not believe an inquiry by the Senate Legal and Constitutional Affairs References Committee is the appropriate way to examine these issues. As Senator Patrick's motion identifies, there are unresolved questions relating to the intelligence operation in question and to the decision of the former Attorney-General, Mr Porter, to authorise the prosecution of Witness K and Mr Collaery.

In considering Senator Patrick's proposed reference, Labor investigated the possibility of the Parliamentary Joint Committee on Intelligence and Security, the PJCIS, conducting an inquiry in the same terms as Senator Patrick has proposed. Unfortunately, that is not possible due to the limitations of the scope of the committee's inquiry powers under the Intelligence Services Act 2001. The provisions of section 29(3) of the Intelligence

Services Act mean that the PJCIS is unable to review particular operations that have been undertaken by ASIS or an aspect of the activities of ASIS that does not affect an Australian person, or to conduct inquiries into individual complaints about the activities of ASIS.

Labor believes the Intelligence Services Act 2001 should be amended to implement the recommendations of the 2017 Independent Intelligence Review in so far as they relate to the oversight and evaluation arrangements of the Australian intelligence community. In particular, the Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020, introduced by Senator McAllister, would enact recommendation 23 of the 2017 review. That recommendation was that the role of the PJCIS be expanded by amending relevant legislation to include a provision enabling it to request the Inspector-General of Intelligence and Security to conduct an inquiry into the legality and propriety of particular operational activities of the national intelligence community agencies and to provide a report to the PJCIS, the Prime Minister and the responsible minister. This bill follows the Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015, developed by former senator John Faulkner and introduced by Senator Wong, which also proposed a series of amendments to improve the operation of the committee and to ensure that the adequacy and effectiveness of parliamentary oversight of intelligence and security agencies kept pace with the agency's powers.

The inability for this matter to be referred to the PJCIS demonstrates again the need for the Intelligence Services Act 2001 to be amended, which Labor will do in government. In relation to comments made by Senator McKim that the crossbench are specifically excluded from the PJCIS, I would like to inform the chamber that the arrangements and the appointments to that committee are completely within the control of the Prime Minister, who nominates and appoints House of Representatives members, and the Leader of the Government in the Senate, who nominates and appoints senators. I'm advised that, during Labor's last term in government, Mr Wilkie actually sat on the committee. So just to be clear: it's not a big conspiracy to exclude the crossbench and in fact the legislation doesn't require that, but it is the government's view, at this point in time, that the crossbench would not be invited to sit on that committee.

In government, Labor will amend the Intelligence Services Act for this matter to be referred to the PJCIS. In government, we will ensure an inquiry into the circumstances of the intelligence operation conducted by the Australian Secret Intelligence Service in Timor-Leste and the subsequent decision to prosecute Witness K and his lawyer, Mr Bernard Collaery. Further, Labor call on the Attorney-General to provide an explanation to the Senate of the public interest in continuing to prosecute Mr Collaery. For reasons that have not been publicly explained, Mr Morrison's former Attorney-General, Mr Porter, personally authorised the prosecution of Witness K and Mr Collaery. This is despite Mr Porter's predecessor, Mr Brandis QC, declining to provide that authorisation. Labor have been calling for Mr Porter to explain why he suddenly authorised these prosecutions, given the charges relate to events alleged to have occurred in 2004 and may have involved senior members of the Howard government. To date, neither Mr Porter nor his successor as Attorney-General, Senator Cash, have provided the public with an explanation for a decision to authorise the prosecutions or explained how the public interest is served by them.

Labor is also concerned by reports that Mr Porter instructed his lawyers to intervene in the pre-trial proceedings against Mr Collaery on multiple occasions in order to press the court to cast a greater cloak of secrecy over the trial. This has reportedly led to considerable further delay and cost and, in doing so, increased the stress and financial hardship faced by the accused. Under questioning from Labor in May this year, the Morrison government conceded that it had already spent over \$4 million on these two prosecutions, even though they have still not progressed to the trial stage.

Labor is also aware that both Mr Collaery and Witness K claim to be whistleblowers. More generally, the Attorney-General's unexplained decision to prosecute Witness K and Mr Collaery and the attempts to have the trial of Mr Collaery conducted in secret appear to be part of a broader shift towards more secrecy and less accountability in government. That shift began with the election of the Abbott government and has escalated rapidly under Prime Minister Morrison, who, despite multiple scandals on his watch, has never held any of his ministers to account. For these reasons it is more important than ever that Mr Porter's replacement as Attorney-General, Senator Cash, provide a detailed explanation as to why the ongoing prosecution of Mr Collaery is in the public interest.

Senator WHISH-WILSON (Tasmania) (18:47): I agree with a lot of what Senator Gallagher said there. It is quite intriguing why the government won't support this motion based on what they have said here tonight. I won't go over old ground, but I want to pay my respects to Senator Patrick for bringing this forward and to Senator McKim for the work he has done on this over many years. I just want to highlight the particular point that Witness K, the ex-ASIS officer who through internal avenues blew the whistle on what he obviously thought was immoral or potentially criminal behaviour, did that when former minister Alexander Downer joined Woodside Petroleum.

That's a really important point to make. That is what triggered this intelligence officer to come forward with these concerns. It triggered the whole process that we are discussing here today.

It hasn't skipped my attention either that Senator Brandis, who many of us who have been here for a while were very familiar with from his time in this chamber, refused to sign off on the prosecution of Bernard Collaery and Witness K. As soon as he was gone, Mr Christian Porter, in the other place, signed off on it. Also, he was previously legal counsel for Woodside Petroleum. Is there a pattern to this? Should we be joining the dots? Why the cover-up? Why the silence? Why the lack of transparency? Why the abuse of power—because that's what this is?

This is using the resources of government from one of the highest offices of the land to cover up an event that occurred over a decade ago that clearly implicates illegal behaviour, potential criminality, certainly immoral and unethical behaviour in the eyes of many people—and probably a whole lot more.

I would like to particularly say that abuses of power need scrutiny. This is an opportunity, through the legal and cons committee, to scrutinise this. Asking Mr Christian Porter to make a statement we all know is not about to fly. This is just a salve by the Labor Party. Two weeks ago, Senator Patrick put this reference on the table that we're debating tonight, and I know there are some good people in the Labor Party who support this. It's just so disappointing that clearly they're not supporting this because they are too close to the intelligence community. They're clearly either too close or too afraid. They're lacking courage to have scrutiny of the institution of parliament to which we've been democratically elected to represent the Australian people. It's very disappointing.

It's clear that the relentless hounding of Bernard Collaery, a man of upstanding achievement and history and experience and who's held in significant gravitas by this country, has been designed to send a message. The relentless hounding of these two men, who, as Senator McKim so rightly said, should have been given a medal for exposing what they have exposed, is designed to send a message: Don't blow the whistle. Don't embarrass powerful people, or we will come after you with everything we have got. We're also seeing it in the case of David McBride for blowing the whistle on the allegations that ultimately led to the Afghan war inquiry, which is playing out partly through the courts at the moment. And we've most certainly seen it in relation to Chelsea Manning overseas, and the brave man Julian Assange and organisation WikiLeaks, who published these disclosures that so embarrassed powerful people in the US and here in Australia.

At 10.30 am London time tomorrow, on 11 August, the UK High Court will hear the appeal of the Biden administration into the extradition trial of Australian publisher—and hero to many people, including myself—Julian Assange. It is an absolute travesty that Assange is still in jail. He's never been charged with any crime. It's purely to send a message: don't disclose our dirty secrets, our dirty laundry, or we will come after you with everything we have got. The parliamentary friends of Assange group have sought to have a media pass so we can watch the proceedings of that High Court case in the UK live, and I think that's a great thing. Those members of the group will have the ability to watch that live on the internet, and I'm very encouraged at the number of senators that have come forward from the Labor Party to join the parliamentary friends of Assange group. As Julian Assange often says, courage is contagious, and it's good to see more people joining that group and getting involved. I understand there's even a Liberal Party MP that's finally joined the group. The local member, from where I live in Launceston, Bridget Archer is a member of the parliamentary friends of Assange group, but I know there are other members and senators who would like to be a part of that group. Nevertheless, that is tomorrow. I hope that the High Court doesn't uphold the appeal when it ultimately gets to the substantive case in a few months time and that this Australian, who's essentially been in hard lockdown now for nearly 11 years, gets to walk free and that we get a very powerful message that press freedom is important and whistleblowing is important.

The ACTING DEPUTY PRESIDENT (Senator Chandler): The question is that the motion moved by Senator Patrick be agreed to.

The Senate divided. [18:59]

(The Acting Deputy President—Senator Chandler)

Ayes8
Noes23
Majority.....15

AYES

Hanson-Young, SC
McKim, NJ
Roberts, M
Waters, LJ

Lambie, J
Patrick, RL (teller)
Siewert, R
Whish-Wilson, PS