

Crikey.com 7 August 2019

The big question that has gone unanswered in the Witness K saga

Madeleine Miller

Did our government break the law in the 2004 bugging incident? Australians deserve to know.



Supporters of lawyer Bernard Collaery and Witness K (Image: AAP /Lukas Coch)

In 2004, Australian Secret Intelligence Service (ASIS) officers disguised as Australian aid workers planted bugs in Timor-Leste's cabinet building for Canberra to listen in and keep abreast of the nation's claim to the oil in the Timor Sea.

News that our government sought to defraud our newest and most desperately poor neighbor by using these measures to gain the upper hand in treaty negotiations rocked the conscience of many Australians, as it did for one particular Australian involved in this scandal: Witness K.

Ensnared by broad counter-terrorism laws, Witness K has plead guilty this week to communicating information about ASIS. His lawyer, Bernard Collaery, will now fight his own charges in the ACT Supreme Court.

But through all this, there's a fundamental question that hasn't been answered. Could ASIS *really* do this — was it legal? And if it could, what laws need to be changed to prevent this from happening again?

Unlocking the truth

The key to getting these answers is the watchdog of our intelligence agencies, the Inspector General of Intelligence and Security (IGIS), Margaret Stone.

The role of the IGIS is fundamental. The office has powers akin to a royal commission. It is the office that is responsible for reassuring the public that, despite the shields of secrecy afforded to our intelligence agencies and our government's uses of them, the secrecy is not a smokescreen to corruption, illegal and unethical behavior.

As Andrew Wilkie and several other parliamentarians discovered last year, an AFP investigation needs to be sparked by a referral from the IGIS. The IGIS has two grounds with respect to Timor that she can use to investigate the actions of an intelligence agency: legality or propriety.

In October 2018, several parliamentarians wrote to the IGIS asking for an investigation into the bugging incident and a consideration of the criminality of those involved. The IGIS' response was disturbing. Her letter does not come close to answering the question owed to the Australian public.

In her letter, the IGIS claims that even if the “alleged” operation did take place, those involved are immune from the *Criminal Code* and therefore would not be found guilty of conspiring to defraud.

However, the IGIS neglected to consider whether those involved are guilty at common law (laws that develop in the court as inherited from our British legal system) — in which they would not have immunity. Several important legal questions are raised by this case with respect to our common law: is it a crime to conspire to defraud a foreign government? Is it a crime to conspire to breach the laws of another country?

These are not questions that the IGIS herself can answer. The IGIS is not a judge and cannot say that a crime has or has not been committed. However, it is her role to undertake a proper assessment of legal merit and refer possible criminal actions to the court to consider.

The importance of questions to the power of our parliamentarians and intelligence agencies cannot be overstated.

What is within the IGIS’ power?

The IGIS claims that if the government required ASIS to conduct an operation, such as the bugging of the Timor cabinet, it is not for the IGIS to scrutinise. This limitation on her power is not set out in law.

ASIS is a resource for government, but it is confined by law in what it can do. The law says that ASIS can conduct operations that “are in the interests of national security, foreign relations and economic wellbeing”.

On this, the IGIS makes an astonishing statement:

It seems to me that a government requirement relating to the negotiation of an international agreement would always be in the interests of Australia’s foreign relations.

From this it would seem that the IGIS does not consider that stealing information during an international treaty negotiation was against international law, a stain on our integrity internationally, or reckless to our relationships with other countries.

It would also seem that she does not consider that the safety of Australian foreign aid workers was compromised by intelligence agents using their identity to defraud the country they were there to help.

Nor did she consider the allegation that ASIS’ resources were diverted from investigating the Bali bombings and counter-terrorism operations in Indonesia to the bugging operation in Timor. Couldn’t this have endangered our national security?

Watching the watchdog

The IGIS not only has the power to investigate whether an operation by an intelligence agency is lawful, but also has the power to investigate in circumstances where the actions raise questions of ethics.

There is no question that, in the conscience of many Australians, the bugging of Timor’s cabinet crossed a line in terms of morality. Yet in her response to parliamentarians, the IGIS seems to deprive herself of jurisdiction for considering a question of morality as it would require her to question the requirements of government. Nothing in the law places such a restriction on the watchdog’s power.

As long as the IGIS sticks to a shallow interpretation of the law and refuses to investigate, we will not know if ASIS and government broke the law and if our law needs to change. Perhaps more disturbingly, Australians cannot be reassured that we have an independent watchdog capable of holding our intelligence agencies to account.