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Australia-East Timor spying scandal: senior lawyer says 'crime was committed'

Australian Broadcasting Corporation

Broadcast: 26/11/2015

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In part two of a Lateline exclusive, Steve Cannane asks Nicholas Cowdery QC about his assessment of revelations that the Australian Secret Intelligence Service (ASIS) bugged cabinet rooms in Dili during secret negotiations over an oil and gas treaty.

Transcript

TONY JONES, PRESENTER: Last night on Lateline we examined the fallout from the spying scandal that's plagued relations between Australia and East Timor since a former ASIS officer known only as Witness K came forward to give evidence. K detailed an operation he led in 2004 to bug East Timor's cabinet rooms in Dili to give Australia an advantage during negotiations over an oil and gas treaty.

Well the incident raises serious moral questions for Australia, but does that bad faith also raise serious legal questions?

Tonight we'll hear from one of Australia's most senior lawyers, who's provided a written legal opinion that a crime was committed.

Steve Cannane has our exclusive report, produced by Sashka Koloff.

STEVE CANNANE, REPORTER: The Australian capital Canberra is the official friendship sister city to Dili.

But a not-so-friendly plan to bug the cabinet rooms in East Timor's capital was conceived here in 2004.

The Prime Minister of East Timor at the time says it was a crime.

MARI ALKATIRI, FMR EAST TIMOR PRIME MINISTER (subtitles): I have no doubts on this, this kind of thing. Even in terms

of international law, it's a crime.

STEVE CANNANE: The father of East Timor's independence also thinks the bugging was criminal.

XANANA GUSMAO, FMR EAST TIMOR PRESIDENT & PRIME MINISTER (subtitles): Australia would not allow. It would be under the Security Act, it will be criminal act, no?

STEVE CANNANE: In the opinion of one of Australia's most senior lawyers, the act was illegal. Nicholas Cowdery thinks if the bugging operation was planned on Australian soil, it is subject to Australian law.

NICHOLAS COWDERY, FMR NSW DIR. OF PUBLIC PROSECUTIONS: My preliminary advice is that there is a case of conspiracy to defraud that could be mounted against those responsible for the planning and the direction and indeed some of those responsible for the execution of the bugging in East Timor.

STEVE CANNANE: Nicholas Cowdery QC was NSW Director of Public Prosecutions for 16 years. He was engaged to give advice to Bernard Collaery, the former legal advisor to East Timor.

Lateline has obtained a copy of the document which lays out Nicholas Cowdery's legal opinion. The executive summary says, "... that under Australian law, the espionage carried out by Australia was illegal, and outside the power of ASIS."

If a case was run, current and former ASIS officials, even cabinet ministers, could face prosecution.

NICHOLAS COWDERY: That would require some further investigation of the primary evidence that would be available, but it seems pretty clear that the Director-General of Intelligence at the time, David Irvine, his deputy and a number of other senior officials who were involved in the planning and the direction of the bugging operation would certainly be liable. Query whether the relevant minister at the time had any direct involvement in the matter. That's something that I'm not clear about.

STEVE CANNANE: So the Foreign Minister at the time was Alexander Downer. If he ordered the bugging, he could be involved in this conspiracy as well?

NICHOLAS COWDERY: That's so, yes.

STEVE CANNANE: The key to any legal case might lie in legislative changes made following another infamous ASIS operation.

REPORTER (archive footage, 1983): The Victorian Government says the legislation will clear the way for the prosecution of the ASIS agents who terrorised guests and staff at Melbourne's Sheraton Hotel last November. It's believed 12 agents were involved in the raid.

STEVE CANNANE: In 1983, ASIS agents wielding machine guns conducted a bungled training exercise at a Melbourne hotel. Federal laws were changed to restrict ASIS to what was called, "the proper performance of a function of the agency".

BERNARD COLLAERY, FMR LEGAL ADVISOR TO EAST TIMOR: The word proper was inserted by the Parliament when it decided to bring ASIS under legislative control. And if there's any doubt about the meaning of a word in a piece of legislation, it's the meaning of proper. Proper means you don't do improper things like they did at the Sheraton.

STEVE CANNANE: Nicholas Cowdery believes this could be the key to any potential legal action.

NICHOLAS COWDERY: It's a word in the legislation that is to be given its full meaning. Is it proper for ASIS, even if it says that it is acting to protect the economic interests of Australia, to be involved in what is unlawful activity on the ground and what is, I think in the judgment of any reasonable person, dishonest activity?

STEVE CANNANE: But Ben Saul, Professor of International Law at the University of Sydney, has a different view.

BEN SAUL, PROF. OF INT. LAW, UNIVERSITY OF SYDNEY: I think courts would generally accept that bugging is something in the exercise of the proper performance of an intelligence agency. I mean, really, it's core business.

STEVE CANNANE: If a prosecution was launched, it's likely there'd be two key defences: that ASIS was operating in the interests of Australia's national security or Australia's national economic well-being. But a national security defence could prove interesting.

Within the ranks of Australia's current and former servicemen and women, East Timor has strong support. Xanana Gusmao was in Australia last Anzac Day. He says countless veterans told him that what Australia did was wrong.

XANANA GUSMAO (subtitles): I can tell you many, many - how to say? - demonstration of solidarity came from the veterans.

STEVE CANNANE: Retired Major General Peter Phillips, the former national president of the RSL, is one of those appalled by Australia's actions.

PETER PHILLIPS, RETIRED MAJOR GENERAL: Well frankly, I was horrified. I just couldn't believe that we would do that to a neighbour that meant so much to us. ... In terms of bugging the Timor cabinet office, I thought that was way beyond what we would expect of our intelligence services. I can't - still can't see what it has to do with national security.

STEVE CANNANE: Bernard Collaery says Major General Phillips' views are not uncommon in senior military ranks.

BERNARD COLLAERY: Senior Defence officials and senior military people have often - have quietly, unobtrusively shaken my hands at functions and said, "All strength to your arm".

STEVE CANNANE: In 1999, Admiral Chris Barrie, as then-chief of the Defence Force, planned and commanded the operation to secure East Timor following widespread militia-led violence. He too was surprised by the decision to bug East Timor's cabinet rooms in 2004.

CHRIS BARRIE FORMER DEFENCE FORCE CHIEF: Well I found it almost unbelievable that we would do anything like that. ... It's a bit extraordinary, isn't it? On one hand you conduct a security operation to establish a new country in this part of the world, and then a few years later, you're up to these sort of shenanigans.

STEVE CANNANE: Admiral Barrie makes the case that facilitating economic development in poor countries in our region is in our national security interest.

CHRIS BARRIE: Look, by anyway you can think about Australian security and our future, you have to see the first line for us to be investing in as being the near region. For us, it's about countries in our near region that are stable, peaceful and have an effective democracy.

STEVE CANNANE: Despite the concerns raised within military circles, Ben Saul believes the courts would look kindly on a national security defence in any potential prosecution

BEN SAUL: I think the bar for a successful prosecution would be pretty high. That's because the Australian courts, like many democratic courts, give a pretty broad discretion to the Government to determine what is in the interests of national security.

STEVE CANNANE: So what about the economic defence? ASIS has as one its functions that it acts in the interests of Australia's national economic well-being.

Alexander Downer was Foreign Minister at the time of the Dili bugging. He has never admitted that the operation took place, but he told Four Corners last year that government should act in the interests of Australian business.

ALEXANDER DOWNER, FORMER FOREIGN MINISTER (2014): The Australian Government isn't against Australian companies, or if it is, it's derelict in its duty. The Australian Government supports Australian business and Australian industry. The Australian Government unashamedly should be trying to advance the interests of Australian companies.

BERNARD COLLAERY: I agree with that. But you should advance it within the rule of law and you should advance it in our economic interests. Giving Woodside a floating platform, as it were, and ConocoPhillips with flown-in foreign labour isn't advancing the interests of the Northern Territory. If Timor couldn't get the pipeline, how about Australia getting it? Both countries missed out. And that was not disclosed in the public interest statement when Alexander Downer produced the treaty - the unlawful treaty, as we now say - to the Australian Parliament.

STEVE CANNANE: But Ben Saul says benefitting Australian companies might be enough under the law.

BEN SAUL: Certainly, national economic well-being can of course be affected by what happens to Australian companies, not just what happens at the governmental level.

STEVE CANNANE: So if Australian law was broken in the ASIS bugging operation, who could launch a prosecution?

NICHOLAS COWDERY: Any citizen in Australia, any person in Australia - it doesn't even have to be a citizen, for that matter - can institute a criminal prosecution in the magistrates court in the Australian Capital Territory. So in theory, anybody can commence the proceedings in that jurisdiction. But there are controls in place over that sort of conduct. First of all, it would be very unwise for anybody to commence any proceedings without having the primary evidence available to it and proper legal advice based upon that primary evidence.

STEVE CANNANE: There seems to be one obvious candidate.

Did you ask for this advice from Nick Cowdery?

BERNARD COLLAERY: Yes, indeed.

STEVE CANNANE: So you wouldn't ask for it unless you were considering using it, would you?

BERNARD COLLAERY: That's correct.

STEVE CANNANE: So what would make you use it?

BERNARD COLLAERY: I - I - I think the new Prime Minister has some important advisors to convoke and we need to see if the current Prime Minister would in any way agree with the way Australia presented itself recently at The Hague before the International Court.

STEVE CANNANE: Last year in the International Court of Justice, Australia's Solicitor-General Justin Gleeson claimed Bernard Collaery and his client, Witness K, who ran the Dili bugging operation, may have committed a crime.

JUSTIN GLEESON, SOLICITOR-GENERAL: It is a crime if a present or former officer of ASIS communicates information concerning the performance of the functions of ASIS acquired as an officer.

STEVE CANNANE: But Nicholas Cowdery says the Solicitor-General provided no evidence of a crime and that he believes no offences have been committed.

NICHOLAS COWDERY: The offences relate to the unauthorised release of information of one sort or another, but the offences that people are talking about require a specific intent to harm the interests of Australia in doing so. And I don't think it could be said in any way at all that either Collaery or K had that intention, much less could it be proved.

BERNARD COLLAERY: Would it be the case if they prosecute you and K, they would also have to prove that ASIS operated

in the national interest?

BERNARD COLLAERY: Yes.

STEVE CANNANE: And how difficult will that be to prove and what will they have to lay out?

BERNARD COLLAERY: They'll have to lay out their justifications and we will take great relish in dealing with that and that will in effect be the Royal commission that we want. So, come on, if you've got the courage, just lay a few charges and we might lay a few back.

TONY JONES: Well we asked the Attorney-General George Brandis to come on the program and give his views. He declined. In a statement, he said, "The Australian Government does not comment on the operations of our intelligence agencies." He says they operate within a robust legal framework under Australian law and he's confident they're compliant with those obligations.

The former Foreign Minister Alexander Downer, former ASIS Director-General David Irvine declined to comment.



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