

Illegal bugging of Timorese not relevant: court ruling smashes whistleblower Bernard Collaery

By Bernard Keane in Michael West, reprinted from Crikey with permission. May 18, 2022

The latest ruling in the trial of the former ACT attorney-general effectively liberates Australia's intelligence agencies from judicial oversight, writes Bernard Keane.

In an extraordinary ruling on Tuesday, [the ACT Supreme Court](#) decided that the illegality of the Howard government's bugging of the Timor-Leste cabinet room in 2004 was irrelevant for the purposes of the Morrison government's political prosecution of Bernard Collaery for his role in disclosing the bugging.

It removes at a stroke a key element of Collaery's defence — that the bugging was not done in accordance with the functions of the Australian Secret Intelligence Service — because ACT Supreme Court judge David Mossop has blocked Collaery, a former ACT attorney-general, from subpoenaing ASIS, DFAT, Prime Minister and Cabinet, and the Office of National Intelligence to provide material that would prove or disprove the bugging was not in accordance with ASIS functions.

Mossop has, outrageously, effectively declared that it doesn't matter ASIS' activities were outside the scope of its functions and therefore illegal — Collaery has no right to seek information that could expose that.

It's a remarkable leg-up for the government, which throughout the trial — separate from the Commonwealth director of public prosecutions — has sought to cloak its persecution in a blanket of secrecy and delay Collaery's trial as long as possible, under the instructions of first former attorney-general Christian Porter and then current AG Michaelia Cash.

In tortuous reasoning, Mossop decided that the Commonwealth did not have to do anything to prove that ASIS had been operating in accordance with the Intelligence Services Act despite Collaery being notionally prosecuted for revealing activities that have to be in accordance with the IS Act for the purposes of his prosecution.

Even more bizarrely, Mossop tried to disguise the ridiculous carte blanche he had given to intelligence agencies — who by his lights can commit any atrocity they like and always be able to see whistleblowers jailed for revealing them — by invoking the inspector-general of intelligence and security as some sort of check on the proper behaviour of intelligence agencies.

It was, for the record, the then inspector-general of intelligence and security who advised Witness K to pursue "private legal action" against ASIS, which is exactly what he did and why he ended up being prosecuted for revealing information.

As independent Senator Rex Patrick said today: "Never have I seen a judicial officer suggest the responsibility of judicial oversight be abandoned because a member of the executive has a measure of oversight and can report breaches of the law to the prime minister. In effect, Justice Mossop places no limits on executive power and leaves the responsibility for limited oversight exclusively to a statutory official, giving the court no role."

It's a shocking moment in the rotten history of independent oversight of Australia's intelligence agencies, which unlike their Five Eyes counterparts operate with no effective parliamentary oversight and, if Mossop's absurd ruling stands, no court oversight either. And it has passed with minimal media coverage.

Three years ago, before the 2019 election, the hope was that a change of government would see a new attorney-general revoke the authority for this malicious prosecution. Three years and endless, vindictive delays later, we're left with the same hope.

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