

# W NEWS

## 'Witness K' lawyer Bernard Collaery got jail warning from Government over book months before being charged in Timor-Leste spy case

By Steve Cannane, ABC Investigations

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PHOTO: An activist paints the Australian Embassy wall during a protest in Dili. (AAP/EPA: Antonio Dasiparu)

**The lawyer who helped expose an Australian spying operation on its ally Timor-Leste was given a chilling warning by the Federal Government, just months before charges were filed against him for breaches of the Intelligence Services Act.**

In a legal letter obtained by the ABC, Bernard Collaery was warned that if he disclosed secret information about the Australian Secret Intelligence Service (ASIS) in his book, due to be published next year, he could face "a maximum penalty of 10 years' imprisonment".

The letter from the Australian Government Solicitor (AGS) warns he does not have approval to make "broader disclosures about ASIS staff members and ASIS activities, much less to the world at large".

It points out Mr Collaery agreed to particular rules — including a "secrecy undertaking" — so that he could legally represent an Australian spy.

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### Key points:

- Lawyer Bernard Collaery has written a book the publisher says raises important questions about the "integrity of systems of government" in Australia
  - The Canberra lawyer and his client, former ASIS spy Witness K, have been summoned to appear in court next month
  - Experts are questioning why Mr Collaery and Witness K are being prosecuted years after evidence was gathered in raids
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**PHOTO:** Canberra lawyer Bernard Collaery has authored a book about Australia's relations with Timor-Leste. (ABC News: Nick Haggarty)

Mr Collaery and his client, the former intelligence agent known as Witness K, are due to face court next month over allegations not contained in the letter.

The pair is accused of conspiring to communicate secret information to the Government of Timor-Leste some time between May 2008 and May 2013.

Mr Collaery is also accused of sharing information with ABC journalists about the 2004 operation which saw Australia bug Timor-Leste's cabinet room during maritime boundary negotiations over oil and gas reserves worth an estimated \$40 billion.

Those conversations allegedly occurred after the December 2013 raid on Mr Collaery's office, where a legal brief was seized.

The timing of the prosecution, more than four years after ASIO agents first raided the homes of Mr Collaery and Witness K, has legal and political experts asking the question: Why now?

Former Victorian premier and adviser to Timor-Leste, Steve Bracks, told the ABC the prosecution is "political".

One of Australia's most senior lawyers, Nicholas Cowdery QC, has questioned whether the prosecution is in the public interest and said the long delay is highly unusual.

## The book

Mr Collaery's book is expected to be explosive: shining a spotlight on Australia's relations with Timor-Leste since World War II and exposing decisions made by a series of senior politicians and diplomats.

Monash University Publishing would not be explicit about the book's contents, however director Dr Nathan Hollier said it would raise important questions about "the integrity of systems of government in Australia".

The book has alarmed those at the highest levels of Australia's foreign intelligence service.

According to the AGS letter, the warning was sent following a request from Paul Symon, the head of ASIS.

ASIS would not comment due to legal proceedings.

A copy was also sent to the lawyers of Witness K, who was a senior ASIS officer at the time of the Dili bugging.

Mr Collaery was angered that his proposed book triggered a warning from the Government that he could face a lengthy jail term.

The Canberra-based lawyer fired back a response, describing the original letter as a threat:

"You might conclude that it was unwise to accept an instruction to forward a letter to me in which you acknowledge my awareness of the law but warn me, in a manner intended to convey a threat, of the penalties for a breach of the law."

Two weeks after Mr Collaery responded to the AGS letter, he and Witness K were given court summons over the revelations relating to the 2004 spying operation.

The prosecution had to be approved by Attorney-General Christian Porter following advice from the Commonwealth Director of Public Prosecutions (CDPP).

Mr Porter insists Mr Collaery's book and other "external factors" have nothing to do with the decision to approve the prosecution.

In a statement to the ABC he said: "The decision in this matter was made within months of me taking on the portfolio and was based entirely on the request from the independent CDPP."

Mr Collaery was unavailable for comment.



**PHOTO:** The AGS says ASIS chief Paul Symon gave instructions for the letter to be written. (Supplied: ASIS)

## Timeline of events

### 2004

Australia bugs Timor-Leste's cabinet room during negotiations over a maritime border covering lucrative oil and gas deposits.

### January 2006

The two nations agree revenue from the oil and gas project will be split evenly in the CMATS treaty and permanent maritime border negotiations put on hold for 50 years.

### 2012

Timor-Leste government finds out about the spying operation and approaches the Australian government, led by then-prime minister Julia Gillard.

### April 2013

Timor-Leste launch action in The Hague to overturn the CMATS treaty.

### December 2013

Bernard Collaery and Witness K's homes are raided with a warrant issued by attorney-general George Brandis.

### January 2017

The Timorese government agrees to drop the case in The Hague when Australia agrees to negotiate a permanent maritime boundary in the Timor Sea.

### December 2017

Christian Porter takes over as Attorney-General from Senator Brandis.

### March 2018

Australia and Timor-Leste sign a new agreement on maritime borders.

Letter sent to Mr Collaery, warning him about the contents of his upcoming book.

### May 2018

Mr Collaery and Witness K charged for breaches of the Intelligence Services Act.

### June 2018

Independent MP Andrew Wilkie uses parliamentary privilege to expose the charges.

## The deal

Former Victorian premier Steve Bracks believes the prosecution has been triggered by other events.

He says Witness K and Mr Collaery are being prosecuted because Australia has only recently renegotiated a deal with Timor-Leste over maritime borders.

"Why wouldn't they do this previously? Why wouldn't they do that while the UN Convention on the Law of the Sea compulsory conciliation was going on? Why did they wait until it was resolved to do this?"

Mr Bracks is close to Timor's first president, Xanana Gusmao, and has acted as a special adviser to the fledgling country.

"I've got no doubt it's political," he said.

At the time of the 2004 spying operation, Australia was in negotiations with its impoverished neighbour over maritime boundaries covering lucrative oil and gas deposits. The Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS treaty) was finally signed in 2006.



**PHOTO:** Timor-Leste's first president Xanana Gusmao (L) and former Victorian premier Steve Bracks. (Supplied: Steve Bracks)



**PHOTO:** Australian protesters urging the government to strike a fair deal with Timor-Leste amid disputes over gas and oil reserves in 2004. (Reuters: David Gray)

After the spying operation was made public, Timor-Leste claimed its maritime treaty with Australia was invalid and took legal action in the Permanent Court of Arbitration in The Hague.

"They wanted to know our weakness and they took advantage of our weakness," Mr Gusmao told the ABC in 2015.

Timor-Leste dropped the case after Australia agreed to enter genuine negotiations over maritime boundaries.

A new agreement, giving Timor a larger share of territory and oil and gas revenue, was finally signed in March this year and approved by the Joint Standing Committee on Treaties on May 7.

Three weeks later Witness K and Mr Collaery were summoned.

The Attorney-General said the treaty and the negotiations around it had no influence on his decision.

"The decision was based on my consideration of the CDPP's independent assessment of the evidence," Mr Porter said.

"External factors played no part in my consideration of the matter."

## The CDPP and Attorney-General changeover

Questions about the delay in prosecuting Witness K and Mr Collaery are further complicated by changes in personnel at the top.

Since the pair first had their homes raided in 2013, a new CDPP and new Attorney-General have been appointed.



**PHOTO:** Current Attorney-General Christian Porter and former, George Brandis. (AAP: Lukas Coch)

When the brief of evidence was delivered in 2015 to the CDPP, George Brandis was the attorney-general and Robert Bromwich was the Commonwealth DPP.

When Witness K and Mr Collaery were finally summoned to court this year, Sarah McNaughton had been the CDPP for two years, and Christian Porter was Attorney-General.

The ABC understands both CDPPs gave formal advice to then-attorney-general Brandis about whether to prosecute Witness K and Mr Collaery.

It's not clear whether the CDPP's legal opinions differed nor why Mr Porter approved a prosecution and Senator Brandis did not.

In a statement to the ABC, Mr Porter said: "I will not discuss the substance or timing of evidence provided to the CDPP in the matter."

Mr Brandis was unavailable for comment.



**PHOTO:** East Timorese activist carrying an effigy of then-prime minister John Howard during a protest in Dili on April 21, 2004. (Reuters: Lario da Fonesca)

## 'The person who exposes it gets prosecuted': Cowdery

Former NSW director of public prosecutions Nicholas Cowdery is calling for more transparency around the decision to prosecute Witness K and Mr Collaery.



**PHOTO:** Former NSW director of public prosecutions, Nick Cowdery. (ABC News: Dave Maguire)

While there was no legal obligation on the government to explain why it had taken so long to prosecute the pair, he said they should do so to protect public confidence in the law and the office of the CDPP.

"The population needs to have confidence that what is being done on its behalf is being done properly and it can't have that confidence and it can't make that judgement unless it gets the information," he said.

Mr Cowdery has previously given advice the bugging operation conducted by Australia was illegal.

Regardless of the merits of the case, he believes the decision to prosecute is not in the public interest, a key criteria in prosecutions such as this one.

"We see too often circumstances where some official wrongdoing occurs. Somebody exposes that, may have some involvement in it as well, and it's the person who exposes it gets prosecuted while the officials [who planned and authorised the bugging] get away scot free."