

OPINION

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Secret trials: our judges need to resist the government's pressure

Anyone who is interested knows in their heart that the Australian Secret Intelligence Service, on behalf of the government, bugged the cabinet room and other offices of the Timor Leste government in 2004 to give Australia a major edge over our impoverished neighbour in negotiations for the ownership of massive underwater oil and helium reserves. The two countries had solemnly agreed to negotiate in good faith.

Coyly, the federal government has neither confirmed nor denied the bugging. But if there was no bugging, it would not breach official secrets laws to say there was. The operation was conducted under cover of an aid project – a cruel, modern take on the Trojan horse. The bugging was almost certainly a crime in Timor Leste and, according to written advice of a former NSW Director of Public Prosecutions, Nick Cowdery, it was likely also criminal under Australian law.

Yet the government is prosecuting a former ASIS officer, Witness K, who was troubled by the operation, for disclosing secret information. It is also prosecuting his lawyer, the former ACT attorney-general Bernard Collaery, for using the information provided by K to help Timor Leste overturn the deal on the boundary line, on the basis that the negotiations with Australia were tainted by the bugging.

A certificate was needed from the federal attorney-general for the prosecutions of Collaery and K to proceed. For over two years, the former attorney-general, George Brandis, had sat on the request for the certificate. His successor, the current Attorney-General, Christian Porter, was not so squeamish. Collaery's case is now moving to trial in the ACT Supreme Court. Ahead of that, Porter has issued certificates to court seeking that much of Collaery's trial be held in secret. And the government recently passed laws requiring the judge to give greatest weight to the Attorney-General's view on the secrecy issue.

The trial judge has come down largely on the side of secrecy. Nearly a month later, the court's reasons are not public. An appeal on the issue of openness is highly likely. Likewise, K's proceedings have mostly been in secret. The ABC is contesting that, and it was back in court with this application on Wednesday.

Secret trials would undermine the rule of law, which requires the judicial system to be open and transparent, and that independent judges, rather than the executive government or the Parliament, decide legal cases. These are cornerstones of Australia's system of government and law. The courts are a vital protection against authoritarian government and abuse of power. Seeking to punish those who have embarrassed politicians and senior officials by revealing atrocious political decisions would be such an abuse.

The major beneficiary of Australia's initial win in the boundary negotiations was Woodside Petroleum Ltd. Alexander Downer was foreign affairs minister at the time of the bugging. ASIS came under his ministerial responsibility. On the ABC's *Four Corners* in 2014, Downer admitted Australia had acted in Woodside's interests in negotiating with Timor Leste. After leaving politics, Downer became a paid consultant to Woodside. The secretary of Downer's department at the time of the bugging, the late Ashton Calvert, became a director of Woodside nine months after his retirement from Foreign Affairs, and very soon after the bugging.

Leading former officials had given evidence in favour of openness in the Collaery trial: former foreign affairs minister and attorney-general Gareth Evans, former chief of the Australian Defence Force, Admiral Chris Barrie, former ambassador to the US and Indonesia John McCarthy, and former NSW Supreme Court judge and ICAC commissioner Anthony Whealy QC. Former East Timor Presidents Xanana Gusmao and Jose Ramos Horta also gave evidence for Collaery's bid for the trial to be in public.

Protecting secrets vital to national security or the safety and operational cover of intelligence officers is one thing. It is a very different matter to use authoritarian powers to punish those who have embarrassed politicians and senior officials when those officials have authorised a risky, unethical and possibly illegal operation that ended up causing great damage to Australia's reputation for being a straight-shooter on the international stage.



Ian Cunliffe is a former chief executive of the Australian Law Reform Commission and the Constitutional Commission, and was deputy to the secretary of Australia's first royal commission into intelligence and security in the 1970s.

<http://www.smh.com.au/national/secret-trials-our-judges-need-to-resist-the-government-s-pressure-20200717-p55d2p.html?btis>