

SPENCER ZIFCAK. The Attorney-General, the ASIS Officer and his Lawyer: The Story of the Shameful Timor Prosecution

Last week the Attorney-General, Christian Porter, announced that he had approved the prosecution of Witness K, a former ASIS operative and his lawyer, Bernard Collaery, a former Attorney-General of the ACT. They are to be prosecuted for a breach of s.39 of the Intelligence Services Act 2001 (Cth). The prosecution arises out of the involvement of Witness K and Collaery in legal disputation between the governments of Australia and Timor-Leste concerning their respective entitlements to revenues from oil and gas fields located in the Timor Sea.

From 2002-2004, the two countries were locked in intense and heated negotiations as to the proper allocation of the oil and gas revenues. That allocation, in turn, depended critically on where the maritime boundary between Timor and Australia should be drawn. As to this, the governments' positions were categorically opposed.

The Timorese Government proposed that the boundary dispute should go to the International Court of Justice for independent determination. The Australian Government responded by withdrawing from the Court's maritime boundary jurisdiction, thus depriving Timor-Leste of the opportunity to pursue its case.

Nevertheless, further negotiations produced an initial agreement as to the division of revenues in that part of the Timor Sea defined as the Joint Petroleum Development Area. There was no agreement, however, as to the relevant maritime boundary upon which the division of the oil revenues from the adjacent, lucrative Sunrise oil and gas field depended.

A first round of talks on this issue was held in Dili between April 19 and 22, 2004. Correspondingly, then Foreign Minister, Alexander Downer, instructed ASIS to undertake surveillance activity in Timor-Leste in order to ascertain the Timorese Government's position as to the location of the maritime boundary and its impact upon the distribution of the potential oil riches from the Sunrise field.

Whether at the behest of the Minister or otherwise, it appears that ASIS operatives posed as aid workers, deployed by Ausaid, who assisted with the construction of the Palacio Governo in Dili. This was the building in which the Timorese Prime Minister and Cabinet held their meetings. During the course of construction, it seems that ASIS agents placed surveillance devices in meeting rooms which allowed ASIS to listen in to Timor-Leste's Cabinet discussions. These included Cabinet's deliberations as to Timor's negotiating position with respect to the maritime boundary and the future carve up of the Greater Sunrise revenues. The Australian Government thereby obtained critical information about Timor's negotiation strategy, providing it with a substantial but hugely unfair advantage in the oil and gas argumentation.

The negotiations continued and, in May 2005, a joint agreement was reached on a formula for revenue sharing from Greater Sunrise. Timor got more money but caved in to Australia's demand that the maritime boundary issue should be indefinitely deferred. Timor's position in those negotiations had been weak, given the parlous state of its economy and the government's pressing need to obtain oil revenues to undertake desperately needed infrastructure development. So, the Government still believed that the agreement reached was very unfair.

In 2007, following the Howard Government's loss at the 2006 election, Alexander Downer obtained a highly paid consultancy with Woodside Petroleum, the company responsible for exploiting the oil and gas reserves in the Timor Sea. This prompted Witness K, who had been part of the ASIS team

engaged in bugging the Timor government's offices, to complain to the Inspector-General of Intelligence about the legality of the operation. The Inspector-General agreed that Witness K's evidence could be disclosed in any related legal proceedings. After that, information as to the Cabinet surveillance operation made its way progressively into the Australian and Timorese media.

In 2013, the Timorese Government briefed Bernard Collaery to represent its interests in relation to the Sunrise dispute. Witness K briefed him defensively as protection from possible repercussions arising from his complaint to the Inspector-General and from any legal action related to disclosures he might make in prospective legal proceedings.

The story gets uglier from there. In 2013, the Timorese government took its concern about Australian surveillance and the commercial disadvantage it had suffered thereby to the Permanent Court of Arbitration in The Hague. It declared that it wished to withdraw from existing treaty commitments, citing the surveillance activity as startling evidence of Australia's bad faith in the conduct of the preceding negotiations as to the maritime boundary matter.

The Timorese Government decided to call Witness K to strengthen its argument at Court. The Australian Government acted quickly. It cancelled his passport to prevent him from leaving the country and providing his evidence. His passport has still not been returned.

Next, the Government raided both Witness K's and Collaery's homes and offices. ASIO agents confiscated troves of documents from Collaery. These documents included an early draft of Witness K's affidavit on the surveillance of Timorese Cabinet deliberations. Further, they included Collaery's legal advice as to Timor's entitlements to areas of the Timor sea and advice as to the strongest legal arguments that Timor might put forward to fortify its claims.

Last week, Christian Porter approved the criminal prosecution of Witness K and Claery, his lawyer, for breaches of the *Intelligence Services Act*. The essential charge is that they conspired to disclose classified information with respect to the activities of ASIS.

Before moving to a consideration of that prosecution, it is worth reflecting for a moment on the illegal activities in which the Australian Government may have engaged. It appears likely that ASIS undertook an act of criminal trespass in Timor-Leste by planting surveillance devices to monitor the Timor Cabinet's deliberations. As in every other democratic country, Timor's Cabinet deliberations are by law secret.

Within the terms of the *UN Convention on Jurisdictional Immunities of States and their Property*, and in customary international law, States and their property are immune from the domestic jurisdiction of another country, whatever its nature. Australia broke international law by raiding Witness K's and Collaery's offices and confiscating documents that were, clearly, documents the property of the Government of Timor-Leste.

In Australia, the law protects legal professional privilege. Communications between lawyer and client are privileged from disclosure in legal proceedings where relevant documents contain clients' instructions to their lawyers and lawyers provide clients with legal advice in accordance with those instructions. By, in effect, stealing Collaery's extensive legal advice to the Timorese Government and Witness K, ASIS transgressed the law underpinning the confidentiality of lawyer-client communications.

It should also be understood that there is nothing in Australian law which would permit Executive Government to initiate activities that are contrary to Australian law or to the law of another sovereign

country. Justice Anthony Mason put an end to the argument that Executive government might condone illegal activity by its intelligence agencies when he said in *A v Hayden*: that:

For the future, the point needs to be made loudly and clearly that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law.

Returning finally to the forthcoming prosecution of Collaery and Witness K, they are charged with having infringed the provisions of s.39 of the *Intelligence Services Act 2001*.

The relevant provision states that a person commits an offence if he or she communicates any information...that relates to the performance by ASIS of its functions, and the information...has come into the possession of the person by reason of his or her being a...staff member of ASIS...or having been an employee of an agent who has entered into a contract...with ASIS.

This looks bad for Witness K and Bernard Collaery except for one thing. In the past twenty five years, the High Court has firmed up its opinion that the Australian Constitution contains an implied freedom of public and political communication. It is quite possible that the Court may find that the terms of s.39 of the *Intelligence Service Act* are cast in such broad terms as to infringe upon that freedom.

That is most likely in circumstances, as here, where a strong public interest in the disclosure of covert and probably illegal activity by ASIS far outweighs any marginal interest related to the protection of national security. Timor-Leste hardly presents any imminent danger to this country.

Should the freedom of political communication argument prevail, Witness K and Bernard Collaery may emerge from the High Court as free speech heroes rather than as villains. It might have been more appropriate if the people in the dock were the former Minister for Foreign Affairs and the former Director of ASIS.

Spencer Zifcak is Allan Myers Professor of Law and former President of Liberty Victoria. He worked with the UN in Timor-Leste between 1999-2004.