

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

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Lawyer Bernard Collaery, flanked by Senators Tim Storer, Rex Patrick, Nick McKim and Andrew Wilkie, is facing a potential two years in jail.
Alex Ellinghausen

The Australian Secret Intelligence Service (ASIS) was set up by Robert Menzies over a round of martinis in 1952 as Canberra looked to navigate its way through the Cold War. Writing to his British counterpart at the time, Menzies said "knowledge of this scheme has been restricted to the fewest possible here" and for the next few decades ASIS remained a tightly-held secret, even within government circles.

While the country's foreign spy agency has since moved out of the shadows, little is publicly known about its operations and at the ACT Magistrates Court on Wednesday, the government will attempt to ensure that remains the case. Commonwealth prosecutors are seeking to hold parts of the trial of "Witness K", a former senior intelligence officer, and his lawyer Bernard Collaery in private. The pair have been [charged with conspiracy to communicate ASIS information](#) after they revealed Canberra had ordered the bugging of East Timor's cabinet offices in 2004 during negotiations with the fledgling nation over an oil and gas treaty.

The government has never confirmed, nor denied, whether the operation took place."

If they want to convict Witness K and Collaery, they need to admit that they were in fact carrying out an espionage operation against East Timor," said Clinton Fernandes, a professor at the University of New South Wales, who has written about the case in a new book, *Island off the Coast of Asia*. "They want the hearing in secret to do so. They want to prevent the defence publicly making its case that the order to conduct the espionage was illegal."

If found guilty, Witness K and Mr Collaery, are facing up to two years in jail. The case has been dubbed by some as "Australia's Watergate" and sparked debate about whether spy agencies should be used for economic purposes.

Section 11 of the Intelligence Services Act says ASIS can perform functions in the interests of national security, foreign relations or national economic well-being. So, Professor Fernandes said the defence is not saying it can't be used for economic purposes. Rather, the defence will likely argue that Australia and East Timor met as joint venture partners with mutual fiduciary duties under the 2002 Timor Sea Treaty and it is a crime to defraud a joint venture partner.

'The harm has already been caused'

Last month, a group of crossbenchers – Rex Patrick, Tim Storer, Andrew Wilkie and Nick McKim – also asked the Inspector-General of Intelligence and Security (IGIS) to investigate. They want to know whether the bugging operation, allegedly ordered by former Foreign Minister Alexander Downer, broke intelligence laws.

Senator Patrick, who visited Dili last week as part of an Australian delegation and lobbied for Witness K and Mr Collaery to be awarded national medals for their service to East Timor, said the government should not insist on a closed court for the trial.

"The charges that have been laid revealed there was an operation and not a fictitious operation," he said. "If that is all that is said in court, it would be improper for the government to insist on the matter being heard in secret. In camera hearings should only be warranted in extreme circumstances."

Senator Patrick said it might be understandable to withhold information from the public if it caused harm to national security or international relations. However, he said in this case "the harm has already been caused and remedied" with the two countries putting aside their bitter dispute and signing an agreement on a maritime border this year.

The Attorney General's Department, in an emailed response to questions, said: "the Government is not seeking to have the whole trial heard in camera."

"The Government's instructions are to allow as much information to be publicly available as is reasonable in all the circumstances where it would not prejudice national security."

On the complaint by the crossbenchers, Senator Patrick said the Inspector-General for Intelligence and Security, Margaret Stone, had a good understanding of the issues but he was concerned she did not have the power to investigate ministers or former ministers.

Professor Fernandes said compared to the US, there was inadequate oversight of intelligence agencies in Australia.

While Ms Stone was an independent statutory officer, she still sits within the executive branch of government, having been appointed by the Governor-General on the prime minister's recommendation.

"It's not part of the legislature and we have no judicial oversight at all," he said.