

Top lawyer says Australia has criminal case to answer over East Timor spying scandal

Steve Cannane – *Lateline ABC* – 26 November 2015

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Nicholas Cowdery QC says the bugging of an East Timorese cabinet office by ASIS was a crime under Australian law.

One of Australia's most senior lawyers believes there is a criminal case to answer over an Australian spying operation in East Timor and that senior intelligence officers, even a former cabinet minister, could face prosecution.

Former New South Wales Director of Public Prosecutions Nicholas Cowdery QC told *Lateline* it is his legal opinion that the bugging of an East Timorese cabinet office by Australia's foreign intelligence service (ASIS) was a crime under Australian law.

"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," he said.

The 2004 spying operation gave Australia the upper-hand in negotiations with East Timor over a treaty to divide the Greater Sunrise oil and gas field, worth an estimated \$40 billion.

Mr Cowdery said if the case went before the Australian courts, senior ASIS officials could face prosecution, and the foreign minister at the time, Alexander Downer, could also be included if he was the one who ordered the bugging.

[Oil, spies and a diplomatic bungle](#)



[Lateline reveals new details about how Australia spied on one of its poorest neighbours in negotiations over an oil and gas field in the Timor Sea worth an estimated \\$40 billion.](#)

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"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," Mr Cowdery said.

"Whether the relevant minister at the time had any direct involvement in the matter? That's something that I'm not clear about."

Mr Cowdery was engaged to provide a legal opinion for Bernard Collaery, the former legal adviser to East Timor.

"It's potentially very serious because this is a relationship between a relatively large, progressive wealthy country, Australia, and its small impoverished, new neighbour," Mr Cowdery said.

"A situation where if a prosecution of that kind can be mounted, then it would demonstrate that Australia was seeking to use its might to secure advantage for itself over its smaller and weaker neighbour."

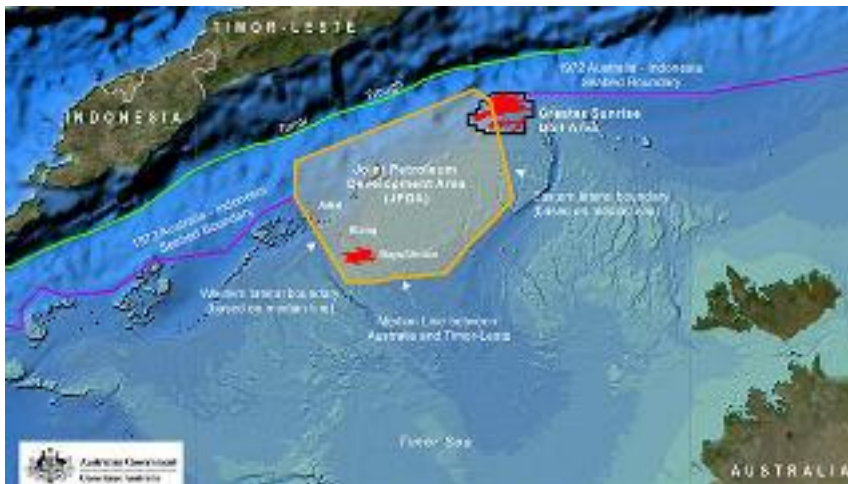
But Ben Saul, Professor of International Law at Sydney University, does not think the case would stack up in an Australian court.

"I think courts would generally accept that bugging is something in the exercise of the proper performance of an intelligence agency. It's core business," he said.

"Just because it's against a poorer neighbour, just because it's directed towards ripping off a country that needs the money more than we do, doesn't mean that it's somehow improper or that it's not potentially in Australia's national economic interests."

'Extraordinary spying shenanigans'

A history of treaties in the Timor Sea



- In 1989 Australia and Indonesia signed the Timor Gap Treaty when East Timor was still under Indonesian occupation.
- East Timor was left with no permanent maritime border and Indonesia and Australia got to share the wealth in what was known as the Timor Gap.
- In 2002 East Timor gained independence and the Timor Sea Treaty was signed, but no permanent maritime border was negotiated.
- East Timor has long argued the border should sit halfway between it and Australia, placing most of the Greater Sunrise oil and gas field in their territory.
- In 2004 East Timor started negotiating with Australia again about the border.
- In 2006 the CMATS treaty was signed, but no permanent border was set, and instead it ruled that revenue from the Greater Sunrise oil and gas field would be split evenly between the two countries.

If a prosecution was launched, it is likely there would 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 defence based on national security could prove interesting, considering many in Australia's military have been angered or surprised by the spying operation.

In 1999 Admiral Chris Barrie as then chief of the Defence Force planned, directed, and commanded the operation to secure East Timor after widespread militia-led violence.

He was surprised by the decision to bug East Timor's cabinet rooms.

"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," he said.

Retired Major-General Peter Phillips, the former national president of the RSL was appalled by Australia's actions.

"Well frankly, I was horrified. I just couldn't believe we would do that to a neighbour that meant so much to us," he said.

"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."

'I have never seen the US do this'

The bugging operation took place under the guise of an Australian aid project, with ASIS spies sneaking into the cabinet room where the East Timorese negotiating team held meetings, to install listening devices.

Peter Galbraith is a former American diplomat and was the lead negotiator for East Timor during the treaty talks with Australia.

He told Lateline the case should be tested in an Australian court.

"I'm not an expert on Australian law, but what is clear is Australia was not doing this for national security reasons, it was doing it for its commercial interests, to help the oil companies and to secure additional revenue for the Treasury," he said.

Mr Galbraith was shocked that Australia would do something as brazen as to bug the cabinet office of a friendly country.

"I spent much of my career as an American diplomat and I can tell you that of course we engage in a lot of espionage, but I have never seen the United States do this for a commercial advantage," he said.

"It's always been for things that fall within what I think almost everybody would agree was national security, combating terrorism, understanding what the Soviets are doing."

East Timor is taking another case over the bugging operation back to the Permanent Court of Arbitration in The Hague, in a bid to have the oil and gas treaty torn up.

Former foreign minister Alexander Downer and former ASIS Director General David Irvine declined to comment to Lateline.

In a statement, Attorney General George Brandis said "the Australian Government does not comment on the operations of our intelligence agencies... Australia's intelligence agencies operate within a robust legal framework under Australian law, and I am confident that they are compliant with those obligations."