

# The unconscionable prosecution of Bernard Collaery was an assault on the values Australia holds dear

*Spencer Zifcak in The Conversation, 12 July 2022*

Last week Attorney-General Mark Dreyfus put an end to Canberra lawyer Bernard Collaery's criminal prosecution.

Collaery was prosecuted in 2018 and was facing five charges, including allegedly conspiring with his client, "Witness K", to disclose confidential information about the Australian government's spying operation in Timor-Leste.

The prosecution was a scandal and should never have been commenced.

## So how did we get here?

In 2004, at former foreign minister [Alexander Downer's behest](#), the Australian Secret Intelligence Service (ASIS) planted surveillance devices in the Palacio Governo, the building that housed the offices of Timor-Leste's prime minister and the national cabinet conference room.

The purpose of this intelligence-gathering enterprise was to listen in to Timor-Leste's cabinet deliberations concerning a legal dispute between the two countries over the location of the maritime boundary between them.

The outcome of that dispute would determine the share of lucrative oil and gas revenues that Timor-Leste and Australia would each receive from prospective drilling in the Timor Sea.

Through this secret surveillance activity, the Australian government obtained crucial information regarding Timor's case about the maritime boundary before the International Court of Justice (ICJ). This provided Australia with an unfair advantage in the oil and gas dispute.

In the end, to evade the court's judgement, the Australian government [withdrew from its jurisdiction](#).

"Witness K" had been an ASIS officer involved in the surveillance operation. He was troubled by it, so he lodged a complaint with the Inspector-General of Intelligence and Security suggesting that the surveillance may have been illegal.

The Inspector-General agreed Witness K could disclose relevant information as evidence in any related legal proceedings. Information regarding the secret surveillance operation made its way progressively into Australia's and Timor-Leste's media.

In 2013, Timor-Leste [sought to reopen proceedings](#) with respect to the maritime boundary issue in the Permanent Court of Arbitration in the Hague. It briefed Collaery to represent its interests, as he had a [long history](#) of representing the interests of the country.

Then, in an extraordinary action in late 2013, the Australian Federal Police raided Witness K's and Collaery's homes and offices.

At Collaery's office, the police uncovered a detailed legal memorandum containing his advice to Timor-Leste's government with respect to the location of the maritime boundary.

## Criminal prosecution

Things went quiet for five years. Then, in late 2018, out of the blue and for reasons that remain unclear, former Attorney-General Christian Porter [approved](#) the criminal prosecution of Witness K and Collaery. Porter alleged they had disclosed classified information illegally.

Legal argument with respect to the conduct of the prosecution continued for four years, to Collaery's great personal and financial detriment.

There are several matters concerning the prosecution that warrant close consideration.

It's highly likely the Australian government itself acted unlawfully. ASIS undertook an act of criminal trespass in Timor-Leste by planting surveillance devices to monitor the Timor-Leste's Cabinet's deliberations.

As in every other democratic country, Timor Leste's cabinet deliberations are, by law, secret.

Under a [United Nations convention](#) (the Convention on Jurisdictional Immunities of States and their Property), states and their property are immune from the domestic jurisdiction of another country.

Australia clearly broke international law by raiding Witness K's and Collaery's offices and confiscating documents that were the property of the government of Timor-Leste.

In Australia, the law protects communications between lawyer and client. By effectively stealing Collaery's extensive legal advice to the Timor-Leste government, ASIS transgressed the confidentiality of lawyer-client communications.

Next, Porter made application after application to the ACT Supreme Court to ensure Collaery's trial would be [conducted in secret](#).

The government argued that should documents revealing ASIS operations become public, foreign intelligence agencies into whose hands such documents fell may be able – when combining them with other sources of information – to construct an intelligible mosaic from which the processes and methods of Australian secret surveillance activities could be ascertained.

In this case, however, the documents in question related to a single intelligence operation conducted in a tiny country 18 years ago. It would come as a surprise to any informed lay observer, and probably to any capable intelligence analyst, if historical methods of surveillance used in 2004 could cast even the remotest light on the technological methodology of contemporary intelligence practice.

A secret trial constitutes a radical attack on the fundamental principles of open justice and fair trial.

## **Everything turned upside down**

There was a certain Alice in Wonderland quality about all this. Everything had been turned upside down.

The two people who acted in the national interest by disclosing unlawful activity undertaken by Australia's overseas intelligence service in bugging East Timor's Cabinet were the defendants in the criminal case.

Those in government who initiated the unlawful, covert operation, through their successors in government, had become the prosecutors. Something had gone very wrong.

Had Collaery's case proceeded to trial, the ramifications of the case for freedom of expression, journalism and governmental accountability would have resonated through Australian law and society for years.

It was a direct assault on freedom of political communication, and it intimidated whistleblowers.

It discouraged investigative journalism, undermined press freedom, involved criminal trespass and contractual fraud, invaded legal privilege, violated UN Conventions, and denied fair trial. It was a blot on the conduct of Australia's foreign relations and was a grievous attack on individuals of conscience.

Dreyfus should be highly commended for drawing this scandalous legal proceeding to a close.