

The Conviction and Sentencing of Witness K

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After tormenting the man for years, it became clear that the Australian authorities were willing to, for want of a better word, compromise. The more accurate word would be compromising. Instead of banishing former spy turned bean spiller Witness K to a cell and throwing away the key, there was a preference for a softer, more hypocritical mode of punishment. He would be spared jail time, showing that the national security state can, when it wishes to sit in judgment, show some mercy.

For those familiar with the case, there was nothing merciful in the finding. A punishment had been leveled for exposing an unlawful operation against a friendly and fledgling state. In 2004, Australia's then foreign minister, Alexander Downer, authorised the [bugging of the cabinet offices of Timor-Leste](#) by officers of the Australian Secret Intelligence Services (ASIS).

The surveillance of Timor-Leste's negotiators was an act of economic espionage and fraud, intended to give the Australians the upper hand in discussions between the countries over their maritime boundary. At stake were the oil and gas-rich deposits in the Timor Sea. Unaware of the surveillance operation, the East Timorese went ahead and signed a treaty which distinctly favoured Australia: a 50-50 division of the Greater Sunrise fields.

Eventually, the truth came out. The operation was revealed. Former US ambassador to Croatia, Peter Galbraith, who was the chief negotiator on behalf of the Timor-Leste government, [was stunned](#) by Canberra's commercial rapacity. "The whole experience of the negotiation from 2000 on and through this whole episode was to see a country that – yes, in many ways focuses on the public good – but where corporate greed was a big part of it, because the Howard and Downer government, they were shills for the corporations."

This is where Witness K's role becomes important. As the former [head of technical operations](#) at the agency, he felt sour by the prioritising of resources against Timor-Leste over other security matters. When he became aware of Downer's consultancy with the multinational Woodside, who stood to benefit from a general divvying up of the Greater Sunrise fields, the red mist descended.

Exercised by the matter, Witness K made an internal complaint to the Inspector General of Intelligence and Security (IGIS) about the bugging. Showing how such internal complaint mechanisms only serve to expose the complainant to retribution, Witness K saw his employment terminated. With the consent of the IGIS, Witness K secured the services of an ASIS-approved lawyer and former ACT attorney-general, Bernard Collaery. Collaery did some digging and came [to the conclusion](#) that the espionage operation was not only unlawful but probably a conspiracy to defraud the government of Timor-Leste under section 334 of the Criminal Code.

Timor-Leste, aggrieved by the bugging incident, went to the Permanent Court of Arbitration in The Hague intent on overturning the sham arrangement they had reached with Canberra. In 2013, aided by Collaery's efforts, an invitation was extended to Witness K to give evidence. Disclosures regarding the surveillance operation were made in two affidavits. Alarmed, Australia's attorney-general George Brandis sprang into action. Witness K's passport was canceled. The domestic intelligence service, ASIO, raided the homes of both men.

Brandis flirted with prosecuting both Witness K and Collaery. But it was only in May 2018, a mere two months after Canberra's conclusion of a renegotiated treaty with Timor-Leste, that the Commonwealth Director of Public Prosecutions formally brought charges under [section 39](#) of the *Intelligence Services Act 2001*, which criminalises the communication of any information or matter acquired or prepared by or on behalf of ASIS in connection with its functions or relates to its performance.

Law academic Spencer Zifcak, in [writing](#) about the matter with some horror, saw an "Alice in Wonderland quality about all this" (Kafka would have been more appropriate): the defendants in a criminal case were the very men who "acted in the national interest by disclosing alleged unlawful activity by Australia's intelligence service." The prosecutors were the very individuals who initiated the covert operation.

In 2019, Witness K suggested that he would plead guilty. On June 17, concealed behind a wall of black panels, he formally entered a guilty plea in the ACT Magistrates Court. The next day, magistrate Glenn Theakston [concluded](#) that the former ASIS agent would not face the bars of a prison and would be subject to a 12-month good behaviour bond. Adding his bit to the Alice in Wonderland farce, Theakston claimed that, "It cannot and should not be up to...former staff members to unilaterally depart from those security obligations" though he admitted that this "was not a breach that was going to go hidden for some time." That said, it was "express" and "deliberate." It compromised the agency's effectiveness, safety, and security and jeopardised Australia's relationships and reputations.

While stern and rigid on the letter of the law – the proscriptions regarding ASIS were "strict and absolute" – the magistrate did note that Witness K had been motivated by considerations of justice, not those of personal gain. The former agent's disclosures were part of an effort to participate in a "rules-based order of international relations." (The bitter ironist will detect how this jars with Canberra's incessant babble of about such an order even has it tries to upend it.)

Richard Maidment QC, representing the Commonwealth Director of Public Prosecutions, swatted Witness K's efforts to secure a non-conviction order. His conviction would serve as a lesson of deterrence. Whether it was "appropriate for him to breach the obligations, which had been brought to his attention many times, does not afford him mitigation."

The criminals behind the Timor-Leste operation remain at large. The wrong man was convicted. Senator for South Australia Rex Patrick [released](#) a sombre statement claiming to be "ashamed to be an Australian." Collaery, for his part, has refused to plead guilty. His fate, largely being determined behind closed doors, is likely to be a harsher one.