Lessons from the Bernard Collaery case

By Gareth Evans – *The Saturday Paper* – 15 October 2022

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It is difficult to conceive of a set of government decisions purportedly aimed at protecting Australia's national interests that have been more comprehensively destructive of them than those made by successive Coalition governments in the Timor-Leste case. Everything about the initial espionage operation, if reported at all accurately, and the conduct of the criminal prosecutions involving Bernard Collaery and Witness K that followed it, served not to enhance but to shred our reputation and status as a decent, principled and competent country.

What is required from intelligence agencies, senior officials and their ministers in sensitive national security matters is, above all, balanced judgement. And that seems to have gone spectacularly missing not only in the conduct of the operation in Dili in 2004 but in the decisions made in 2018 to initiate the prosecution of both Witness K and Collaery, and, over the course of the next four years, to run the court proceedings in almost total secrecy. The decision of Attorney-General Mark Dreyfus in July this year to terminate the Collaery case, one of the first made by the incoming Albanese government, was the right thing to do from every moral and rational perspective.

In commenting about what went wrong under the previous governments, and what we can learn from its mistakes, I speak as someone who learnt the hard way. Having had ministerial responsibility over nearly a decade, as attorney-general and later as Foreign Affairs minister, for both the Australian Security Intelligence Organisation (ASIO) and Australian Secret Intelligence Service (ASIS), I was badly burnt politically in my first year in each job for taking too much of their doomsaying at face value. The most painful example of this was the Combe–Ivanov affair in 1983. I also faced backlash for going along with attempts by ASIS in 1988 to get court injunctions against imminent press disclosures of some of the service's more embarrassing activities.

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Both these agencies, and the intelligence community more generally, have become more sophisticated in recent decades as their roles have changed to focus more on counterterrorism, cybersecurity and perhaps more insidious and less comic-strip forms of foreign influence. But all continue to need serious adult supervision.

No intelligence operation should ever be considered unless the value to the national interest of the intelligence being pursued outweighs the damage likely to be done to our international relations and security interests if that operation is ever publicly revealed. No bugging operation of the kind alleged by Witness K could meet that criterion: it would involve taking maximum risk for minimum reward. The operational agencies will always be tempted to mount technical intelligence-gathering operations simply because they can. It is the role of ministers not to encourage them but to keep them under control.

The rationale for whatever operation may have been mounted in Dili in 2004 had nothing to do with national security. It would have been economic: to understand the East Timorese internal position in the negotiations between Australia and Timor-Leste for a petroleum and gas revenue sharing agreement. Any action would have been primarily for the benefit of Australian private commercial interests.

In the unsentimental world of international competition, a prima facie case can be made for securing national economic advantage in any way one can. But the cost-benefit calculation runs wholly the other way in cases where you have a friendly country posing no threat of any kind, with a power imbalance all Australia's way, and any revelation bound to do Australia significant reputational harm internationally.

That potential harm was abundantly clear in 2013, when Timor-Leste, believing that spying had occurred, initiated proceedings to terminate the treaty in the Permanent Court of Arbitration (PCA), with this damage further compounded by the order in the International Court of Justice in 2014 prohibiting the use in that arbitration court case of material seized by ASIO in its raid on Collaery's office.

Overall, any Timor bugging operation along the lines alleged would rank as just as stupidly wrongheaded as the tapping of the private telephones of then Indonesian president Susilo Bambang Yudhoyono and his wife, which was revealed in 2013. I know from direct conversations with his senior ministers in Jakarta at the time that this caused great pain to a government that was strongly pro-Australian, in a country that was and remains an unthreatening, open and democratic society, one in which information flows freely and for all but the most sensitive of issues is available for the asking to a friendly neighbour such as Australia.

Then there is the decision to prosecute. I well understand the argument that absolute institutional discipline must be maintained in relation to our intelligence agencies, and its corollary that this requires legal action be taken against any serving officer or security-cleared associate believed to have disclosed any secret information at all about the operation of any of them. Every case is context-dependent, however, which is why prosecutorial discretion always exists in criminal cases and why the attorney-general of the day should be prepared to exercise it when appropriate.

There are multiple grounds why that discretion should have been exercised here, by the Director of Public Prosecutions in the first instance or by the attorney-general overriding him, in relation to both Witness K and Bernard Collaery.

It is clear the motivation of Collaery, like Witness K, was not to aid an enemy or adversary but to call out alleged official activity they saw as ill-advised and unconscionable. The public allegations did not name or otherwise put at risk any individual intelligence officers and did not describe any operational methodology different from that universally assumed to be standard practice for intelligence agencies.

The prosecutions were launched six years after the disclosures first entered the public domain and 14 years after the actual events. They gave new life to the reputational damage already suffered internationally by Australia in the PCA and International Court of Justice cases. It was obvious they would again tear open the old bilateral wounds between Timor-Leste and Australia, which had been partially healed by the passage of time and the later negotiation of new treaty arrangements more acceptable to Dili.

George Brandis, as attorney-general from 2013-17, was acutely aware of all these realities and, wisely if not very bravely, chose the path of inaction in pursuing the prosecutions. It was Christian Porter, and his successor Michaelia Cash, who chose to set the trial proceedings in motion. They should have had more sense.

In insisting that every phase of the Collaery trial, in particular, should be conducted in the most extreme secrecy, the Morrison government utterly failed to understand or accept the centrality of open justice to the credibility, both domestically and internationally, of our judicial system. In acting as a witness in the proceedings contesting that secrecy, I fully understood and accepted that no one could seriously object to particular evidence relating to intelligence matters being kept from the public domain. But keeping effectively almost the entire case secret was indefensible. Quite apart from anything else, this exposed the government to credible claims that it was being

employed, in the words of Justice David Mossop, “as a cover to protect from disclosure in a trial material which is merely politically embarrassing to a government or to avoid legitimate scrutiny of its conduct”. (While His Honour was evidently not persuaded that anything so vulgar or untoward had occurred here, many objective observers remain less convinced.)

The key point that I sought to make as a witness in the case, drawing on my own decades of experience in international affairs, was that the government and its intelligence community witnesses were wildly over-inflating the risks to national security interests that would be posed by more open hearings.

All of my oral evidence was in closed court, and two of my three affidavits were secret, so I cannot address those aspects of the case. But in my open affidavit, where I assumed the reported facts to be true rather than false, I argued that if any disclosures in court did not extend to really sensitive intelligence matters, such as the identification of individual personnel or non-routine surveillance methodology, no new damage would be done to Australia’s national security or international relations beyond the reputational damage that had already occurred from the allegations becoming public.

I added that, in my experience, disclosure that a sensitive but essentially routine surveillance operation has taken place, in the kind of cases where a government is not widely seen to be misusing its intelligence-gathering capability, would not normally generate particularly adverse consequences for a state so caught out.

In my affidavit I gave the example of having to cope, as Foreign Affairs minister in 1995, with press disclosure of a successful bugging operation by ASIO almost a decade earlier in the course of construction of the new Chinese embassy in Canberra. I feared the worst but there was in fact negligible reaction from the Chinese government or any other state: it was a familiar game that everyone played.

My bottom line was that if the impact of embarrassing evidence in this kind of case being canvassed in open court is to ensure that more intelligent cost-benefit calculations are made in the future – weighing the likely returns of any such operation against the risk of its later revelation – that would be to enhance, not diminish, our national security and international relations interests.

These arguments fell on largely deaf ears at that stage of the court proceedings. But they clearly weighed with the new attorney-general in his decision to bring to an end Bernard Collaery’s protracted nightmare.

It is never easy for any government to reverse course in a high-profile issue, and the Morrison government seemed to find it impossible. But here, as elsewhere, the oldest lesson of all is that if you have dug a hole for yourself, and it is getting bigger, the wisest course is to stop digging.

A version of this piece was presented at a Gilbert + Tobin seminar in Sydney. The piece assumes the reported facts in the case are accurate – although the government has never confirmed this. The author did not draw on any special knowledge from his involvement as a witness in proceedings.

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