

# **‘Secrets, Spies and Lies – Bernard Collaery in conversation with Kieran Pender’ - Transcript**

**Professor Lidia Xynas – Victoria University College of Law, and Justice, Victoria Law School, Dean**

Good evening, everyone. I'm Professor Lidia Xynas, I'm the Dean here at the College of Law and Justice, Victoria Law School, Victoria University.

Let me begin with an acknowledgement of country.

We acknowledge the ancestors, elders and families of the Bunurong, Woiwurrung and Wadawurrung people of the Kulin who are the traditional owners and custodians of the university land. As we share our knowledge practices within the university may we pay respect to the deep knowledge embedded within the Aboriginal community and the ownership of country.

We acknowledge that the land on which we meet is a place of age old ceremonies of celebration, initiation and renewal, and that the Kulin people's living culture has a unique role in the life of this region.

Victoria University is committed to building better relationships and fostering greater understanding between the wider Australian community and the Aboriginal and Torres Strait Islander peoples.

I would like to welcome you all this evening to this conversation style seminar here at our law school. Special welcome to our guest speakers, Mr. Bernard Collaery in conversation with Mr. Kieran Pender. I'd also like to welcome Ms. Pollyanna Clayton-Stamm, Victoria University's Chancellor, the Honourable Dr. Steve Bracks, Dr. Terry Bracks, Vice-Chancellor, Professor Adam Shoemaker and others.

Thank you so much. If I may call up the Honourable Steve Bracks. Thank you.

**Honourable Steve Bracks – Chancellor of Victoria University**

Well, thank you very much, Lidia, and could I thank you all for being here tonight.

Victoria University is delighted to host Bernard's first Melbourne event since the new Attorney-General Mark Dreyfus KC dropped the charges against him in July.

As some of you may know, I have had a long involvement with Timor-Leste, including ten years as a pro-bono advisor to the former president, Prime Minister Xanana Gusmao, a position I might say, which was funded and supported by a great friend of Timor-Leste, Harold Mitchell, who is here with us as well.

It was in that role that I met Bernard Collaery. Bernard's link to Timor-Leste stretched back further than mine, he was on Xanana Gusmao's legal team, even before Timor-Leste became independent in 2002. As we all learn more about tonight, there are still reasons why Bernard can't talk in detail about the events that led to him being charged with conspiracy to breach the Intelligence Services Act, an act passed to deal with terrorist threat to Australia in 2001.

Bernard's charges related to an ASIS operation in Dili in 2004, authorised by the Howard government during which our spies installed listening devices to record Timor-Leste official's private discussions

about multi-billion dollar maritime boundary negotiations with Australia. The legality and morality of the spying have been widely critiqued in Australia and by the international media.

The spying result in Australia making embarrassing appearances at the Permanent Court of Arbitration at The Hague and the International Court of Justice, and eventually participating in a conciliation commission established under the United Nations Convention on the Law of the Sea, at the end of which, Australia was forced to concede a median law and boundary with Timor-Leste.

When Australian and Timor-Leste signed a Timor-Sea Maritime Boundary Treaty in March 2008, we all thought that the sorry saga was behind us. But just four months after the treaty signing, in June 2019, Attorney-General Christian Porter in the then Morrison government consented to charges being laid against Bernard Collaery and Witness K.

Three years after being charged, Witness K pleaded guilty to a lesser charge, and in June 2021, he was given a suspended sentence. Bernard Collaery maintained his innocence. Before charges were dropped, he faced over 50 court hearings and a dozen judgements over the extent of secrecy to be applied to his jury trial. Even now, despite the charges being dropped, Bernard cannot talk about what he was apparently charged with revealing. It's absurd. Before Bernard was caught up in this bizarre prosecution he had a thriving legal practice. He has acted for families of victims of the Thredbo landslide, the Royal Canberra Hospital demolition tragedy, the Glenbrook Rail disaster in the Blue Mountains, the fire aboard HMAS Westralia, the tragic loss of an RAFF F-111 in the South China Sea and the RAF Special Forces aircraft and crew in Iraq.

In late 1980s, he was the Attorney-General for the Australian Capital Territory. He introduced the independent law reform process that culminated in the drafting of human rights legislation, including anti-discrimination legislation. Currently, Bernard is patron and honorary solicitor of various charitable and non-profit organisations serving Indigenous Australians and marginalised sectors of the community. Bernard is a man of integrity and courage and it's an honour to have him with us here tonight.

We're also delighted to have Kieran Pender with us tonight. Kieran is a senior lawyer at the Human Rights Law Centre. He's a graduate of the Australian National University where he's awarded the university medal. He is now an honorary lecturer at the ANU College of Law. Kieran is also an award winning writer. He has written prolifically on the outrageous prosecution of Bernard Collaery in The Guardian, in The Age, The Sydney Morning Herald, the Sunday Paper, The Canberra Times, Crikey and The Australian Book Review, and tonight, Kieran and Bernard will discuss the relations between Australia and Timor-Leste, what the Bernard Collaery's case means for Australian democracy and why law reform is needed to ensure such a prosecution can never happen again.

Thank you and I wonder if you could welcome then Kieran and Bernard for tonight's discussion. Thank you.

### **Kieran Pender**

Thanks and thanks for that very kind introduction.

Prolifically is probably too kind, I would have said repetitively, and having written about the case for the best period of four years, I'd begun to find it difficult to find new ways to express outrage. One of many reasons I was very glad that the Attorney General intervened.

I also want to acknowledge the traditional owners of this land, the peoples of the Kulin, and acknowledge that sovereignty was never ceded, and this always was and always will be Aboriginal land.

And Bernard, a man who needs no introduction, and we've heard of his many great feats, but all I would add is, of course, the defendant in one of the most egregious political prosecutions in Australian history and I'm sure everyone here today is familiar with the key outline of the case.

I just want to highlight a few points before we get into some questions.

This was a sordid saga that went on for the best part of a decade, dating back to when Bernard's offices in Canberra were raided in 2013. Charges laid in 2018. As we heard more than 50 court hearings over a dozen judgements and relentless attempts by the then Attorney-General or Attorney General's, Attorneys General over a period of time to shroud the proceedings in secrecy, an attempt that went all the way to the High Court. Bernard and his legal team stood firm, they fought almost every issue, including the first instance decision of Justice Mossop, of the ACT Supreme Court, that the trial should go ahead largely in closed court.

That was a decision overturned by the Court of Appeal, and I note the Court of Appeal commented that there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed.

The court emphasised that the open hearings of criminal trials was important, was important because it deterred political prosecutions. Now, of course, we had a change of government on Thursday, the 7th of July, the Attorney-General, Mark Dreyfus, now KC, appeared unexpectedly at a press conference in Sydney to announce that the prosecution would finally be over. I believe Bernard was in France at the time having a holiday which may or may not have been for the best.

A landmark step for Australian democracy. I understand the Attorney-General's intervention to be only the first time in Australian history that that power under the Judiciary Act has been exercised.

And I think a real tribute to the effort of Bernard and his courage, his lawyers and all of civil society who stood with him particularly. There were some fantastic people in Canberra who gathered outside the court, rain, hail and shine, and there was a lot of cold Canberra mornings to protest this case, and I think as I wrote in The Guardian the next day..... "and now at last relief, an unjust case has ended. Justice has prevailed". A landmark moment, but of course, this is not the end. Even just in this prosecution, there is still a judgement outstanding, a judgement of the Court of Appeal in relation to the level of redactions to apply to that final Court of Appeal decision ordering that there be no secret trial.

I think the Kafkaesque nature of that really gets to me, this is a decision of the Court of Appeal saying no to a secret trial, and then even the current government having dropped this prosecution is fighting to keep that judgement secret. Does really boggle the mind. There are two whistle-blowers who remain on trial, David McBride and Richard Boyle. We might touch on those later. There's been no accountability for the millions in taxpayer dollars expended on this political prosecution. And the acts that enabled secrecy to shroud large parts of this case remains in place. The NSI Act. Now to turn to the man of the hour, I just wanted to disclaim that of course, as we've heard, there are limits on what Bernard can say, and I've tailored my questions accordingly, there'll be some time for Q&A, but again, I ask you, keep in mind the secrecy obligations that persist on Bernard personally and

indefinitely and again, I think an indication of the flaws in our law that those secrecy limitations apply forever.

So, Bernard, I want to go back to the beginning of all of this. Where were you when you first heard that your prosecution had been discontinued? I think you were overseas. Tell us about that moment. So we started that start at the end and then we'll go back to the beginning. Where what where were you when, when you heard and what was the reaction when you got that phone call?

### **Bernard Collaery**

Well, Kieran, it was about 6 a.m. Central France time where I've got a house. And I was trying to get Odette to get dressed and we were packing the car to drive 700kms to my nephew's wedding in Brittany. And in the middle of that rush, because in July of any year, there's no accommodation and en-route, there's no point, you just sleep in a garage, stop over so we had to leave the house and the phone started ringing, and a member of my team, a well-connected member of my team, imminent member, rang me and said, the decision has just been made.

It was actually on the sixth that Mark Dreyfus signed this once in a lifetime instrument. It was the seventh when it was announced that he'd actually signed the instrument courageously because I'm fairly certain he had no support from, quote 'the agencies' and he certainly had no support from the Commonwealth Director of Public Prosecutions.

So how did I react? Well, to be absolutely honest, it meant that we couldn't get the disclosures, we couldn't get the showdown that was looming., so to be honest, it was great, really, for Pollyanna and my family and me to an extent, but I also felt and still feel that after the four years of trauma, they were they were effectively getting away with it. They'd lost government. They were determined not to have the trial before they faced an election. It all gone wrong for them. They probably no longer care what they did to my life and our lives and to our country and to our image abroad and all of the grievous acts that led from port are doing that, but so, we drove off in sort of silence and Pollyanna said, after about 100km's "How do you feel"? I said, I'm still trying to work out how I feel because I can't come back for this.

I was doing jury trial work as Robert Richter there knows, and you can't return to jury trial work, particularly in Canberra, because I don't know who be on the jury a pro or against, and if it was a pro, I might, of course, all my clients are absolutely innocent as Fiona up there knows, but you know, so I'm back where I was. I went and did the district court circuit in New South Wales for about five years after I was Attorney General in the ACT during that tumultuous self-government stage., and at the moment my career has been finished, and given my age, I don't know if I can easily get back to facing a jury work, which I love.

### **Kieran Pender**

We might come back to the impact the case has had on you, but if we go back now almost a decade and I guess a bit north from where you were in France when it ended and this began, I think you're in The Hague.

### **Bernard Collaery**

Well, I was asleep and I was woken by....No, I've got to correct this not to give the wrong impression. I was woken by my assistant but by banging on my door, and she said the ASIO and the police have been in our chambers all day and at your home and at Witness K's, and we were due to appear and they'd seized our brief.

I've got this lasting memory of wonderful, mellifluous, voiced early Lauterpacht, who is my leader saying to um, the imminent judges in front of us.

Your Honour, I don't, Your Honour, I don't have much to say today because the Australians on my right have seized our briefs so they can tell you those stories.

And I was just unbelief. I mean, it's just unprecedented, unheard of, shocking.

And I couldn't believe that they would be so stupid, so absolutely stupid to publicly raid the chambers, tell the whole world before I knew we were asleep.

Worst thing was they didn't turn. They seized the phone of our only law clerk present, and wouldn't let her go to the loo, for instance, with the door shut and held her incommunicado all day, but then left and left our servers, not turned off, and for various reasons I can't go into, various servers that we had contingency plans for since K, as people will know, wasn't my only client ever from various places, and it was 19 hours in effect before we could turn the servers off.

It was a massive breach of security, massive, because we had we had systems, but they wouldn't have been able to defeat, um, sophisticated inroads and, um, just protecting K's identity was vital to protect his life, but there are other implications of that. I'd been appearing in Britain in very classified, then very current matters involving the war in Iraq.

It was a massive intrusion, a stupid, inane intrusion, telling the whole world that there was an authoritarian terrorism.

I remember one of the first calls I got was from Professor I know in Berlin, and she said, oh, did you know it's a great coincidence that on the 5th of December in Moscow this year, the Moscow police raided one of our legal colleagues, in a similar fashion. So that sort of sent shockwaves through the system. The next shock wave was when the Australian Solicitor General stood up and said some words.

You can lead me on that....(laughter..)

### **Kieran Pender**

Well, I mean the raid, obviously a damning act by the Australian Government, but then as Bennett has so beautifully segwayed, in the proceedings, they then effectively accused you and the Timor government of espionage yourselves.

### **Bernard Collaery**

It was just astounding, and it sickened, it certainly sickened witness K as I subsequently found out, I mean, well, put another way, I mean, in our own ways, we'd served our country. I'd grown up as the child of someone who'd been killed in the war. We felt a great patriotism, my generation, and for a young, young, smart silk to stand up and look down the bar table in The Hague and accuse us of espionage was just the pits. It was a terrible thing to do. I accept that it was probably on instructions and I'm now increasingly certain that to get the warrant from George Brandis the then and the now

late David Irving had alleged that we were involved in espionage, I mean, Timor-Leste, impoverished Timor-Leste was running an espionage operation against Australia, I mean, it sounds funny now, but it wasn't when that man stood up and pointed down the bar table, he pointed to the second most senior silk in Britain, former ad hoc judge of the international court, and just, it was, an awful insult to me, because K and I were actually serving our country. It was not in our national interest to be doing what I'm not able to talk to you about. It was absolutely contrary to the national interest and what we had to disclose included matters of ultimate national security affecting others.

Let me start another way, Kieran. What happened to the Timorese was that a lot of us could never understand why we wanted the Timor Sea resources when we had so much closer to home in the Browse Basin and all the rest and for years I couldn't work it out, and then around this same time we found out, the Timorese found out, that under the Green Dome in the Timor Sea was the only useful, practicable, but a massive supply of helium.

Helium was a defence critical commodity since the airships of World War One and Australia had paid royalties to look for helium and drill for helium all over our country and it was a critical commodity which has a defence implication and Australia knew, China knew, Japan knew, the Japan State Government petroleum agency called INPEX knew we found out, Timorese didn't know, I was their advisor I didn't know, and we had found out, and at that time, China was building its nuclear industry, particularly many, many scores, dozens of nuclear plants and building up its missile material, and it was dependent on Qatar, the UAE, Algeria, some from Poland, but mostly from Wyoming. So they needed an assured supply of helium. And a great coincidence, but David Irving as ambassador in Beijing, before he was brought home to head the Australian Secret Intelligence Service had hosted the negotiations, whereby the Chinese expected to find an assured close supply of helium, and you've got to know this, the Timorese were apparently unaware of the helium, but to make sure of the helium supply principally for Japan and China's nuclear industry, and a couple of other sources, Australia needed to be sure that the Timorese wouldn't wake up to the helium, and what it processed onshore because it would change dramatically the field economics is Australia principally through its proxy. Woodside was saying it's too expensive to cross the 40k's from Greater Sunrise to the South Coast of the impoverished, unemployed south coast of East Timor and the field economics suggested we use the existing pipeline connected to the Bayu-Undan field already pipe to Darwin, but if the helium factor had been known to the Timorese, they could have swung the negotiations their way. They'd already done bathymetric surveys and tectonic, getting tectonic advice, I've been part of that, and we knew the alleged Timor gap trench was not tectonically active, so we all would have worked if they'd known about helium, but Australia needed to know, Australia needed to know if the helium as the Timorese were aware of the helium. I can't go any further, and then I subsequently found out that the Department of Defence knew nothing about this. We had a brief prepared for the Commonwealth Director of Public Prosecutions. We had a two pronged thing. We were going to apply in The Hague and we were going to pursue, if necessary, through the Commonwealth Director of Public Prosecutions, this matter, and I didn't just search and seize our briefs, they deleted data, and to this day, we can't find our brief to the Commonwealth Director of Public Prosecutions.

**Kieran Pender**

So Bernard that was 2013.

## **Bernard Collaery**

Yes.

## **Kieran Pender**

The case has dragged on ever since, until July now Bernard is very happy always to talk about national security, law reform and helium, but doesn't like to talk about the impact this case had on himself, but I said to Bernard, have to tell the audience, okay, what impact has this case had on you and your family?

Bernard Collaery - Well, if any of you have really messed up or any of you have, you know, really suffering grief and all those things that we have in life, I had all that sleeplessness. I'd started a new relationship with Pollyanna there, and suddenly she found she was in with a jailbird. We had a young child and I had grandchildren at school who get the usual unthought taunts. It was very destructive. But I've always had this saying. I think others have used it. There used to be a grenade that had phosphorous in it, and once I saw someone with phosphorous in in their body and you could smell them cooking, it just burns. It burns, and injustice burns like phosphorous in you. You can't sleep for a while, you can't deal with it and there's no quenching it. It's got to be removed. And the only way to remove it is for a trial or vindication or a jury verdict. I couldn't get there. I couldn't get there a year on year on year, they piled on their secrecy and we couldn't get there. There'd be endless waiting for a court appearance. There was the issue of gently and hopefully helping Witness K with the immense mental health injuries inflicted on him as a patriot, and the risks for him by exposure and whether they would leak his identity, because you can imagine, I mean, when you're in that trade, the four team rules, that would be a rather benign operation to motivate others. So and there was my worry all along, I'd given him certain legal advice and he knew what he was doing, courageous man, but immensely damaging to him, too, and I felt his injury, and for a lot of reasons, I can't explain, I was close to that man, and I feel like you always feel for a client, you might have not given the best advice to as I saw it, I believed in the way, once we can get past the secrecy, I can explain why I think and there was good law involved in it, but I am bound in perpetuity by these orders, Mark Dreyfus has asked the National Security Monitor Grant Donaldson to look at it, and Grant Donaldson is trying to work out his terms of reference to look at this national security legislation. I've done lots of criminal trials. You got one of Your Eminence Grey here, Robert Richter. When the DPP are decent and honourable, when they are, they will insist that the police reveal everything, do the right thing. The Commonwealth DPP in my prosecution was unbelievably submissive, walked out of court when we were ordered out of court and I go back to the Guildford Six and the fact that we brought the DPP in to have an independent prosecution service and I saw nothing from the Commonwealth DPP and in our prosecutions that suggested that they wanted to know what was behind the redactions and what the court only secret evidence was and judge only evidence.

I felt very low the day the single trial judge said that he would receive Michaelia Cash as secret cache. I mean it sort of comes out of Robespierre and Fouquet and all those evil days. Uh, he received a sealed envelope from the attorney's office in my trial against our wishes. We don't know what was in it, and we don't know because not long afterwards rather vehemently, he found against us and that we he would maintain a secret trial.

## **Kieran Pender**

In one of the articles I wrote, I described it as a secrecy onion, layer upon layer upon layer.

Lots to condemn about the saga of the past ten years, but one silver lining has to be the way the legal profession surrounded Bernard and provided support. Gilbert + Tobin and White & Case and a dozen or so barristers, including the likes of Phil Boulton, SC., Chris Ward, SC., Bret Walker I see

Bernard Collaery - Yes. I mean, Bret, uh, once again stepped up and Christian Porter and started a proceeding so he couldn't represent me. So that turned one of the judges who ultimately sat on the appeals panel very stringently on about injustice, but, I was up Ballan the other day at the Bravery Association dinner and the country's flooded the Indigenous are out on an island on the Clarence River, flooded even more, and we have this you know, we make this comment to Country and the injustices, but I, I said I think in perspective, there was a great deal of injustice done to me, my family and K but you can imagine the other injustices that exist in the world, in society, and that helps me psychologically to put it into place that I'm, I'm diminished by it all, they wrecked my career when I was reached, probably reasonably close to my peak, they wrecked everything.

And I was very proud to be a boy from Wollongong sitting at high table in Trinity College in Cambridge. You know, I remember looking up one day, up table and I thought we had a German professor, young professor, because we'd have visitors, I learnt bitterly, you are forbidden to speak French at table in Trinity since Elizabeth first and that famous portrait of Henry the Eighth sits above the table and the royal astronomer, the reaction by Trinity to the raid and the accusation on them, their most senior fellow of espionage was to invite me to bring my papers to Trinity College for protection, and it was an age of protection.

I remember Martin Rees come up from the House of Lords some nights a bit late, we'd wait for him, the master, got me to sit on his right for a while to make sure I wouldn't, you know, use my cutlery against myself, and Martin said, "well, look, we have an eminent record of protecting Protestants at this table during the times but we've just having a change of pace with this Bernard Collaery next to us".

So there I was looking at the table that young German professor a little later in, in the, in the parlour I realised it was William, Prince William. I mean, here's the bloke from Wollongong at table every night riding home, pissed on his bike, and that was the best time of my professional life, being in Cambridge, writing, defending the Timorese, working hard to get the case together, and then to get raided and almost defrocked, and it was formed for me to step out of college, I had to do that. I thought, how awful, that was the pits.

## **Kieran Pender**

The secrecy shrouded this case. I remember I tried to attend as many of the hearings and directions hearings as possible, and the dilemma was always how much to pay in parking outside the Supreme Court, because you never knew whether you'd be allowed in, not allowed in at all or allowed in for 5 minutes or allowed in all day.

So that was always the gamble that we had to take, but I particularly remember what stuck with me was when Bernard was contesting the secrecy order in relation to the trial in the Court of Appeal, and so we had a matter over two days on issues of law, well, I presume, you know, it's an appellate hearing, one would presume they are largely matters of law, and myself and some journalists are



sitting at the back of the courtroom watching it for the begin, and the chief justice asks Bret Walker, you know, do you accept that I have no choice but to expel the public, and Brett shrugged his shoulders and said, "Yes, I guess so", and we were all marched out. This was a hearing of law, not of fact, and it wasn't just that the chief justice had made conceited decision that the interests of justice were best served by a closed court, but the law did not provide any alternative but an entirely closed court. Now, one upside of this case and other recent cases is that it's demonstrated the inadequacies of the existing law, the NSI Act, the Attorney General has asked the National Security Legislation Monitor to undertake a review. How important will that review be? And can you comment on the impact that the secrecy had on the case and on you?

### **Bernard Collaery**

Yes, I think, well said Kieran. I've written to Grant Donaldson, the National Security Monitor who's actually preparing suggest the terms of reference so they're not even struck it and I think that's a very effective way to start it, but the NSI act, as we call it, has a power in it that gives the directive capacity of the attorney to intrude into proper judicial activity, there's a power in it to declare that the judge in a national security case and must give the greatest weight to the attorneys view, and that that was done. But the submissions nature of the Commonwealth Director of Public Prosecutions is interrelated and I've written to Grant Donaldson and asked him to accept that he has to review the interaction of this horrendous set of laws with the independence of the DPP and a variety in a number of other laws that affected us. On the way up to the Court of Appeal, there was a secret hearing, and I am allowed to say who the witnesses were hey were the heads of the Secret Service agencies, and the departmental heads. There is a thing called the Secretaries Security Committee, four or five powerful departmental heads sort of sift national security matters that then go up to the Prime Minister, the attorney general and the National Security Committee of Cabinet, so a couple of those people gave evidence Pazuello and Nick Warner, then head of the National Security Agency, and then under that ASIS head Paul Simons, under that Michael Burgess, ASIO head and some others.

As a young man interested in Soviet activity, for one reason or another, I'd read Arthur Kessler's Darkness of Noon, and I'd read of the Stalin's Moscow trials in 1935, 36, 37, and I'd had some insights there, and I'll never forget the way they were laid in. I was almost certain Michael Burgess wasn't too keen, and he said hello to me on the way in, and you got to know that as you come out okay in this affair, Duncan Lewis, who became the head of ASIO after David Irving. David Irving got a double shift, you know, head of ASIS, and then contrary to all of our learnings in the Cold War, head of ASIO raids me, accuses us of espionage and the brief that, you know, covers a period of negotiations in China when his ambassador disappears, and he writes me and Duncan Lewis replaces him, because he is retired shortly after that. He comes back as head of the Foreign Investment Review Board, but before he comes back from the wilderness, Duncan Lewis arrives and declares that Witness K can have his passport because he is, quote, no threat to national security.

And Julie Bishop went back to him again because we got the papers and he says no, he's no threat to national security, and he's the decision maker, the head of ASIO for passports, but Julie was able, through the Passports Act, to appoint, guess who, head of ASIS as the determining authority, and K doesn't have his passport to this day, which is an outrage.

So Grant Donaldson has a far wider brief, in my view, than we think the anti-terrorist legislation, as Kieran calls it, needs reworking anyway. We do need some of the protections of it, but its misuse is evident, most evident, and my trial would have shown a misuse of it. What breach of national

security did K and I cause what? We've never heard it. They've never been forced to answer. What we did that breached national security. What did we give away? What name? What? What technique? That is a John Le Carre novel. What? What did we do? That was actually a breach of national security? And they could never tell us. We never got what lawyers call 'particulars'. We never once got particulars they wouldn't give us by subpoena all the documents we wanted. Normally you subpoena the documents. If the police don't produce it, the DPP often back you and you get it. We never got any of it. It was just a railroading affair to get me in jail. I don't think they were happy when Robert Richter got k a suspended sentence. I could see their faces. I thought, 'good on you Robert', and Robert's just down here (points to the audience).

So, K put up his hand, we weren't going to that, but I'm continuing to support him. The thing that is immensely troubling to me at the moment is and I've written to the joint committee looking at the proposed National Integrity Commission, of course, to extend the extenuating circumstances issue about public hearings, I've joined and supported the transparency group on, but guess what, the same provision that gives the attorney the power to close down an inquiry or to secrecy is in the bill. Almost the same provision is in the end. So I've written tactfully because certainly Mark Dreyfus is a man of integrity. I've written very tactfully and said, this bill presumes, presumes the integrity of the executive at the top, the Prime Minister and the Attorney-General. It presumes that, and I've just written once and I have not seen it because the public submission, they didn't publish it.

I do not share that presumption.

I'm not referring to the current government, but as far as I'm concerned, the executive of our country went awry in 2004, and I'll tell you why, I'd worked so hard all those years in Timor to ensure that we outfox the Chinese. They were constantly on the leadership. They knew what was in the sea.

They had done their own on the high seas bathymetric surveys and there was a great keenness in Beijing to get to get Timor working with them comprehensively on some good issues and Silk Road kind of concepts, but alternatively not on others, and when they came with INTERFET, because few of you know, the Chinese came with contingents, they set up very efficient police stations around the island, lots of antennas and all the rest not being dramatic, I'm just saying that I worked hard, to ensure, and I didn't need to build on a defence relationship that was very effective because the undermining by the Howard a government was the absolute and the undermining of our Howard Downer defence interest, trust me, constantly defat, undermined our genuine defence interests.

But I worked hard to ensure I can only put it lightly, an effective intelligence connection between our countries, I worked so hard on that and when you occasionally see me on television, refer to utter, utter treachery, I'm nuancing it because I can't speak about it, but it utterly undermined years and years of work being done in that area. For one thing, that was very clear. One thing was very clear, that if you bug an ally, you shouldn't, you should know what the implications are if you do do that.

I'm speaking hypothetically, of course, and the implications of it all, we're not....Gareth Evans wrote a great article recently. It was published somewhere in a Saturday paper, it was a no-no job, but the worst thing is it had nothing to do with our national security, nothing at all, because guess what? The helium was given away free to Conico, Woodside and IMPEX still to this day. It's gone, away free. Timor missed it, but Australia is entitled to its 50%. We didn't get it. Billions. So, that's where I'm precluded from talking. I can't go further to complete that story.

**Kieran Pender**

Bernard, two last questions and we will take Q and A.

Your prosecution has been dropped, something that groups like the Human Rights Law Centre have been calling on for a long time. Finally, we see justice, but there are two others, two other whistle-blowers on trial, David McBride, whose alleged open whistle on Australia's alleged war crimes in Afghanistan, Richard Boyle, who allegedly spoke up to the media about improper practices at the tax office. Now, Bernard and I were both outside the Supreme Court a week or two ago in relation to the McBride case, your case is over, but seeing those men still on trial, standing there with David outside the court the other week, what's your reaction?

### **Bernard Collaery**

Well, I know both of them. I know David and I, Richard and I spoke with David, in fact, sent David along to Mark Davis and David's telephone, sent David along to them, and helped set up through Natalia Nikolic lawyer in Canberra, the go fund me for Richard Boyle.

The public interest disclosure reforms won't help them, because they're not going to be respective. They are complex because I think, the ATO commissioners. Immensely powerful and, but almost independent of the executive and almost has to be independently executive, and no member of the executive should be able to ring the commissioner to find out what my income is in theory, and so there's this complication, the Richards case, about the state interfering with the alleged absolute tax laws about non-disclosure of issues, and that so nuanced and so awkward that I imagine Mark Dreyfus as having to work through that labyrinths, it was pretty easy with my murder, but I think the reachable one is very complicated.

The McBride matter, of course, I mean, the whole Brereton thing is a scandal. I mean, what am I outraged about the rate of my practice was that I had a special force case, that I went through it all, and I were absolutely amazed that I had this replica sort of M4 in cardboard because I was dealing with, you know, issues to do with the use of what size weapons in caves and that in Afghanistan and issues of it, they intruded on live files that I had and is a very complicated area that McBride is in once again with an Attorney General that doesn't control the portfolio that he's needing to intercede in, and moving defence on issues like that and knowing the implications of how many other McBride's are in the woodwork, the defence haven't revealed that if there's a decision on McBride, it creates a precedent for people to put their hands up, so I think my case was relatively straightforward compared with McBride's, not making excuses for Mark Dreyfus, but I think both of them have big complications in Cabinet for an attorney who has to stretch himself into other minister's domains.

### **Kieran Pender**

I'm amused to hear you describe your case with its 50 plus hearings, 16 or so judgements as relatively simple, but we'll go with that. Finally, Bernard, I want to ask. This case has cost you an immense amount personally, professionally, financially, it is exposed shortcomings with our laws and our democratic institutions.

It's had all of these challenges institutionally, personally, but I guess on the other hand of the ledger, we have a renegotiated agreement between Australia and Timor, of course I'm not connecting those two things, but that has happened.

We have increased oil and gas revenue for the Timor government. In light of everything that's happened over the past decade, would you do it again if you could go back in time and you get this brief to advise witness K, would you say yes or no?

### **Bernard Collaery**

I would do it again, but I would have sent the brief to the Commonwealth Director of Public Prosecutions to the Guardian. I would have acted far earlier. I would have. I mean, I think I saw the signs in two ways. The series of letters warning me not to publish that book, and oh Nathan Hollier is up there from Melbourne Uni press Melbourne, had the guts to decide to go ahead I think, ah oh as I now know they were reading all my mail all through.

They read our memorial, our draft memorial as we settled it in Cambridge, they read everything we worked on all those, those years and, and with warrants issued in Canberra, that's going to be an issue, public issue soon the number of warrants issued out of the Magistrate's Court in Canberra by the Chief Magistrate will come to that, so well, I would do it a different way, but I'll never forget the support of my profession. There was a year opening, we open the year, we have a ceremony, it used to be a church service, but now we have a ceremony, at the opening of the law year one year recently, the President of the local act bar got up and said the treatment of Bernard Collaery is totally wrong, improper, outrageous, there was the trial judge sitting stony faced. I mean, that's a gutsy bar president, and he hasn't taken silk yet, and then the whole of the bar, the law council, Fiona McLeod's up there...I mean, really, our legal profession showed its best, in my view, showed its very best and closed ranks and even conservative barristers I'd tangle with at times were very, very nice. The other thing is lots of very obvious, conservatively minded people wrote to me and contacted me about the matter, and I thought that was wonderful. I'd been trained by a former commando in East Timor, I'd been trained as a young man who told me about East Timorese so, I have immense regard for the Timorese people from their World War II experience, because I was actually young enough to be trained by one of the survivors of that, um, period. I do think John Howard and Alexander Downer led our country seriously, seriously astray in that period, not just over East Timor, over whole variety of things, it wasn't just children overboard. I mean, the children overboard thing the media never quite got like the thing was, it was a fib, well, yes, they do fib, but the fact was, would parents really throw an infant in the sea to get a visa and I remember I was with [unintelligible] he's a bit of a hugger and we where we were at a mass grave, and they were turning over the bodies, and there were women there. The U.N. investigator who pointed out those who had been carrying babies, the babies had gone, but the shawls were there. They'd been shot in the back. They had turned their backs. The last thing a parent would do. Yet he got away with it, basically, it was just a fib, was a political ploy. It was a gross insult to, particularly motherhood.

It was a bad era for our country, and they're still using their mates, particularly in the West, to cover up their vested interests. We had reached the stage where I naively thought we were safe, and we should have got our brief out earlier to the Commonwealth Director, but all roads were leading to Perth. All roads were leading to Conoco and Woodside in Perth over to helium and we got trumped. They seized our papers and prosecutors, and if that's the way our country's going, and if we have any return to orthodoxy, we're in trouble.

**Kieran Pender**

We have time for a couple of questions.

**Questions from the audience:**

Mr. Collaery did it ever occur to you to breach the orders, tell all and rely on the court of public opinion to get you out of [unintelligible]

**Bernard Collaery**

I thought about it often, but, um, I knew that there were judges and juries who'd convict me. I knew that I could.

Audience question: Can I just ask this? We know that Witness J went to jail. We don't know for how long, and we don't know why. Uh, and I was just wondering whether the, the, moniker of Witness K, uh, came out of a field of comedians who remembered the Kafka trial and remember that, uh, uh, Josef K was a hero in the, in the trial. How many letters are left in terms of prosecutions that we know of?

**Bernard Collaery**

Well, I'm sure that there is a fear that L, M, N, O, P Q are out there.

J asked for me as his representative, and they refused him. They told him he couldn't have me as his lawyer. I've learnt that from J. I can't say more. And I wonder if K regrets having me. But Robert, you represent him and very well. I, I think a big factor in it has been to intimidate the people in the services who are overwhelmingly people of integrity. I think it was enormously brave of Duncan Lewis to refuse Julie Bishop, up what she wanted to say. K's no threat to national security.

When I suggested we call him as a witness, one of my legal team said, "Oh, no, he's a nut, conservative right wing, but there they are, and so I don't know what it all had to do with national security. The only national security was, how did helium get given away to China the way it was, and Japan with no money coming to Australia or Timor. How did that happen? And if you read a couple of chapters in my book, you'll see how, I'm not selling my book, although Nathan will buy me a beer for that.

**Kieran Pender**

It's a great book. Probably time for one or two more questions and then we wrap up.

Question from the audience: My question is, we had a meeting with the group of, I think, you know, in court last time and we really concerns about K how he's doing and what would be I mean the people in Timor and the government can do to sort of free him up in some ways because from what I've learned of this that he's still can't have his passport, and that's actually very sad for us to hear. I think that's all I want to ask.

## **Bernard Collaery**

Well, K remains a punitive example. I'm sure they refer to the K history with the young trainees for the Secret Service "Look what's happened to K" He remains important to them as a punitive measure. It's immensely cruel if you knew K and his family. It's an immensely cruel thing to do to deny him a passport still, and I don't know what can be done there?

I received a message today that Geraldine Doogue interviewed the retiring head of the Australian Secret Intelligence Service, Paul Simon today and he said interestingly, cause that's not my recollection from other matters that he believes firmly in open justice. Bless Geraldine Doogue. But something has to be done for Witness K. I'm surviving, I mean, I'm living on borrowings and I'm more indebted than ever in my life, but K is effectively under house arrest and you've got to remember how people from discipline services who've got immensely, immensely proud records who are heroes in their own right, and veterans can you imagine how they feel having been cast as the black sheep in the family.

It's an immensely cruel series of mental health injuries being inflicted on him and family and children and grandchildren, and at the irony is he's not really a whistle-blower. You don't know who he is. You never heard him, right? He's just a decent, honourable human being. Who was deeply morally offended by, how did we put it in the Senate? We got away with that. A change culture. A change culture. Um. You know, you asked me. I think you tried to get a tier, Kieran. Um, but, you know, I'm a lawyer. I've had a look on the awful things. I try, I have my teary moments but I try not in public, but when K saw me, I was going to Hanoi and Siem Reap and Jakarta and a secret place in Malaysia for various reasons because we have been dealing with Hamas to stop young suicide bombers, but I was in the St James Ethics Centre work abroad with young leaders, we would go to young leaders in Hanoi and Cambodia and Jakarta and we would try to, and they were young leaders in industry here, in farming, in the defence, a couple of your famous policemen from Victoria, up and coming young policemen, and we would take them to meet comparative leaders in Cambodia, believe it or not, and quietly it was Fairfax funded, and we were talking about Australian values and I had to harbour this information that K had given me for two years to work out what to do and prepare a brief for the CDPP, took too long to do I suppose, because I was doing trials along the way, but there I was talking about our values knowing, knowing this. So I can tell you now, tonight, you under the scope, we were in a conference room looking over Ho Chi Minh mausoleum and a young woman in one of our defence offices got up and was talking about Australian values and I realised I've got to go on this, I realised in Hanoi I realised I can't be on this circuit, and not do something about this evil that was flourishing in our country. The other thing was when I was up in Dili, I had to say to the [unintelligible] and others, let's just go up the mountain to talk.

They say "No no I'm happy here, I've got a new office. It's all been outfitted. I say I'm sick of offices, I'm always in an office in Canberra can we go up the mountain?"

They say, Oh, yes. Well, well. Okay, let's go.

And so it was an immense two years of stress and strain, and every barrister gets a challenge like that, sometimes, you know, you're in the box and your client, hang on, that's not what you told us, there's no way you told us, you've got to keep a poker face. But this, I guess, in terms of ethics, what was I to do? I'd signed an undertaking. I'd signed an undertaking to that, I knew the secrecy laws. I had secrets. I'd actually got what's called a 'British Eyes Only Clearance' in Britain during the Iraq war inquiry, and I was on and I was used to holding secrets and I knew they'd ruin me. I knew, I just knew they would set out to ruin me, and they did.

**Kieran Pender**

We've run a bit of it over time. Final question and then a short answer from Bernard, if that's possible, and then we'll wrap up.

**Question from the audience:**

Hi. I was just wanting to ask because obviously you were discussing the NSI act quite in a paraphrased way, but when you were talking about the McBride banner, I was thinking, what does legal privilege have with these two witness matters? Is there any sort of interaction around that to push the discourse because it is so constrained at the moment and has been for the last 20 years fiscally?

**Bernard Collaery**

The question to ask is have those NSI laws and the agencies been instructed to monitor the work of the lawyers? Because we found out that they were reading everything. There was no legal, professional privilege applicable. They were appearing in the International Court and the Court of Arbitration for a government. I don't know whether the lawyers appearing for the Australian Government had had the information passed to them, but the Australian agencies were forced to reveal towards the end of our case early this year and late last year that they had a warrant.

I had a computer I slept with. They had warrant access to that. I really, to this day don't know how I got access to my own certain personal standalone computer. They did, and we always presumed they were listening to our phones and that, and they overtly followed us to intimidate my team. They followed my team in London. They sent a team to London, and when my staff were posting mail, I get followed to the box, and that that's an overt process it. It wasn't good. It wasn't good. I can't answer your question.

I'm very, very cynical about whether the good lawyers representing both of those people have any legal profession privilege in our country at the moment, and I question whether responsible ministers would be told.

**Kieran Pender**

Well, on that note, I'll hand back over to our hosts, but thank you, Bernard.

**Professor Lidia Xynas – Victoria University College of Law and Justice, Victoria Law School, Dean**

On behalf of Victoria University and the law school here, I would like to give my sincere thanks to Mr. Bernard Collaery and Mr. Kieran Pender for presenting us with their perspectives on what these events have meant for Australian democracy and the rule of law. Bernard's case highlights how important it is, how we all need to remain committed to speaking out for our Australian values, and it also highlights what law reforms are needed.

I want to thank all of you for attending tonight's event, one of many that we will be holding as part of Victorian Law School Seminar Discussion series going forward into 2023, so we'll see you again, of course, and our series aims to provide a platform for leaders such as Bernard within our community to share their experiences deep understanding, knowledge, reflections on issues of justice and the upholding of the rule of law.

So thank you, everyone.