

## A spy scandal and a secret trial

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From Schwartz Media, I'm Ruby Jones. This is 7am.

For the past three years one of the most secretive trials in Australia has been taking place in Canberra.

The former attorney-general for the ACT, Bernard Collaery, has been charged with conspiracy, but the details of the case have been hidden from journalists and the public.

Today, senior lawyer for the Human Rights Law Centre, Kieran Pender, on the trial of Bernard Collaery, and why the government is trying so hard to keep it as secret as possible.

It's Monday December 6.

### RUBY:

Kieran, you've been going to court to sit in on the case of Bernard Collaery. What makes this case unique, and what has it been like to watch it unfold so far?

### KIERAN:

Yeah so this is a case about secrecy, it's a case involving a high profile lawyer, a secret spy, secret hearings, secret judgements, secret evidence.

So I've been trying my best to go along when I can. That's been really hard.

To give an example, I tried to attend the Court of Appeal hearing about how much of this case should be in secret. I was there along with a few journalists. We were kicked out within a few minutes when the court was closed.

So trying to piece together the bits of the jigsaw or trying to understand what the government is doing and why it is so obsessed with secrecy in this case is really difficult.

But I and others have been trying to go along to keep an eye on this, concerned about the wider implications of this case.

### RUBY:

OK, so understanding then that a lot of it is secret and it's hard to get information about the case. Can you tell me what it's about?

### KIERAN:

So this case has its roots in a spying scandal involving Australia, our neighbour, Timor-Leste and some of the world's biggest energy companies.

Back in 2004, Australia and Timor were sitting down to negotiate a deal in relation to the oil and gas reserves that sit under the Timor Sea, that's between Australia and Timor.

**Archival Tape -- Unidentified Reporter #1:** "At stake, billions of dollars' worth of gas and oil that lie in the Timor Sea."

### KIERAN:

That sea between our countries is really rich in oil and gas, and the boundaries and the ownership of that was disputed.

**Archival Tape -- Unidentified Reporter #2:** "At the first round of talks, Timor Leste's Prime Minister Mari Alkatiri came out swinging"

**Archival Tape -- President Mari Alkatiri:** "For us a 20 year negotiation is not an option. Timor-Leste will lose one million dollars a day due to Australia's unlawful exploitation of resources in the disputed area."

### KIERAN:

So Australia and Timor Leste governments were negotiating, you know, what were the proportions that will be split.

**Archival Tape -- President Jose Ramos-Horta:** "We are negotiating in good faith as mature adults..."

### KIERAN:

But little did they know that Timor Leste officials were negotiating effectively with a mirror behind them.

**Archival Tape -- President Jose Ramos-Horta:** "And then they bug our offices to try to obtain advantages in the negotiations."

**KIERAN:**

The cabinet offices of the Timor government had been bugged. And so the Australian government could see their hand the whole time. They knew what Timor's negotiating positions were and they were able to exploit that and ultimately come away with a really beneficial deal that split the energy reserve 50-50. Which was very advantageous for Australia given most of the resources are far closer to Timor than the Australian shore.

**RUBY:**

Right. So Australia was spying on Timor Leste while these sensitive trade negotiations were underway, and obviously the Timor government was completely unaware of that fact.

**KIERAN:**

That's right, and I just think it's worth sort of underscoring how significant that is.

**Archival Tape -- Francisco Guterres (Joaquim Fonseca?):** "The government and people of Timor-Leste feel a real sense of grievance at the manner in which they have been treated by our large neighbour in this respect."

**KIERAN:**

Australia spied on our impoverished neighbour, newly independent, rebuilding, large parts of the country were in ruins. Timor had been occupied by Indonesia for a long time. There'd been a long and really deadly struggle of independence.

It's estimated that over 100,000 Timorese lost their lives during the Indonesian occupation.

And so Timor had won independence and were trying to rebuild, trying to build their nation. They needed all of the energy reserves and resources and royalties they could get to be able to rebuild. And we're here, you know, one of the richest countries in the world, spying on our neighbour solely for commercial gain.

**RUBY:**

Right so it sounds like the Australian government wasn't exactly playing fair during this process - they had intel during these negotiations. So how did all of this come to light, Kieran?

**KIERAN:**

So there's really two main actors here. We've got Witness K, a former Australian spy who was allegedly involved in the bugging operation, and we've got Bernard Collaery, a lawyer, a very distinguished Canberra lawyer, the former ACT Attorney-General.

Now I'll be a bit careful with my language because much of this is still remains before the court. But in short, we can surmise that Witness K gave information about the bugging operation to Timor, and they then used that information to launch some international legal cases in response to Australia's spying.

**Archival Tape -- Francisco Guterres (Joaquim Fonseca?):** "It has caused deep offence and shock in my country. It is that that brings us here to this great Hall of Justice to seek justice from the World Court..."

**KIERAN:**

Bernard Collaery was Witness K's lawyer. He was also for a very long time, a lawyer for the Timorese independence movement.

**Archival Tape -- Bernard Collaery:** "I was cooking a meal here one evening and two police officers came to the door. I thought it was related to another case, and I got served with a summons."

**KIERAN:**

The two of them were subsequently charged in 2018 after Collaery's office had been raided and files taken.

**Archival Tape -- Bernard Collaery:** "This was a summons alleging that in providing professional legal advice, I had become an accused criminal."

**KIERAN:**

The crux of those allegations were that the two of them had conspired to give secret information to the government of Timor, which was then used for Timor to bring international legal proceedings about Australia's spying on them.

**Archival Tape -- Bernard Collaery:** "This is a very, very determined push to hide dirty political linen. That's what this is all about."

**KIERAN:**

The charges that we laid have been just the beginning of an incredibly arduous legal journey. That is ultimately seeing Witness K plead guilty, and Bernard Collaery fight on.

**Archival Tape -- Bernard Collaery:** "I yearn for the day when I can defend Witness K and myself in open court. This is democracy."

**KIERAN:**

And ever since there's been this ongoing really Kafkaesque saga.

**RUBY:**

Kieran, we're talking about the lawyer, Bernard Collaery. He was charged, as you say, in 2018 with giving state secrets to another country. Can you tell me a bit more about those charges and about how his case has been playing out in the courts?

**KIERAN:**

So Collaery is charged with five different counts. One relates to that conspiracy with Witness K, and the other four relate to him providing information to the ABC to a range of different ABC journalists in reporting on these issues.

As I said, he was charged in 2018. We're now in 2021 and he's not going to face a jury trial any time soon. There's been over a dozen initial judgements, fifty or so court hearings. This has just been a war of attrition, a legal war of attrition, about how much of this trial should be in secret.

**RUBY:**

And, Kieran, it's the Australian government who is pursuing this case, it's coming, I believe, from the Attorney General's Office. So what are they saying about this level of secrecy, why it's necessary?

**KIERAN:**

So the secrecy is being driven by the Attorney General's Office, and they're saying this is about national security. In short, you know, they don't want our important national secrets being aired in a public court hearing.

But when you unpack that a bit, you can see that the real reason is that the government don't want to admit in public that Australia spied on

Timor. No one really denies that did happen, but the secrecy allows the government to continue this facade, to effectively deceive the Australian people. So they want the secrecy to enable them to tell the court and the jury one thing and the Australian people another.

**RUBY:**

Mm okay. And a case like this, it's really raising questions about a lot of things. The Australian government's moral legitimacy when it comes to deals that we make with less powerful nations. But it's also exposing the way that the government responds when someone blows the whistle on their actions. As you said, right at the very beginning, this is about secrecy and transparency and how we treat whistleblowers, isn't it?

**KIERAN:**

Exactly. And so even just in itself, this is a really important case and the actions of the Australian government in shrouding this in secrecy and allowing this prosecution to go ahead is deeply concerning. But we have to see this case against a much broader backdrop, a backdrop of creeping secrecy and surveillance in our lives.

**Archival Tape -- Unidentified Reporter #1:**

"Police entered the headquarters of the Australian Broadcasting Corporation with a warrant after it broadcast classified material in 2017."

**KIERAN:**

We've had journalists be raided. Other whistleblowers are on trial, not just Bernard Collaery, but also the likes of David McBride, who blew the whistle about alleged war crimes in Afghanistan.

**Archival Tape -- David McBride:**

"I believe in this country. I think what I did was the patriotic duty to stand up for what's right about this country..."

**KIERAN:**

Richard Boyle, who spoke up about misconduct at the tax office.

**Archival Tape -- Richard Boyle:**

"They offered me quite a substantial sum of money. I thought it is more important that I tell the story of what's happening in the community with these

taxpayers who've been adversely affected by this unethical directive."

**KIERAN:**

All of these whistleblowers thought they were doing the right thing. In the case of McBride and Boyle, they thought they were following the letter of whistleblowing law that allows them to speak up. And now both of them and Bernard Collaery face jail time for speaking up in the public interest.

**RUBY:**

Mm-hmm. And is the problem here, then the laws not being strong enough to protect people who do want to speak up? Because all of this I mean it, it definitely sounds like information that should be in the public domain.

**KIERAN:**

Yeah, I guess that's what makes these cases so significant. No one denies that any of these issues are true, that any of them are not in the public interest. And yet they remain on trial, and I think that shows that our whistleblowing laws need reform.

The government was told in 2016 that the federal whistleblowing law was not good enough and it needed to be fixed. It took until last December for them to accept those recommendations, and 12 months later, there has been no substantive progress.

So we've got a one hand prosecution of whistleblowers, and on the other hand, the Morrison government sitting on important whistleblowing law reform.

**RUBY:**

And in terms of Bernard Collaery, what happens next in his trial?

**KIERAN:**

That's really anyone's guess. This trial has been so complicated and unpredictable that it's really hard to say, but in the short term, there's going to be an ongoing argument about the extent of the secrecy.

The ACT Court of Appeal recently said that the trial shouldn't happen in secret. A really astonishing judgement. They said that open trials are important to safeguard against political prosecution, and the government is currently

trying to appeal against that. Not directly, but indirectly by saying that there's more evidence, secret evidence they want to introduce. And so likely that will drag on for some time may well end up in the High Court, and I think it's unlikely Bernard Collaery will be on trial before 2023. That's an astonishing, lengthy legal saga for anyone. And we've got to remember this is just one man.

**Archival Tape -- Bernard Collaery:** "I think what's being done to me is pretty ordinary, it's a bad dream."

**KIERAN:**

Now Bernard's been fortunate that he's had a group of lawyers and very distinguished barristers working for him for free because they recognise how important this case is. But the odds are really stacked against them. The government has the best lawyers money can buy, and they've spent almost \$4 million in taxpayer money on legal fees in this case and the Witness K case.

**Archival Tape -- Bernard Collaery:** "It ruined my practise and everything I've worked for. Be different if I felt that I'd done something wrong. It's sheer, unadulterated, vindictive injustice, as far as I'm concerned."

**KIERAN:**

You know, the fact that this case is happening, the fact that the cases of McBride and Boyle are happening shows fundamentally that our law is broken. People who spoke the truth about things in the public interest are on trial and face prison. That cannot be OK.

But I think what I take away from following this case and following these other cases is that fundamentally whistleblowers make Australia a better place. They need to be protected, not punished and certainly not prosecuted in a secret trial with secret evidence and secret judgements. And the sooner we fix our laws, the better.

**RUBY:**

Hmm. Kieran, thank you for speaking to me about this.

**KIERAN:**

Thanks a lot.