

The secret trial that could turn pear-shaped for the government

By Andrew Clark in the Financial Review, Jun 20, 2020

In 2004, Timor-Leste was on its knees. After more than a quarter of a century of Indonesian occupation, massacres and civil war, it had an infant mortality rate that was 20 times higher than Australia's, and a maternal mortality rate more than 80 times worse.

The one potential lifeline was [a continental shelf rich in oil and gas](#) that straddled the Timor Sea border with an Australia that had been the fledgling state's friend and key support during its violent separation from Indonesia.

This included Australia leading a 9000-strong, UN-sanctioned military contingent in Timor-Leste – a show of force that underwrote its emergence into formal independence.



Lawyer Bernard Collaery addresses the media outside the Supreme Court in Canberra last year. He says the case will expose the Coalition's "dirty linen". *AAP*

It was therefore not unreasonable to assume negotiations between both states over the Timor Sea would lead to an equitable carve-up of its energy-rich continental shelf. Wrong.

John Howard's Coalition government turned to the Australian Secret Intelligence Service to secure the upper hand, and the top secret security agency reportedly used the cover of an aid project to install listening devices in Timor-Leste's cabinet office in Dili.

The clandestine spying operation allegedly gave Australia secret access to the inside running on the other side's negotiating positions.

“Shocking,” many have said, but what is worse is that 16 years after Australia’s secretive act against a “friend”, a successor Coalition government headed by Scott Morrison is intent on punishing the two whistleblowers who alerted the Australian public to it.

In two [largely secret court proceedings](#) under way in Canberra, the Morrison government is prosecuting Canberra lawyer and one-time ACT attorney-general Bernard Collaery, and his former client, an ASIS operative known as 'Witness K'.

Both are accused of disclosing information about the ASIS operation against Timor-Leste, and could, if convicted, notionally face jail time of up to two years, although this is unlikely.

However, the court hearing could also turn pear-shaped for the government. Collaery, one of Australia’s most experienced lawyers, is expected to instruct his legal team to issue subpoenas to have former prime minister John Howard and former foreign minister Alexander Downer summonsed to give evidence.

At the same time, Collaery’s lawyers will petition the presiding judge, David Mossop, to open the court to the public.

Legal observers are divided about whether such a scenario is likely, or even possible, but if it does come about, the government will face an acute dilemma. It could, conceivably, drop the charges, citing national security as the reason.

In comments that further raise the stakes, Collaery tells *AFR Weekend*: “This is Coalition dirty linen. There’s a multibillion-dollar restitution issue to do with the helium [extracted] from the Bayu-Undan Field in the Timor Sea being treated as waste gas and being given away for nothing to the contractors.”

Asked to comment on these claims, Downer responds: “This is a matter before the courts. I have not been following it. I don’t have any further comment.”

There are other issues. According to Clinton Fernandes, professor of international and political studies at the Australian Defence Force Academy in Canberra, the 2004 ASIS operation in Dili “diverted precious ASIS resources away from the war on terror”.

On September 9, 2004, the Australian Embassy in Jakarta was attacked by a car bomb “while the operation in Timor-Leste was under way in real time”.

Among those killed were an embassy security guard, four Indonesian policemen, the gardener, a visa applicant and some others. The Islamist extremist group known as Jemaah Islamiyah – the target of ASIS’ intelligence work since the Bali bombings two years earlier – claimed responsibility.

Earlier, the Australian government released a white paper on terrorism, identifying “extremist Muslim” terrorism as a focus. However, at a critical point much of ASIS’ regional focus shifted to supporting Australia’s Timor Sea negotiations. “It ought to be a national scandal,” Professor Fernandes says.

At the same time, a parliamentary review of the scandal is virtually prohibited. The Parliamentary Joint Committee on Intelligence and Security is prevented by the Intelligence Services Act 2001 from reviewing Australian intelligence-gathering operations.

“Australia has no judicial oversight of the agencies, either. Everything happens inside the executive branch of government, in sharp contrast with the USA,” Professor Fernandes says.

“Therefore, there is an overwhelming public interest in the Collaery trial being open, with the obvious exception of the real identity of Witness K. It would allow Alexander Downer, as the responsible minister, to be questioned about the operation for the first time.”

Former foreign minister Alexander Downer: "This is a matter before the courts. I have not been following it."

However, it is fair to point out that Australian intelligence operatives had already gathered information that painted an alarming picture of growing Chinese influence on a small group of powerful Timor-Leste politicians.

Through an early exercise in Beijing’s now ubiquitous debt diplomacy, these intelligence operatives reasoned the Chinese would be the ultimate beneficiaries of a favourable Timor Sea continental shelf deal negotiated by Timor-Leste.

But this significant factor does not explain the level of official determination to silence Collaery and Witness K.

Collaery had not just acted as a lawyer for Witness K in an employment dispute with ASIS, but also for the Timor-Leste government. This means he was “working for the bugger and the buggee,” as legal writer Richard Ackland puts it.

Now 75, Collaery says his practice has collapsed since the government pressed charges, and likens the secrecy surrounding the court proceedings to the Stalinist era in Moscow.

After acknowledging the legitimate need of the state to maintain secrecy about some foreign activities, the matter still highlights the issue of whether secretly administered justice can, in fact, be just.

As Professor Fernandes puts it: “The difference between the core fact of espionage and the ancillary fact of Collaery revealing and Witness K disclosing that information [means] it’s absurd that they might be convicted on the basis of the ancillary facts being true while the prosecution refuses to admit the core facts are true.”

Veteran defence strategist Hugh White, who has a long record in government dealing with security agencies, does not resile from “the proposition that governments need to keep secrets, including the operations of intelligence services”.

[But] I do have a problem with secret trials. Justice has to be done in public. It’s legitimate to conceal some aspects of a trial, [but] they need to be very clearly defined," he says.

"We don’t know if the government’s orders are intended to protect the secrets we already know, or whether there’s other stuff we don’t know about.

“I would not give the government the benefit of the doubt. It does seem to be very serious and unwarranted for the government to go after Collaery in the way it has. It’s very unclear why the government has taken such a punitive approach.”

The way things are going, we may never find out.