Xanana Gusmao offers to give evidence that could embarrass Australia in Witness K trial

Four Corners By Steve Cannane, ABC Investigations and Peter Cronau

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PHOTO: Supporters of Bernard Collaery and Witness K staged a protest outside court in Canberra earlier this month. (AAP: Lukas Coch)

The former prime minister of Timor Leste, Xanana Gusmao, says he wants to travel to Canberra to give evidence in court on behalf of former spy Witness K and lawyer Bernard Collaery if their prosecution continues.

Mr Gusmao has told Four Corners his evidence is likely to embarrass previous Australian governments in relation to the 2004 intelligence operation in which the Dili offices of the prime minister Mari Alkatiri were bugged by Australian foreign agents during treaty negotiations over oil and gas in the Timor Sea.

"I already promised to them, if it was not a secret trial, I will go to be their witness," Mr Gusmao told Four Corners.

When asked what he would reveal in court, Mr Gusmao said, "All the information that I know."

Witness K is a former intelligence agent who was involved in the Dili bugging operation in 2004. Mr Collaery is his former lawyer.

The pair are facing potential jail sentences after being prosecuted for allegedly conspiring to share secret information with the government of Timor Leste over the spying operation.

Key points

- Senior Australian lawyers have questioned the secrecy surrounding the trials of Witness K and Bernard Collaery
- One former judge says they could be the most secretive trials in Australian history
- Xanana Gusmao says he is prepared to act as a witness for Witness K and Mr Collaery

Mr Collaery faces four further charges over speaking to ABC journalists about the matter following an ASIO and AFP raid on his home and office.

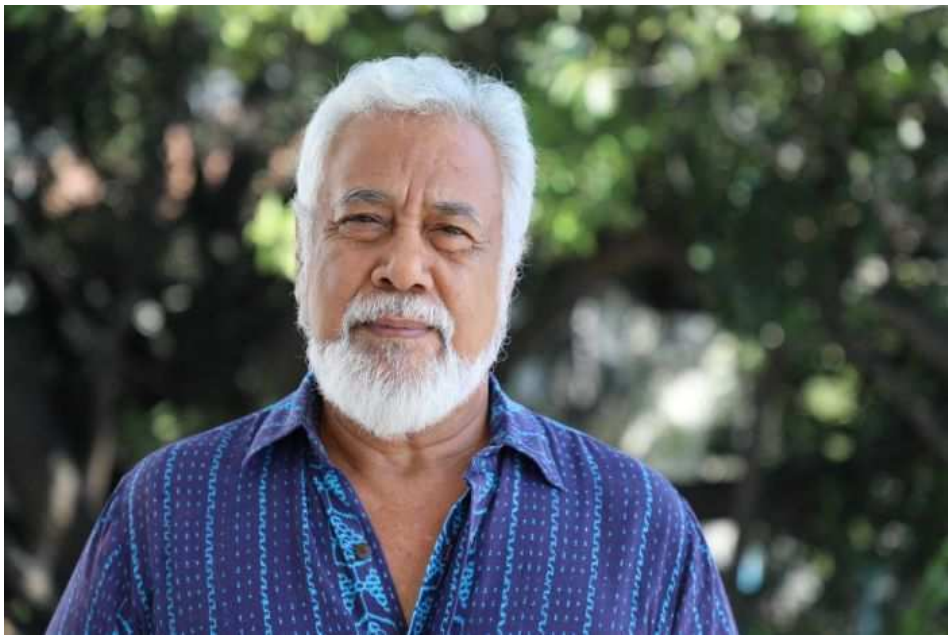

PHOTO: Xanana Gusmao says he has told Witness K and Bernard Collaery he is prepared to act as their witness. (ABC News: Mathew Marsic)

Senior lawyers and crossbench politicians have expressed concerns about the prosecution and the secrecy surrounding the trials against the two men which are being run under the National Security Information (NSI) Act.

The NSI Act was introduced in 2004 to deal with classified and sensitive material in court cases. It has been used predominantly for terrorism trials and allows certain evidence and information to be heard in a closed court.

Anthony Whealy QC, a former judge who presided over the Lodhi terrorism trial, the first-ever case heard under the NSI Act, has questioned the use of the act in this case.

"This could be one of the most secretive trials in Australian history," he said.

Laws 'not designed' for whistleblower cases

"I don't think they [the NSI laws] were designed for this sort of case at all. I don't think they're designed for cases involving whistleblowers, journalists, or the lawyers for whistleblowers," Mr Whealy said.

Stephen Charles QC, a former judge of the Supreme Court, who as a barrister has acted for both ASIO and ASIS, has also spoken out.

"It is difficult to imagine any justification for these proceedings taking place in secret," he told Four Corners.

"Everyone who reads the newspapers is aware that ASIS officers, entered and bugged the Timorese cabinet premises.

"Everyone is aware that the result of bugging those premises was that Australia got a huge and very unfair advantage in the negotiations being carried out between Timor and Australia."

Bret Walker SC, the former independent monitor of Australia's national security legislation, who has previously acted for Witness K in another matter, told Four Corners it was important that the principles of open justice were upheld.

"Every Australian, I imagine, is interested to know that Australian authorities will be held to account. That's difficult to do if a trial, at the pointy end, will be held secretly," he said.

Attorney-General Christian Porter has issued a secret certificate limiting the disclosure of certain information and evidence in court that is considered prejudicial to national security.

Defendant restricted in what he can say to lawyers

Ultimately, it is up to a judge or magistrate to decide what is heard in open court.

But Mr Collaery said the NSI Act had already impacted on his defence and his ability to instruct his lawyers.

"I don't know what I'm going to be allowed to say in court. I've only just been allowed to speak to my lawyers after 18 months, or whatever it is. I'm now able to speak to my lawyers, but I'm circumscribed even in what I can tell my own lawyers. It's amazing," he said.

In a statement, the Attorney-General told Four Corners he believed the courts would get it right.

"I have confidence in the judicial process and that the court will strike the right balance between the need to protect national security and the principle of open and transparent proceedings in this matter," the statement said.

"I have previously expressed the view that as far as it is possible, any legal proceedings in this matter should be conducted in open court, and this remains my view."

PHOTO: Lawyer Bernard Collaery says he doesn't know what he'll be able to say in court. (www.cclaw.com.au)

The prosecution of Witness K and Mr Collaery is different from most legal cases in that it requires consent from the Attorney-General before the prosecution can go ahead.

That is because the case involves alleged breaches of the secrecy provisions of the act that governs Australia's foreign intelligence agency ASIS — the Australia Secret Intelligence Service.

Mr Porter made the decision to prosecute in May last year, within six months of taking office, but his predecessor George Brandis did not give consent in the two years and three months after he was first asked to do so by the Commonwealth Director of Public Prosecutions (CDPP).

Mr Collaery is pleading not guilty to all charges.

Witness K has indicated he intends to plead guilty subject to agreed facts.

If the prosecution agrees, that plea would be limited to a narrow admission that all he did was execute an affidavit in anticipation of hearings in an international court.

Watch Steve Cannane's investigation, Secrets, Spies and Trials, tonight on Four Corners at 8:30pm on ABC TV and iview.

Read Christian Porter's full statement on following pages

THE HON. CHRISTIAN PORTER MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Media Statement

19th August 2019

All below answers direct from Attorney-General, Christian Porter

Questions:

1. Why do you believe the prosecution of witness K and Bernard Collaery is in the public interest?

As I confirmed in my public statement of 28 June 2018, the Commonwealth Director of Public Prosecutions made an independent decision that a prosecution was the appropriate course of action which independent decision involves a conclusion by the Commonwealth DPP both that there is a reasonable prospect of conviction based on the evidence against the accused and that the prosecution allowing for matters such as the seriousness of the offence and the strength of the evidence is in the public interest. Having made this independent conclusion the Commonwealth DPP then subsequently sought my consent to that prosecution, which is a statutory requirement in matters of this type.

The entire process was considered, thorough and detailed and the culmination of this process was that I ultimately consented to a the Commonwealth DPP's independently formulated and determined request to prosecute, in so doing close attention and consideration was given to the totality of the CDPP's advice and all the relevant evidence.

2. Did you simply follow advice from the Commonwealth DPP before consenting to the prosecution, or did you weigh up whether this prosecution was in the public interest or not?

The decision was based on my final consideration of the CDPP's independent assessment of the evidence. External expert legal opinion was also sought and considered before I consented to the prosecution.

Ultimately my decision was in effect to agree with the independent determination of the Commonwealth DPP and the independent expert external opinion; that the strength of the evidence in this matter underwrote a reasonable prospect of conviction and supported a view that there existed a public interest in putting the prosecution before a court.

While the matter remains before the Courts there are limitations as to what can be said regarding the strength of the case considered by the Commonwealth DPP. However, it speaks for itself that the fact of Witness K determining to plead guilty is entirely consistent with the Commonwealth DPPs conclusion that the strength of the evidence in this matter against that accused, underwrote a reasonable prospect of conviction.

3. What other considerations did you make prior to responding to the CDPP's request for consent to prosecute?

Obviously requests of this type from the CDPP are supported by a range of information and assessments of the relevant brief of evidence such that the Attorney General's statutory role is to consider that evidence and how it relates to and satisfies the questions of the existence of a reasonable prospect of conviction and a public interest in pursuing the prosecution. The entire process was considered, thorough and detailed

4. Did you consider advice from the intelligence agencies before consenting to the prosecution? If so, which agencies provided advice, and was it unanimous?

As above for Q 3

5. Why is it appropriate for the NSI Act to apply in relation to these prosecutions?

It is a usual process for an NSI certificate to be issued when matters of national security are involved. Certificates do not necessarily apply to the whole proceedings, but can apply to parts of proceedings and ultimately it is for the court to decide whether any particular parts of proceedings will be closed it is important to note that NSI Act being applied to the proceedings does not mean the entire proceedings is conducted in a non-public way, simply that parts of it may be conducted in closed session if there is an acceptance by the Court that there exists a compelling national security rationale for doing so.

6. How can a closed court or partially closed court avoid compromising the principle of open justice or the implied right of political communication?

I have confidence in the judicial process and that the court will strike the right balance between the need to protect national security and the principle of open and transparent proceedings in this matter.

I have previously expressed the view that as far as it is possible, of any legal proceedings in this matter should be conducted in open court and this remains my view.

However, it is obvious that there will be applications for the protection of national security information arising during the proceedings. It is the duty of any government and, specifically the Attorney-General, to ensure that information central to national security is not publicly disclosed. It should also note that it is not unusual that in certain matters for reasons of national security or for a variety of other reasons such as protecting the identity of children or protecting the identity of public interest disclosures, that certain parts of some Court proceedings will be conducted in a closed way. For instance this occurred in recent Royal Commission hearings into institutional abuse cases and will likely occur in the Disability Services Royal Commission. The idea that any closed proceedings in a court which closed proceedings happen with some regularity for a variety of cogent reasons violates an implied freedom of political communications seems to be a legal misunderstanding of the dimensions of the implied freedom and the nature of court proceedings and judicial independence.

7. Was the advice received from CDPP Robert Bromwich, CDPP Sarah McNaughton, Solicitor-General Stephen Donaghue, and external counsel Wendy Abraham, unanimous in regard to proceeding with the prosecutions?

As to whether advice changed over the years I can note, as a general matter of process, that it is obviously the case that requests of this type from the CDPP are supported by a range of information and assessments of the relevant brief of evidence and that the CDPP provided the former Attorney-General with advice and requested his consent. As to the ultimate conclusions regarding how the

strength of the evidence in this matter underwrote a reasonable prospect of conviction and supported a view that there existed a public interest in putting the prosecution before a court while all legal opinions will differ in emphasis and reasoning on the ultimate conclusion my view was in accord with all the advice received from each of CDPP Robert Bromwich SC, CDPP Sarah McNaughton SC, Solicitor-General Stephen Donaghue QC and external counsel Wendy Abraham SC .

8. Can you explain the 2 year 8 month delay in providing the consent to prosecute – given that the CDPP's initial request was first made on 17 Sept 2015, and consent to prosecute was provided on 11 May 2018?

I will not discuss the timing or go to detail of the contents of briefs of evidence received by the Commonwealth DPP other than to note that it is a matter of public record that in 2015 a spokesperson for the CDPP indicated that the matter was then the subject of active consideration and to note generally that it is unsurprising that the matter may have been under consideration for some time before a decision by the CDPP to seek a consent to prosecute was finalised. My decision was made within five months of me assuming the position of Attorney General.

9. Have you or the Australian government given consideration to discontinuing these prosecutions?

Requests for a discontinuance would need to be put to the prosecution agency.