

John Menadue – Pearls and Irritations

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ERNST WILLHEIM. Secret Trials: The illegal bugging of the Timor Leste Cabinet and the extraordinary prosecution of Bernard Collaery and Witness K

Posted on 7 February 2019

Australians reading about secret trials in foreign countries tend to content themselves in the belief that in Australia we have an open court system and an independent judiciary. After all, freedom of speech, the rule of law and an open and independent court system are basic bulwarks of our democracy. Aren't they? This brief paper challenges that comfortable assumption.

The many Australians who seek to keep themselves informed by reading foreign news media on line may have been surprised to read foreign news media reports that on 11 December 2018 a prominent Australian public figure was convicted in a Victorian Court of sexual abuse offences. The foreign media reported the conviction but went on to report that, because of a suppression order made by the Victorian Court, the charges, the trial and the conviction could not be reported in Australia. Assuming the reports in the foreign media to be correct, many Australians will be properly concerned that an Australian criminal trial involving a prominent Australian public figure was apparently held in secret and apparently the outcome cannot be published in Australia. Surely this only happens in those foreign countries whose human rights records we proudly criticise?

Another criminal trial is apparently proceeding in secrecy in Canberra. This trial involves the prosecution of another prominent public figure, Canberra lawyer and former ACT Attorney-General Bernard Collaery and a former ASIS agent identified only as witness K. The details of the charges have not been made public. They are widely understood to relate to disclosure of illegal bugging of the Timor Leste Cabinet, bugging carried out by an Australian intelligence agency, ASIS, on behalf of the Australian Government, during the course of bilateral negotiations between Australia and Timor Leste over the sea bed boundary between the two countries and allocation of oil and gas revenues in the area often referred to as the 'Timor gap'. It is understood that witness K, the ASIS operative apparently involved in the bugging operation, became concerned when the former Foreign Minister Alexander Downer and the former Departmental Secretary Ashton Calvert both subsequently obtained appointments with Woodside, the company which was thought to benefit by the bugging operations. Witness K apparently complained to the Inspector-General of Intelligence and Security about the legality of the bugging operation and with official approval briefed Canberra lawyer Bernard Collaery.

Australia can hardly be proud of its conduct of the Timor Leste boundary negotiations. When the Timor Leste Government wanted to have the boundary dispute resolved by the International Court of Justice, the normal channel for the resolution of international boundary disputes, Australia, which otherwise boasts of its support for a rules based international order, withdrew maritime boundary issues from the jurisdiction of the Court. Timor Leste then took the dispute to the Permanent Court of Arbitration in the Hague, seeking a declaration that a previously negotiated treaty was invalid for fraud (on account of an Australia spying operation, explained below). (Under the Vienna Convention on the Law of Treaties fraud is a basis for invalidating a treaty). Australia unsuccessfully disputed the jurisdiction of that Tribunal. Apparently Australia was determined to do whatever it takes to thwart fair resolution of the boundary dispute. Whatever it takes included not only withdrawal from the jurisdiction of the International Court of Justice and disputing the jurisdiction of the Permanent Court of Arbitration. It included also ASIS bugging the Timor-Leste Cabinet Office in order to advantage the Australian negotiating team. On the eve of the arbitral tribunal hearing in the Hague, Witness K's passport was seized, effectively preventing him from giving evidence in the Hague. The Director-General of Intelligence at the time of the bugging operation was David Irvine. It is not known whether this operation was the result of a ministerial direction. It is not known whether the Inspector-General of Intelligence and Security was informed or ever

conducted an investigation into the apparently illegal operation.

Australia's neighbour, Timor Leste is a tiny country with hardly any resources other than access to the oil and gas revenues. Many Australians treasure fond memories of support from the people of East Timor (as it then was) for Australian forces in the Second World War. Australians were also concerned about the violence that followed the Indonesian takeover of East Timor. Foreign Minister Downer was criticized for apparently suppressing reports of the violence in Dilli. Later Australia lead a major UN peacekeeping operation after the people of East Timor voted for independence. We see Timor Leste as a small friendly neighbour deserving our support. Timor Leste is hardly a match for its giant resource rich Australian neighbour. Yet Australia apparently thought it right to spy on the Timor Leste cabinet to ascertain their negotiating position. Whatever it takes also included cancelling the passport of witness K, the former ASIS operative, to prevent him giving evidence about the bugging operation to the Tribunal in the Hague.

Later, on 3 December 2013, another Australian intelligence agency, ASIO, raided the Canberra office of the lawyer acting for Timor Leste in the boundary negotiations, Bernard Collaery. Collaery himself was in the Hague. According to a speech Collaery gave at the Australian National University on 11 June 2015, the ASIO officers took the mobile phone of the sole staff member present and refused to show her the search warrant. They seized vast numbers of documents including Collaery's legal advice to the Government of Timor Leste. The head of ASIO was David Irvine.

Can you believe it? Australia's foreign intelligence agency ASIS bugs the Cabinet office of the other side in an international negotiation. Then Australia seizes a passport to stop a witness giving evidence about the bugging operation. And Australia uses its domestic intelligence agency ASIO to raid the offices of the lawyer for the other side in an important international negotiation. And so far as we know none of this has anything to do with national security. No-one in their wildest dreams would suggest that Timor Leste was about to invade Australia or was some kind of threat to Australia. So far as observers can ascertain, it seems it was all about securing commercial benefit for Woodside.

Of course this is not the first occasion when our intelligence agencies have run amok. The official histories of ASIO especially the first volume are full of stories of illegal break-ins and illegal bugging. Some will remember the infamous Sheraton Hotel incident when (in 1983) an ASIS operation went badly wrong. ASIS, at that time a secret organization whose existence was not publicly known, had seriously bungled an exercise, apparently a mock rescue of a hypothetical foreign defector from a room in the Sheraton Hotel. The exercise was so secret, ASIS had not even informed hotel staff. ASIS operatives broke down the hotel door with sledge hammers. A hotel staff member who investigated complaints about noise was bundled into a lift and surrounded by ASIS operatives carrying pistols and machine guns. ASIS operatives escaped from the hotel through a kitchen into waiting cars but when stopped by police they refused to provide identification. At that time ASIS had been established administratively as an intelligence and counter terrorism organization but there was no statutory support. It fell to me as a senior public servant to prepare legal advice on the incident for the Prime Minister. I won't go into the detail of the advice I prepared but it would have been obvious to any lawyer that the legal issues were straightforward. ASIS (and ASIS staff) had no immunity from the ordinary law. Activities such as breaking down a hotel room door, carrying high powered weapons and breach of ordinary traffic laws could all constitute offences. What amused me was that as I dictated my advice those instructing me kept on insisting that I must not mention the name of the organization, ASIS, as its very existence was supposed to be secret. My protestations that details of the incident including identification of ASIS had been published on the front page of the National Times were of no avail. Inappropriate secrecy about improper intelligence activities continues.

One may well ask why, some years after the illegal bugging operation, Government has chosen to proceed with prosecution of Collaery and witness K for disclosure. One might have thought that the Government would be so embarrassed by the activities of its intelligence agencies that it would prefer to have everything quietly forgotten.

But the prosecution proceeds. And as we can see from the seizure of documents from lawyer Collaery's legal office, the matter is hardly being pursued in accordance with the highest professional standards.

So how are the proceedings going? Many Canberrans have sought, unsuccessfully to follow the proceedings. My own interest arises in part out of my participation as the legal member of the Australian delegation in several rounds of Timor Gap boundary negotiations between Australia and Indonesia, conducted in both Canberra and Djakarta. I have a longstanding interest in the legal issues. I also have a long standing interest in freedom of information and openness of court proceedings. I have written and lectured about them. Other Australians interested in these proceedings include the strong supporters of Timor Leste. Friends of Timor Leste have demonstrated outside the ACT Magistrate's Court, calling for the proceedings to be dropped.

When it became known that the prosecution of Collaery and Witness K was to be dealt with in the ACT Magistrate's Court on 12 September 2018 I sought to find out where and when the matter was to be heard. The Magistrate's Court publishes, on line, a list of all matters to be heard including the date. Well I thought it was a list of all matters. But I was mistaken. The Collaery and Witness K matter did not appear on the Court's list. On 11 September, I telephoned the Court, asked why the matter was not in the daily list, sought information about the time and location of the hearing and whether it would be open to the public. The response from the court clerk who took the call was that no information could be provided. Protestations that surely I could be provided with basic information such as the time and place of the hearing and whether it would be open to the public were of no avail. Frustrated, I wrote to the Court, repeating my request and drawing to attention that openness in judicial proceedings is an important constitutional principle well established in English and Australian law.

I also wrote to the ACT Attorney-General drawing his attention to the important constitutional principle that courts are open (I wrote to the Attorney-General because in the ACT court staff are departmental officers, ultimately under the control of the Attorney-General, the ACT has never adopted the reforms adopted at Commonwealth level, transferring administrative responsibility for court staff from the executive government to the relevant Chief Justice). Several months later I have not received a response from the Attorney-General. Eventually I did receive a response from the Court, the matter would be heard at 4.15pm on 12 September. Nevertheless one may reasonably ask why was this matter not included in the court's daily list of matters and why did the court clerk initially reply that no information could be provided. Was the Court seeking to shield this matter from public scrutiny at a time when the Court had not made any relevant non disclosure orders?

I and many others attended. In fact the courtroom was full, with many standing in the aisles. As is common for directions hearings, the proceedings were brief. Counsel handed up draft orders to be made by consent and the presiding magistrate (the Chief Magistrate) signed them. The Chief Magistrate did not read out the orders. I do not know whether it is practice in the Magistrates Court to read out consent orders but having regard to the obvious public interest and the packed public galleries reading out the orders would have done much to assuage public concern over the perceived secrecy of the hearing arrangements.

So what next? The media reported the prosecution served its brief of evidence late on 21 December 2018-in fact after the customary Christmas shut down. I haven't seen any further reports. The Magistrate's Court has informed me the matter will next be before the Court for mention on 28 February. Apparently no orders have been made closing the court to the public.

Can the hearing proceed in secret? The prosecution has a substantial hurdle if that is its preferred course. The principle that judicial proceedings are open to the public is well established. There are numerous House of Lords and High Court decisions to that effect. Some will remember the endeavours of that great reforming Attorney-General Lionel Murphy, to provide for family law disputes to be determined in a dignified, quiet, manner away from public scrutiny. Murphy's objective was to stop the daily lurid publication in the tabloid press of the previous day's divorce proceedings. Notwithstanding the obvious social policy objectives in support of family matters being resolved in private, the High Court ruled that the provision was unconstitutional. "The fact that courts of law are

held openly and not in secret is an essential aspect of their character’.

Openness of judicial proceedings is not some abstract legal principle. It is fundamental to the rule of law. It is the hallmark of our judicial system. Open hearings are fundamental to accountability. This is especially so in proceedings where the government or a government agency is a party. It is especially so where wrongdoing on the part of government or a government agency may be in issue. Litigation, civil and criminal, between the state and its citizens, must be open to public scrutiny. The rule of law, the national interest and public confidence in our judicial system require no less. As one eminent High Court Justice has written, the maintenance of public confidence in the independence and impartiality of the judiciary is diminished if the judiciary is involved in secret procedures. Only last week the Chief Justice of New South Wales in his address to the Opening of the Law Term Dinner said that to facilitate scrutiny courts must operate as transparently as possible. In that way they become accountable to the public. Article 14 of the International Covenant on Civil and Political Rights, to which Australia is a party, establishes an entitlement to a ‘fair and public hearing by an independent and impartial tribunal established by law’. By exposing the judicial process to public scrutiny, courts are publicly accountable. Openness is a prerequisite for public confidence in the integrity of the judicial system.

So how could the proceedings be in secret? Commonwealth legislation enables the Attorney-General to issue a certificate to protect national security (defined to include defence, security and international relations interest). The court may then make orders to in effect close the court and restrict access to evidence. The court is not bound by the Attorney-General’s certificate. It must give weight to a number of factors including whether an order would have a substantial adverse effect on the defendant’s right to a fair hearing. Curiously, the public interest in open justice is not identified as one of the criteria. Critically, the court must give greatest weight to the risk of prejudice to national security. It is not known whether the Attorney-General has issued a certificate (although those who have followed the debate over the Attorney-General’s recent action to prevent disclosure of an Auditor-General’s report have little confidence that the Attorney-General will agree to the proceedings going ahead in public) or whether the court has made any orders. Could an Attorney-General’s certificate withstand challenge? Presumably defence interests are not relevant. The bugging operation itself has undoubtedly damaged relations with Timor Leste. But the bugging operation is already in the public domain. It has been the subject of proceedings in an international tribunal.

Disclosure of the bugging operation in these proceedings could scarcely justify an Attorney-General’s certificate. What may not be in the public domain and what may be prejudicial to security interests is how the bugging operation was carried out. Who did it and what techniques did they use. That suggests any certificate and any orders by the Court should be narrowly confined. The legislation makes further provisions relating to legal representatives. Legal representatives who have not been security cleared may not have access to security information in the prosecution case. I do not know whether members of the defence legal team have sought or obtained security clearances. I would however be surprised if counsel and solicitors would subject themselves to such scrutiny in relation to this matter. If Collaery and Witness K were to challenge any Attorney-General’s certificate and any consequential orders to close the court the outcome could be interesting.

And what about the validity of the prosecution itself? The defence may be able to mount a challenge that disclosure of the bugging operation is protected by the constitutional principle of freedom of political communication. The alleged disclosure apparently relates to an unlawful bugging operation undertaken by an Australian authority to advance the commercial interests of Woodside. Australian holders of public office at the time of the operation subsequently accepted appointments with Woodside. Legislation that would purport to prohibit disclosure in the public interest of nefarious activities on the part of Australian authorities arguably conducted to benefit a large business corporation may impermissibly burden the freedom of political communication and be unconstitutional. Applying the tests established by the High Court for constitutional validity, the first question is whether the legislation burdens political communication. The answer is yes. One must then consider whether the burden on the implied freedom is justified, whether it is compatible with our

system of responsible government.

There may well be circumstances where secrecy concerning the activities of intelligence agencies is in the national interest. But secrecy cannot be absolute. Secrecy must not be allowed to protect wrongdoing. There is obviously enormous public interest in apparently improper activities undertaken by Australian authorities to advance commercial interests. Surely citizens should not be at risk of criminal prosecution for exposing improper conduct on the part of security agencies. In one leading case, *Lange*, the High Court unanimously declared 'that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia'.

Any constitutional challenge to this prosecution would need to be mounted in the High Court. Given the attitude of the Commonwealth so far, it seems unlikely that the Commonwealth would provide any legal aid. The defence may not have the financial resources to pursue a High Court challenge. But personal liberty is at stake. The offence carries a substantial jail term. Every available defence should be pursued.

Will Australians be able to find out when and where these proceedings will be heard? How much of these proceedings, if any will be open to the public? Will we be able to hear evidence of illegal bugging operations? Will we hear evidence of the circumstances in which the bugging was disclosed and why? Will the case for a closed court be argued in public or in secret? Will the very basis of the prosecution be challenged? Interesting days lie ahead. Public confidence in our judicial system is at stake.

Ernst Willheim is a Visiting Fellow in the College of Law at the Australian National University. Before his retirement he was a senior officer in the Commonwealth Attorney-General's Department where he headed several policy divisions, established the Office of General Counsel and was its first head, lead numerous Australian delegations to international conferences and appeared as counsel for the Commonwealth in the High Court and other appellate courts. He has published widely on international, constitutional, refugee and indigenous law matters.



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7 Responses to **ERNST WILLHEIM. Secret Trials: The illegal bugging of the Timor Leste Cabinet and the extraordinary prosecution of Bernard Collaery and Witness K**

Andrew (Andy) Alcock says:

8 February 2019 at 11:03 PM

Thank you for a very accurate article about how Australian leaders attempted to cheat Timor-Leste – the poorest nation in SE Asia out of a lot of its oil and gas just after it had suffered 24 years of fascist barbarity at the hands of the genocidal Indonesian military. (TNI)

And during those 24 years, Australian political leaders – both LNP and ALP aided and abetted the TNI by:

- * covering up its crimes
- * supplying it with arms and other military hardware
- * training its personnel
- * acting as apologists for the TNI and the Suharto dictatorship

This dictatorship, by the way, butchered about 3 million of its own people in 1965 when it seized power, has wiped out about 0.5 million West Papuans, about 1/3 of the population of East Timor and thousands in Aceh. The crimes committed by Indonesia were as bad as those committed by the Nazis.

In addition, the TNI has committed and still commits barbaric crimes against humanity – rape, torture, evisceration etc. It also wiped out 80% of East Timor's infrastructure.

It was good that the East Timorese sacrifice during WW2 was mentioned. Because of their support of Australian soldiers, about 40,000 East Timorese were summarily executed by the Japanese military and another 30,000 were killed because they were caught up in the hostilities.

About 70,000 East Timorese out of a total of 500,000 perished and some believe that the Japanese military may not have invaded if the Australians had not done so first.

In comparison, Australia lost 40,000 lives during WW2 out of a total population of 7 million.

Our leaders who betrayed these people in such a way after all they had suffered can only be described as lower lives. Their support of Indonesian fascism has brought untold suffering to the East Timorese, West Papuans, Achenese and Indonesians.

They preach to us about believing in the rule of law, but they don't practice this at all. It is illegal to aid and abet a crime. The Australian leaders who aided the TNI and tried to cheat the East Timorese out of their badly needed resources should be charged in the International Criminal Court with aiding and abetting genocide and crimes against humanity. Of course, I am aware that this will never happen, but we have to work to change our international policies. We need to become independent and non-aligned with nations that commit crimes against others – eg the US, Britain, Indonesia, Israel, Saudi Arabia etc.

And now Christopher wants to sell armaments to Saudi Arabia as it commits war crimes in Yemen and after it has been supporting the terrorist organisations that have devastated Syria.

I am a frequent international traveller and I know that our image in the eyes of other people is very badly tarnished. We must work for a new Australian republic that works in cooperation with other nations for peace, human rights, social justice and effective care of the environment if we want to improve how we are seen in the world.

[Reply](#)

Scott MacWilliam says:

8 February 2019 at 12:38 PM

A Downer said, in an interview on the ABC that as the Australian Minister for Foreign Affairs, of course he was acting on behalf of an Australian company Woodside. Would anyone expect otherwise, asked the Minister? No secret about his motive and motivation. So this sentence could be amended: 'So far as observers can ascertain, it seems it was all about securing commercial benefit for Woodside.'

[Reply](#)

Robin Wingrove says:

7 February 2019 at 8:52 PM

One can only make the assumption that the reason why the current conservative government is prosecuting this case with such energy and secrecy is that if the truth came out about just how high up the malfeasance was then the whole edifice of conservatism within this country would be damned by the very system which it proudly claims to defend. This is not to condemn conservatism, merely those hypocrites and rogues currently hiding behind its skirts within our country.

[Reply](#)

David Brown says:

7 February 2019 at 4:34 PM

our judicial system being bent by corrupt politicians and ex-politicians

so who would vote for Downer's daughter as a representative in parliament?

[Reply](#)

Rex Williams says:

7 February 2019 at 2:24 PM

Ernst

The actions by Australia against and in East Timor and the anticipated actions against Bernard Collaery and 'Witness K' rank as the most disgusting example of the failures of this country.

We have been involved in some shameful activities but our crimes against one of the poorest countries in the world makes me cringe. Over the years I have never been able to find a justification for such actions on any grounds whatsoever and the involvement of people like Downer add to the disgust I feel. How a person like Downer can walk the streets without abuse from the people is beyond my understanding. As for the support of his colleagues in the LCP in this matter, a pox on them all for their acceptance of their actions.

You are right to have written so well on this crime, because that is what is was and what it will remain while this political show trial (hidden from public scrutiny) remains on the books. After that, the stain will remain but like all the other crimes we seem to accept as the norm, (Whitlam's sacking, Korea, Vietnam, the Middle East today, subservience to the hated USA, votes against Palestine at the UN and now Venezuela, just to name a few) history will diminish its impact for future generations.

But from you, an excellent detailed article. A credit to you.

[Reply](#)

Lawry Herron says:

7 February 2019 at 2:06 PM

An important contribution.
Thank you and keep us posted on developments.

[Reply](#)

Rosemary O'Grady says:

7 February 2019 at 1:52 PM

This Australian has been unable to discover the when & where of that trial-pending, and some others are problematic at times, and this type of Commentary is utterly crucial to the maintenance of democracy. Many Thanks.

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