

The Senate

Committee of Privileges

Person referred to in the Senate

Mr Bernard Collaery

156th Report

May 2014

© Parliament of the Commonwealth of Australia 2014

ISBN 978-1-74229-995-2

This document was produced by the Committee of Privileges, and printed by the Senate Printing Unit, Parliament House, Canberra

MEMBERS OF THE COMMITTEE

Senator Jacinta Collins (**Chair**) (Victoria)

Senator Anne Ruston (**Deputy Chair**) (South Australia)

Senator the Hon John Faulkner (New South Wales)

Senator Scott Ludlam (Western Australia)

Senator the Hon Ian Macdonald (Queensland)

Senator Bridget McKenzie (Victoria)

Senator Dean Smith (Western Australia)

Senator Anne Urquhart (Tasmania)

The Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3360
Facsimile: (02) 6277 3199
Email: priv.sen@aph.gov.au
Internet: www.aph.gov.au

Report

1.1 On 7 April 2014 the President of the Senate, Senator the Honourable John Hogg, received a submission from Mr Bernard Collaery seeking redress under the resolution of the Senate of 25 February 1988 relating to the protection of persons referred to in the Senate (Privilege Resolution 5).

1.2 The submission referred to a speech made by Senator Brandis in the Senate on 4 December 2013. The President accepted the submission as a submission for the purposes of the resolution and referred it to the Committee of Privileges.

1.3 The committee met on 15 May 2014 and, pursuant to paragraph (3) of Privilege Resolution 5, decided to consider the submission. The committee resolved to recommend that the response be incorporated in Hansard without change. In considering the submission, the committee did not find it necessary to confer with the person making the submission.

1.4 The committee draws attention to paragraph 5(6) of the resolution which requires that, in considering a submission under this resolution and reporting to the Senate, the committee shall not consider or judge the truth of any statements made in the Senate or in the submission.

1.5 The committee **recommends:**

That a response by Mr Bernard Collaery, in the terms specified at Appendix 1, be incorporated in *Hansard*.

Senator the Hon Jacinta Collins
Chair

Appendix

Mr Bernard Collaery

Pursuant to Resolution 5(7)(b) of the Senate of 25 February 1988

Reply to statement by Senator the Hon George Brandis

(4 December 2013)

1. Pursuant to Senate Privilege Resolution 5 of 25 February 1988, I request that you refer this statement to the Senate Standing Committee of Privileges, and that it be published in the Parliamentary record as a response to a statement of Senator Brandis of 4 December 2013.
2. Senator Brandis' statement of 4 December 2013 was as follows (Hansard, pp 819–820):

Yesterday, search warrants were executed at premises in Canberra by officers of the Australian Security Intelligence Organisation (ASIO) and, in the course of the execution of those warrants, documents and electronic data were taken into possession. The premises were those of Mr Bernard Collaery and a former ASIS officer. The names of ASIS officers—whether serving or past—may not be disclosed. The warrants were issued by me, at the request of ASIO, on the grounds that the documents and electronic data in question contained intelligence relating to security matters.

By section 39 of the *Intelligence Services Act 2001*, it is a criminal offence for a current or former officer of ASIS to communicate 'any information or matter that was prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions', where the information has come into his possession by reason of his being or having been an officer of ASIS.

...

Last night, rather wild and injudicious claims were made by Mr Collaery and, disappointingly, by Father Frank Brennan, that the

purpose for which the search warrants were issued was to somehow impede or subvert the arbitration. Those claims are wrong. The search warrants were issued, on the advice and at the request of ASIO, **to protect Australia's national security.**

I do not know what particular material was identified from the documents and electronic media taken into possession in the execution of the warrants. That will be a matter for ASIO to analyse in coming days. However, given Mr Collaery's role in the arbitration, and in order to protect Australia from **groundless allegations** of the kind to which I have referred, I have given an instruction to ASIO that the material taken into possession in the execution of the warrants is not under any circumstances to be communicated to those conducting the proceedings on behalf of Australia.

Might I finally make the observation that, merely because Mr Collaery is a lawyer, that fact alone does not excuse him from the ordinary law of the land. In particular, **no lawyer can invoke the principles of lawyer-client privilege to excuse participation, whether as principal or accessory, in offences against the Commonwealth.**

[Emphasis added.]

3. I am the lawyer, Bernard Collaery, Senator Brandis referred to. I am a Barrister and Solicitor of the High Court of Australia, and of the Supreme Court of the Australian Capital Territory. I was first admitted to practise in 1970. I am admitted to practise in other Australian jurisdictions and abroad. I am a former Attorney-General, Deputy Chief Minister of the Australian Capital Territory, and a former member of the National Crime Authority.
4. Concerning Senator Brandis' statement, I make the following observations.

Observation 1 : " The search warrants were issued ... to protect Australia's national security"

5. In 2008, the former Australian Secret Intelligence Service (ASIS) officer to whom Senator Brandis referred (Witness K), approached the then Director-General of Intelligence and Security, Mr Ian Carnell. Witness K alleged he had been constructively dismissed from ASIS, as a result of a new culture within ASIS. The evidence indicates that the change sought included an operation he had been ordered to execute in Dili, Timor-Leste.
6. On 6 March 2008, the then Inspector-General of Intelligence and Security, Mr

Ian Camell, wrote to Witness K as follows:

In our most recent meeting we discussed the various options which are available to you to pursue your concerns. Briefly summarised, these options would appear to include the following:

...

- You could pursue private legal action.

7. On 25 March 2008, Witness K wrote to Mr Camell as follows:

I have spoken briefly with Mr Bernard Collaery of Collaery Lawyers with respect to your letter of 6 March 2008, file ref 2008103.

I have provided Mr Collaery with a general brief in conformity with my security obligations. I anticipate that Mr Collaery will confirm to you his watching brief in the matter.

8. On 2 April 2008, Mr Camell wrote to Witness K as follows:

I also note you have consulted a lawyer, Mr Bernard Collaery, and that he is likely to contact this office at some point, to confirm that he has a general interest in this matter.

9. As a consequence of Mr Carnell's advice, Witness K thereafter instructed me to provide legal advice.

10. The correspondence with the Inspector-General would be readily discoverable in the files of ASIS and of the Inspector-General .

11. I have been instructed in other cases with national security implications. I was approved for this purpose by the Inspector-General of Intelligence and Security. In no case has ASIO or the Inspector-General suggested this approval be withdrawn. I continue to hold file papers in these cases.

12. Witness K has a distinguished record of service to Australia both in the armed forces and intelligence agencies. He holds the Intelligence Medal. There were other matters personal to Witness K such that I assessed his evidence as that of a most dedicated officer without any personal motive beyond his concern for ASIS and the premature end of his career.

13. Senator Brandis did not identify any matters that require the issue of the search warrants to protect Australia's national security. To my knowledge, there are

none.

14. There was no basis for Senator Brandis to conclude that the circumstances in which I have acted for Witness K constituted a threat to Australia's national security.

Observation 2: “No lawyer can invoke the principles of lawyer–client privilege to excuse participation, whether as principal or accessory, in offences against the Commonwealth.”

15. To my knowledge, neither Witness K nor I have committed any offence against the Commonwealth.
16. Senator Brandis referred to section 39 of the Intelligence Services Act 2001 (Cth). I believe that neither Witness K nor I have committed any offence under that section.
17. Accordingly, legal professional privilege inheres in the material seized from my premises.

Observation 3: “ Last night, rather wild and injudicious claims were made by Mr Collaery that the purpose for which the search warrants were issued was to somehow impede or subvert the arbitration ... to protect Australia from groundless allegations of the kind to which I have referred ...”

18. The only public statement I made on the night of 3 December 2013 was a comment broadcast on the ABC Lateline Program. From a review of the transcript of that program, the entirety of my comment was as follows:

I mean, how absurd And so I have no way at this moment of knowing the legal basis upon which this unprecedented action of raiding my law offices to procure evidence which is about to go on the table in The Hague.

19. On 3 December 2013, the Attorney–General had not yet given his undertaking to the Permanent Court of Arbitration of 19 December 2013 or his undertaking to the International Court of Justice of 21 January 2014. These undertakings sought to reassure those Courts that the seized material would not be used to advantage Australia in the proceedings commenced by Timor–Leste.
20. Further, Senator Brandis had not yet sent his letter of 23 December 2013 to the Director–General of Security, Mr David Irvine, purporting to give Mr Irvine directions regarding the material seized from my premises.

21. On 3 March 2014, the International Court of Justice made orders that Australia not use any of the material seized from me in any way until further order of the Court. The Court had before it the undertakings and letter to which I have referred above.
22. The Court considered that even those undertakings and letter did not sufficiently protect Timor–Leste from the possibility of Australia adversely and improperly gaining an advantage in the Arbitration from the material seized from my premises.
23. The Court also felt the need to order Australia not to interfere with communications between Timor–Leste and its legal advisers.
24. In the light of the Court’s concerns, it cannot be said that my comment of 3 December 2013, was “wild”, “injudicious”, or “groundless”.