

# The Sydney Morning Herald

OPINION

## *Secret whistleblower trial will only add to Australia's shame over spying cover-up*

By Anthony Whealy

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The prosecution of witness K, a former intelligence agent, and his lawyer Bernard Collaery has raised considerable outrage. At issue is the right of the public to be given details of wrongful and shameful behaviour by the Australian government. In this case, it is alleged Australia bugged the offices of East Timor's prime minister in 2004 in an operation designed to betray a close and trusting nation, and to gain an unfair advantage in commercial dealings over gas and oil resources.



Lawyer Bernard Collaery addresses the media outside the Supreme Court in Canberra this month. AAP

The perception is that the prosecutions are a payback for disclosure of information that has undoubtedly humiliated Australia in the eyes of the world. Secondly, the perception is that the shrouding of the forthcoming trials in secrecy is designed to cover up further shameful revelations.

The contrary arguments to these perceptions appear to be:

- Prosecution is always justified where a security officer discloses classified or secret information, no matter the circumstances;
- Prosecution is necessary to deter others from acting in a similar manner; and
- National security secrecy in the trial is necessary to prevent the disclosure of information harmful to Australia's economic and international interests.

The problem with these arguments is that no one from the government or the security agencies has actually articulated these propositions. Nor has the government outlined how they play out against the broader public belief that the prosecutions are contrary to the public interest. In the present matter, there was always a discretion not to prosecute.

Why has Attorney-General Christian Porter not simply acknowledged this shameful incident and given an undertaking that it will not be repeated?

As a community we would expect this from an upright and morally responsible government. If the government were to make this acknowledgement, a prosecution would not be necessary. It is not too late for these prosecutions to be discontinued.

There is a broader issue. How should we as a responsible nation balance and reconcile the competing claims between the principles of open government and the need for secrecy provisions?

The Australian Law Reform Commission has recommended "a new and principled framework". This would ensure that criminalisation occurs only where the disclosure of the material would pose a real threat to "essential public interests" and not otherwise.

It could not realistically be argued that the revelation of the Timor bugging posed a real threat to Australia's national security. However, there has been very little progress in relation to the implementation of the ALRC's recommendations.

Continuing the prosecutions against witness K, who was involved in Australia's bugging operation against East Timor, and Collaery will considerably diminish the principles of open government. We obviously want our government to be open with us and to acknowledge publicly when a serious mistake or wrongdoing has occurred.

If the prosecutions are to continue it is essential that the secrecy provisions do not compound our initial perception that this is a "cover up". Of course, national security laws do require secrecy where disclosure poses a real threat. Those laws must be respected in a genuine case. In this case it is very difficult to see what national security interests are under threat.

Our reputation may be diminished but our actions, it seems, deserved condemnation. It is simply too late to complain about the damage done to our national standing.

Moreover, once the veil of secrecy descends on the trial, we may never know the nature of the threat to national security or be in a position to evaluate whether it is valid or not.

The broader issue in this context is the need to reconcile the principles of open justice against the demands of non-disclosure based on national security grounds. At the moment these principles are being largely ignored. We are none the wiser as to why this should be so.

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