

Clinton Fernandes

## **The Witness K case and government secrecy**

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In recent months, I have sat in court as an observer as Canberra lawyer Bernard Collaery has faced charges over disclosing information about the Australian Secret Intelligence Service (ASIS). On Thursday, Collaery's case was back before the Supreme Court of the Australian Capital Territory. It is a good time, then, to consider this case and the national security state's assault on Australia's democratic culture more generally.

In 2004, ASIS installed listening devices in the government offices of newly independent Timor-Leste to eavesdrop on its internal discussions during oil and gas negotiations with Australia. The espionage operation occurred while Alexander Downer and John Howard, who were respectively foreign minister and prime minister at the time, said they were deploying Australia's resources against extremist Muslim terrorism in Indonesia. But the Timor operation diverted precious ASIS resources away from the war on terror. On September 9, 2004, Jemaah Islamiyah terrorists succeeded in bombing the Australian embassy in Indonesia. To make matters worse, the Timor bugging occurred under cover of an aid project, jeopardising the safety of Australian aid workers everywhere.

A senior ASIS officer, known only as Witness K, expressed concerns about the Timor bugging operation. His career is believed to have suffered as a consequence. He approached the inspector-general of intelligence and security and obtained permission to speak with a lawyer – Bernard Collaery. Both men are now on trial: Collaery in the ACT Supreme Court, where he will exercise his constitutional right to a jury trial, and Witness K in the ACT Magistrates Court.

Their conviction will likely be pursued on grounds so narrow that the moral obscenity of the 2004 espionage operation may well be excluded from consideration. But at the time of the bugging operation, Timor-Leste had just one primary economic resource – its oil and gas. The newly independent state had an infant mortality rate more than 20 times higher than Australia's. For every 1000 East Timorese children born, 126 died by the age of five. Tuberculosis was rife – the infection rate more than 122 times higher than in Australia. Timor-Leste's maternal mortality rate was 660 deaths per 100,000 live births. In Australia, it was eight.

Under the Indonesian occupation, moreover, Timor-Leste had suffered the largest loss of life, relative to total population, of any country since the Holocaust. As much as 31 per cent of the population perished. The full extent of Australia's involvement in the Indonesian occupation of Timor-Leste remains classified. The director-general of ASIS has claimed at the Administrative Appeals Tribunal that to even confirm or deny the existence of ASIS records on that topic would harm our security today. As a former Australian Army intelligence officer, I believe national security should be a goal, not an excuse.

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Because Collaery and Witness K may not be able to raise any moral considerations in their defence, they may be left to seek acquittal on legal triviality: subsections in the Criminal Code and the Intelligence Services Act. If the defence is allowed to raise any moral considerations, it will be only after a guilty verdict – if that is the outcome – and only to mitigate their sentences. Likewise for arguments about the Howard government's systematic resort to deceit in using the war on terror to ram draconian laws through parliament, all the while using ASIS to spy on the Timor-Leste government.

Australia's public service conventions ensure that past ASIS operations aren't disclosed to the next government. Thus, Labor's foreign ministers Stephen Smith, Kevin Rudd and Bob Carr weren't "read in" to the ASIS files about the Timor operation. Without Witness K and Collaery, the Howard government could have concealed the entire episode from its successors, and from the Australian public. The episode raises fundamental questions about the limits of a government's legitimate authority. If these questions came before the courts, former ministers might well be in the dock. Instead, the proceedings are aimed at punishing Collaery and Witness K, and implicitly threatening others who might be tempted to speak out.

These prosecutions come at a time of vastly increased powers for police and intelligence agencies, raids on the homes of journalists and news organisations, and the deployment of technologies of mass surveillance. The aim of this power grab must be understood clearly, if it is to be resisted. The national security bureaucracy doesn't want a police state. It is more ambitious than that. The hope is to return Australian culture to the conformity and political quietude of the 1950s.

Beginning in 1952, the defence minister chaired a defence, press and broadcasting committee, whose members included representatives of the media and the government. It issued "D Notices" – denoting Defence information – requesting editors to refrain from publishing information about specified topics. Editors showed great deference to the government's view of what constituted national security. Most journalists did, too; the memory of the Depression spurred their conformist attitudes. They accepted the secrecy surrounding British nuclear proliferation – the polite word is "tests" – despite the damage to the Australian public.

The prevailing domestic culture was also deferential. There was very little public protest during the Korean War. The Royal Australian Air Force's No. 77 Squadron flew barrier patrols to help the United States bomb North Korean cities, mines, industrial plants, hydroelectric stations and dams. Among the war crimes for which the Nuremberg tribunal had sentenced to death Nazi Germany's high commissioner to the Netherlands, Arthur Seyss-Inquart, was opening the dykes and flooding half a million acres of land in order to halt the advance of Allied forces. The US-led dam bombings in North Korea, with Australian planes providing protection, were even more ruinous. But it didn't resonate with the Australian public or media. As the official history of Australia in the Korean War observes, "a powerful anti-war movement of the dimensions of that of the late 1960s was not ready to exploit the political and moral aspects of these operations".

In the '60s, Australian public opinion was consistently pro-war. Anti-war demonstrations were rare and laws against street marches made them all but illegal. Peace activists were often condemned as communist agitators and subjected to harassment, surveillance and arrest. Young men who resisted conscription were sent to prison or went underground to avoid the police.

During the November 1966 election, Labor's then leader, Arthur Calwell, denounced conscription, calling it "the most important issue in this campaign". But Harold Holt, the incumbent prime minister, won – not merely by a landslide but by a bigger margin than Robert Menzies ever had. It wasn't until August 1969 that the first poll favouring a withdrawal of Australian troops from Vietnam appeared. It foreshadowed the emergence of a new generation of journalists who published significant intelligence leaks, starting in 1972 – the last days of the government of William McMahon. This generation had grown up under more affluent conditions than their predecessors. They could pause, examine the arguments for government secrecy and reject them.

The peace movement, feminist movement and early environmental movement had a civilising effect on Australian culture. The public became less willing to support aggression, violence and imperial wars. A few years after Australia withdrew from Vietnam, the national intelligence committee produced an assessment warning that the "growing trend amongst youth [was] to favour humanistic values that commit them to what they consider is the welfare of society as a whole rather than to follow accepted values of the societies in which they live". Such an attitude is anathema to the national security bureaucracy. The D Notice system petered out in 1982. Most journalists exercised their own judgement instead of genuflecting before "Top Secret" markings. As an intelligence officer in the post-D Notice period, I often saw the classified versions of what was published. Although there was no harm to the public, there was anger inside the system, where authoritarian personalities thrive. They were always able to supply worst-case scenarios to argue against disclosure. Interestingly, they usually believed

what they were saying. Now the government seeks to intimidate the media through laws and criminal prosecutions into a deferential posture once more, with editors becoming habituated to asking permission before they publish.

It's been asserted that Collaery and Witness K can't be allowed to act on individual judgements about the morality of their work. That would weaken the intelligence services by encouraging others to follow their lead. But by the same argument, obedience to immoral or illegal orders also encourages others to toe the line meekly and, worse, increases the likelihood that the government will resort to lies and deceit behind the veil of national security. The government has not been held to account for ordering the espionage operation in Timor-Leste in 2004. This trial, in a sense, is about what is more dangerous to Australia – the refusal of citizens to obey immoral or illegal orders, or the use of state power to imprison them while the media are intimidated into silence. Everyone must decide.

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