

International Law Association (Australia Branch) Reporter

The Prosecution of Bernard Collaery and Witness K: International and Regional Implications – Greg Barns – ILA Reporter

Bernard Collaery was once the Attorney-General of the Australian Capital Territory but he now finds himself seated in the dock in that jurisdiction along with his client, a former officer of the Australian Security Intelligence Service (ASIS), known as Witness K. Mr Collaery and Witness K have been charged with allegedly breaching [section 39](#) of the *Federal Intelligence Services Act 2001*, which makes it an offence to communicate “any information or matter that was acquired or prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions.” The matter is being dealt with in the ACT Magistrates Court and carries a maximum penalty of 2 years.

The decision in June this year by the Commonwealth Director of Public Prosecutions (CDPP) to charge Mr Collaery and Witness K required the consent of the federal Attorney-General Christian Porter. The fact that the charges had been laid was revealed by a former spy and military officer Andrew Wilkie, who is now an independent member of the Australian Parliament. The prosecution wants a secret hearing of the case.

Mr Collaery and Witness K are in hot water with the conservative government of Prime Minister Malcolm Turnbull because they revealed the criminal activities of the Australian government in bugging the government offices of East Timor in 2003 when the two nations were at loggerheads over maritime boundaries, which was significant because of a large gas deposit which Australian company Woodside was seeking to develop. The man who ordered the bugging was then foreign Minister of Australia Alexander Downer who belongs to the party Mr Turnbull now leads, the Liberals. It is alleged Mr Downer ordered ASIS to spy on East Timorese negotiators. ASIS installed listening devices in the East Timorese government offices under the false premise of providing a foreign aid program.

Witness K, whom it is thought was the head of technical operations at ASIS, complained about Mr Downer and ASIS’s actions to the spies watchdog, the Inspector General of Intelligence and Security (IGIS). ASIS then terminated Witness K’s employment but the IGIS gave him permission to consult Mr Collaery.

Mr Collaery painstakingly put together a brief which alleged that ASIS had acted illegally in spying on East Timor and that a conspiracy to defraud the nation, which come off a very poor second best in the maritime boundaries negotiation, had been committed by Australian officials.

East Timor and Australia have eventually reached a maritime boundaries settlement after a conciliation process, and the agreement was signed earlier this year, although the resolution of development of the Sunrise Field remains problematic.

Determined that the truth would out, in 2013 Mr Collaery was arranging to have Witness K give evidence at an international *in camera* hearing. In 2014

East Timor took Australia to the International Court of Justice seeking to set aside an agreement reached in 2006 but which East Timor argued was tainted by Australia's unlawful spying. There was also media revelations about Mr Downer and ASIS' conduct published by the government broadcaster, the ABC and the News Limited owned *The Australian*. Mr Colliery and Witness K were subjected to raids by the Australian Intelligence and Security Organisation (ASIO), the domestic spying agency, but it was humiliated when the International Court of Justice warned Australia against interfering with the East Timor case that was before it.

The CDPP's Guidelines state that public interest is a key criteria in deciding whether to prosecute in a case. It is hard to see how the public interest is served when what Mr Collaery and Witness K have done, the prosecution allege, is reveal unlawful conduct and bullying by a wealthy mid-sized power against one of the most impoverished, and at the time newly independent, nation.

While the decision to pursue Mr Collaery has been condemned by leading legal figures such as former New South Wales DPP Nick Cowdrey QC and the former President of the Victorian Court of Appeal Stephen Charles, legal organisations such as bar associations and the peak organisation, the Law Council of Australia have remained silent in the face of what is seen by many as an attack on the independence of the legal profession.

So, what are the implications of highlighting again the unlawful conduct by Australia in East Timor? Firstly, what the East Timor case demonstrates is that Australia's professed commitment to the international rules based order is paper thin. Not only has it treated East Timor with disdain but it has a toxic neo-colonial relationship with other neighbours such as Papua New Guinea and Nauru where Australia pays millions of dollars into the treasuries of these bankrupt nations in exchange for them detaining hundreds of mentally and physically unwell individuals who have sought to arrive in Australia by boat to seek asylum.

And when it comes to the ongoing discourse and dispute over China's redrawing of South China Sea boundaries Australia's influence is weakened by virtue of its recent track record in playing 'dirty' with its neighbours.

The misuse of the criminal law by prosecutors, security agencies and the Australian government to exact revenge on decent courageous revealers of uncomfortable truth is a deeply troubling development in a democratic society. In a society which subscribes to the rule of law the Collaery and Witness K prosecution sends a message that those who seek to uncover illegality in government agencies will find themselves facing a jail term.

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