

# Australia's spies fight to keep covert operation in East Timor secret

[Lisa Murray](#) and [Angus Grigg](#) - *Australian Financial Review* - 4 January 2019

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Australian lawyer Bernard Collaery was woken in the winter darkness of The Hague with news his home office in Canberra was being raided.

It was December 2013 and the former ACT Attorney General was in the Netherlands, acting for East Timor as it sought to invalidate a maritime treaty with Australia, which determined the split of oil and gas revenue between the two nations.

Its argument was explosive.

The tiny nation claimed the 2006 treaty should be torn up as Australia had, in an act of "bad faith", bugged its cabinet offices in order to gain an edge in the negotiations.

Its evidence for such a claim came from a decorated, former Australian Secret Intelligence Service (ASIS) officer known only as "Witness K", who was due to testify in a closed hearing at The Hague, before his passport was cancelled.

The agents raiding Collaery's home were from the Australian Security Intelligence Organisation (ASIO) – ASIS is Australia's foreign spy agency while ASIO deals with domestic security – and they weren't being discreet. Their cars clogged the quiet street outside as neighbours watched them going back and forth from the house carrying big black boxes. They didn't identify themselves to Collaery's assistant, who was there alone, or leave her with a copy of the warrant. Over six hours they searched every room, seizing confidential legal files and telling her only that it was to protect national security.

Collaery and Witness K were charged last year for conspiring to reveal information about ASIS, a breach of the Intelligence Services Act.

The controversial prosecution, which came only after Australia and East Timor managed earlier last year to finally settle their drawn-out maritime boundary dispute, has attracted plenty of media and public attention.

## Rare insight

If the case is heard in an open court, it would offer a rare insight into the motivations of the country's notoriously secretive foreign spy agency and expose Canberra's role in an acrimonious falling out with its tiny, impoverished neighbour.

[Closed proceedings in 'Witness K' case a matter for court: Christian Porter](#)

However, despite international criticism of Australia's conduct in its oil and gas negotiations with East Timor, the government [may manage to evade further scrutiny](#).

Attorney-General Christian Porter [flagged the likelihood of closed proceedings on Friday](#) in his response to a request from Commonwealth prosecutors for him to [issue a non-disclosure certificate](#), which leads to a closed hearing for the court to decide whether information is likely to prejudice national security. Mr Porter said the parties were negotiating the issue and it was up to the court to resolve it. Close watchers of the case expect it will result in a closed trial.

"This is the biggest scandal to hit ASIS in more than three decades," says Clinton Fernandes from UNSW Canberra, who wrote about the bugging operation in his book, *Island off the Coast of Asia*.

"It should not be heard behind closed doors."

### **Witness K case: East Timor spying claims may be heard in secret**

In its efforts to keep further details out of the public domain, the government is using the 2004 National Security Information Act, which was designed to protect classified information in terrorism trials.

## **In a bind**

The government is in a bind. In order to convict Collaery and Witness K, it must say they breached the Intelligence Act by revealing the operation. That would be an official admission the operation took place and one the government would no doubt prefer to make out of the public eye.

"I strongly support the principle that all judicial proceedings should be heard in open court," says Fernandes. "In-camera hearings should only be warranted in extreme circumstances.

"In this instance the fact that the operation took place is not secret. If there is any evidence that goes into revealing sensitive details of the operation then that can be heard in camera."

### **Setback for whistleblowers in East Timor bugging case**

Details of the 2004 bugging operation remain sparse. Under the cover of an Australian aid program, ASIS agents reportedly installed listening devices in East Timor's ministerial offices.

They had a covert agent working inside the building who was responsible for turning the listening device on and off to preserve battery life.

The signal from the bug was then transmitted via direct line-of-sight to the floating Central Maritime Hotel, moored off the coast of Dili. And the digital recordings were allegedly then sent to the Australian embassy and Canberra. Alexander Downer was foreign minister at the time in John Howard's government. David Irvine was director-general of ASIS and would

later go on to head up ASIO, being in charge of the domestic security agency when the raids at Collaery's office took place in 2013.

"The espionage operation was an egregious breach of the principle of good faith," says Fernandes.

Counsel for Collaery and Witness K are expected to argue the bugging operation itself was illegal because Australia and East Timor met as joint venture partners with mutual fiduciary duties under the 2002 Timor Sea Treaty. It is a crime to defraud a joint venture partner.

The pair may also argue immunity from prosecution because Collaery was representing the East Timor government in the International Court of Justice while Witness K was due to appear before the ICJ when the information about ASIS was revealed. The International Organisations (Privileges and Immunities) Act could provide a defence.

## **Little oversight of ASIS**

For the first 20 years of its life, ASIS was itself a secret.

Established by Robert Menzies in 1952, stories about ASIS – which was set up as Australia's version of Britain's MI6 and the US Central Intelligence Agency – didn't start appearing in the media until 1972. Formal recognition took another five years after that as Menzies had insisted knowledge of the agency be restricted to the "fewest possible".

Since then, ASIS – which reports to the foreign minister – has managed to stay remarkably under the radar except for a handful of exceptions, the most glaring of which was the bungled 1983 training exercise at Melbourne's Sheraton Hotel.

Guests and staff were left traumatised as officers broke down a hotel room door on the tenth floor with a sledge hammer, scuffled with a manager and moved through the lobby wearing masks and carrying guns before escaping through the kitchen. The exercise was meant to simulate a hostage rescue operation and ASIS had opted not to tell the hotel or the Victorian police.

The debacle caused embarrassment for the government and sparked a debate about whether there was need for more oversight of Australia's intelligence agencies. A few years later a decision was made to set up the office of the Inspector General of Intelligence and Security (IGIS), currently headed by former Federal Court judge Margaret Stone. The IGIS has the power of a royal commissioner and is able to inspect and review the operations of agencies.

There is also a Parliamentary Joint Committee on Intelligence and Security (PJCIS), which can conduct inquiries into matters referred by the Senate, the House of Representatives or a minister.

However, Centre Alliance senator Rex Patrick, who has called for an investigation into the East Timor bugging operation, says there needs to be more oversight and notes the office of the IGIS sits within the Prime Minister's portfolio.

Australia's PJCIS doesn't have the power to examine past or present operations. And the incoming government is not briefed on concluded operations.

"The IGIS only checks whether or not agencies have acted in accordance with directions not whether those directions are proper," says Patrick. "That is the hole that exists in the current oversight. It's my very strong view that we need parliamentary oversight of the intelligence services.

"If Australia had parliamentary oversight of intelligence operations, this sordid affair would likely have never happened."

## **Spies need secrecy**

Ross Babbage, a former intelligence officer, says in his experience the agencies were extremely careful to operate within the law and to brief the relevant ministers.

"They know the limits of what they can do in minute detail and are fully aware that they are not above the law," he says.

Babbage, who is chief executive of consulting firm Strategic Forum, says the risks of such an operation would have been carefully considered and there was a possibility there may have been other motives for the operation, beyond the boundary negotiations.

"Often people from outside the [intelligence] community are very quick to judge when they only have limited facts," he says.

"I feel very strongly we should not hobble our agencies from doing vital national security work."

However, Patrick is concerned about the government's record of using "national security" reasons to justify its actions. He says in 2017 the government claimed releasing the Future Frigate tender documents would be harmful to national security but that was eventually rejected and the documents were released to the Senate.

"This government on numerous occasions has pleaded national security for the purpose of avoiding embarrassment," he says. "I have a great deal of scepticism about their use of national security as a reason not to disclose something."

He is also worried about Attorney-General Christian Porter making such a crucial decision related to events that took place under the watch of senior Liberal Party figures.

"This happened under the watch of John Howard and Alexander Downer. Now he's in a position where he can make a claim as to national security over matters they were involved in."