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The Timor-Leste spying case is a taste of our future under Asio's new powers

The overblown security concoction being cooked up by George Brandis and our security elite is more about protecting the spy establishment than the nation



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'Interested citizens are scratching their heads and wondering: kept safe from what?' Asio boss David Irvine. Photograph: AAP

Already we have a taste of what lies in wait once the new bundle of Asio laws are passed.

Legislation, to be introduced shortly, provides for [two new offences](#) relating to unauthorised disclosure of information about “special intelligence operations” – up to five years and then up to 10 years for aggravated offences. Currently the tariff for unauthorised communication of information is two years.

There’s to be no mucking around when it comes to preserving state secrets, including ones that are not particularly worthy of the word “secret”. The penalties will apply even in cases of public interest disclosures about misconduct by security agencies where no risk to national security is involved.

That’s what makes the [Timor-Leste spying case](#) so apposite. Of course, it was a bugging and spying operation conducted by Asis, not Asio – though things have become a little blurred. The then head of Asis, David Irvine, who got authorisation for the bugging of the Timor-Leste ministerial office, is now the head of Asio, and ordered the raids on parties engaged in the complaint about the eavesdropping mission.

As a result of the espionage the Timorese are now before the permanent court of arbitration at the Hague, trying to unstitch the treaty with Australia over the oil and gas resources in the Timor Sea.

Timor-Leste lawyer Bernard Collaery and a former Asis officer, known as Witness K, both had their homes and offices raided by Asio early last December. An overblown task force of 15 Asio and AFP officers took to Collaery’s office seizing files, a computer and an important USB stick, just days before a preliminary hearing at the permanent court.

Witness K was extensively interviewed, had documents relating to the case seized and his passport confiscated. Witness K was one of the Asis officers instructed by Irvine to wire-for-sound the office used by Timor-Leste officials during the negotiations over the gas reserves.

Not only is Collaery acting for Timor-Leste, but he also acted for Witness K in another capacity. Three of the operatives engaged in the offshore bugging operation, including Witness K, were subsequently removed from their jobs at ASIS, with the explanation that management was looking for “generational change”.

The Asis officer was given permission to talk to the lawyer about his employment concerns. Collaery was an “approved lawyer” acting for Asio and Asis officers in their disputes with their respective agencies.

In a letter dated 2 April 2008, the then-inspector general of intelligence and security, Ian Carnell, noted there had been consultations and that Collaery would keep a watching brief on an internal inquiry into Witness K's employment concerns.

In a ministerial statement on 4 December, Brandis told the senate that the raids on Collaery and Witness K were nothing to do with the pending hearings in the Hague, were not a contempt of court or an interference in lawyer-client privilege.

It was simply a matter of keeping Australia safe, leaving interested citizens scratching their heads and wondering: from what?

However, the attorney general did attack Collaery, [saying](#) that because he is a lawyer, "that fact alone does not excuse him from the ordinary law of the land. In particular, no lawyer can involve the principles of lawyer-client privilege to excuse participation, whether as principal or accessory, in offences against the Commonwealth".

The suggestion seemed to be that Collaery shouldn't have talked to Witness K about Asis and the espionage in Timor-Leste, the very issues that were related to the move to shaft him from his employment.

Yet, these were the very matters that the Inspector General of Intelligence and Security (IGIS) had cleared for discussion. A carefully worded [denial](#) from IGIS says there were no complaints made "about alleged Australian government activities in East Timor".

Now Irvine has taken it one step further and got approval from Brandis for the AFP to investigate the possibility of prosecutions of Collaery and Witness K over alleged "unauthorised communication of information".

There is a strong case that by spying on the ministers and negotiators of Timor-Leste, the Australian government may be in breach of international law.

Both countries are parties to the Vienna Convention on the Law of Treaties and article 49 says that if a country is induced to agree to a treaty by the fraudulent conduct of another party, then it may invoke fraud to invalidate its consent. Fraud extends to deceitful behaviour. Spying to obtain secret information is deceitful.

The testing point will be for Timor-Leste to show that that it was induced to enter the [Cmats treaty](#) as a result of that deceit. To this end the evidence of Witness K would have been crucial - yet he is without a passport and unlikely to

be unable to attend the PCA.

So, we have the police and the security people seeking to establish a case that Collaery and Witness K broke the [secrecy provisions](#) of the security law in allegedly communicating about a government spying operation that itself was illegal.

In March the international court of justice ordered Australia to stop any spying operations against Timor-Leste and to seal the documents and data seized in the December Asio raids - all of which came as an embarrassment to Brandis and his swaggering assertions about the raid and our security.

Fifteen of the 16 judges on the ICJ panel concurred with the findings and orders. The only exception was Ian Callinan, the former "capital-C" Conservative judge appointed to the high court by the Howard government.

This overblown concoction by Brandis and the security wallahs has all the hallmarks of being more about the protection of Asis and Asio than anything directly bearing on the safety of the nation. No wonder there is no exemption for public interest disclosures in Brandis' new Bill.

Why the legal profession should be so quiet about the Commonwealth meddling with the functions of an independent lawyer in court proceedings is a mystery.

One consolation: Brandis doesn't have a good track record when it comes to his urging the authorities to take legal action against people he regards as enemies of the state.

For some time Brandis was at the forefront of a campaign to get the Commonwealth DPP to bring proceeds of crime proceedings against David Hicks, over the publication of his book Guantanamo: My Journey.

On July 23, 2012 the DPP made a [decision](#) to discontinue the proceedings. Apparently, until that point Brandis and the DPP had forgotten about [section 84](#) of the Evidence Act, and the common law, both of which say that an admission of guilt in relation to a crime cannot be put to a court if it was procured by "violent, oppressive, inhumane or degrading conduct".