

**IN THE MAGISTRATES COURT OF THE  
AUSTRALIAN CAPITAL TERRITORY  
CRIMINAL JURISDICTION**

**Peter Dean**

And

**WITNESS K**

**SUMMARY OF FACTS**

**CHARGES**

1. Witness K has pleaded guilty to the offence of conspiracy to communicate ASIS information between about 1 February 2013 and 20 November 2013 in the Australian Capital Territory and/ or elsewhere contrary to section 11.5 of the *Criminal Code* (Cth) and section 39 of the *Intelligence Services Act 2001* (Cth). The maximum penalty for the offence is 12 months' imprisonment.

**BACKGROUND – EMPLOYMENT OF WITNESS K & SECRECY OBLIGATIONS**

2. On                      Witness K, as an employee of another government agency, was briefed to have access to ASIS information.                      Witness K signed a security declaration and his attention was drawn to the application of sections 70(1) and 70(2) of the *Crimes Act 1914* (Cth) and his obligation to safeguard information concerning the sources of intelligence, the identity of ASIS personnel, its method and operations, and to discuss ASIS information only with persons who have current authorisation to access the information.
3. On                      Witness K commenced employment with ASIS as a fixed term employee. On 1 December 1999, he signed an employment agreement as well as a secrecy agreement which was signed on 1 December 1999. The secrecy agreement included an undertaking not to disclose ASIS information, and brought to his attention the application of offences in the *Crimes Act 1914*.
4. On 29 October 2001, the *Intelligence Services Act 2001* ('the *IS Act*') came into operation. On 17 December 2001, a written brief was provided to all ASIS staff, including Witness K, outlining aspects of the legislation and advice on the new offences under sections 39 and 41 of the *IS Act* relating to the

unauthorised communication of ASIS information and the unauthorised publication of the identity of ASIS staff members. ASIS records show that Witness K accessed this written brief on 3 January 2002. Witness K also attended training in relation to the *IS Act* on 26 February 2004, which included training in relation to the application of sections 39 and 41 of the *IS Act*.

5. On 4 January 2002, Witness K signed a new employment agreement with ASIS as an ongoing employee. He also signed a new secrecy agreement which set out his security and secrecy obligations and the application of the *IS Act* and the *Crimes Act 1914*.
6. As a result of his security briefings and secrecy agreements, Witness K:
  - a. knew his employment was subject to him signing a secrecy agreement, complying with the secrecy agreement, and complying with all other obligations regarding secrecy or confidentiality imposed on him;
  - b. knew his secrecy obligations continued after the end of his employment with ASIS; and
  - c. was aware of the offences which arose under the *IS Act* for the unauthorised communication of ASIS information and the unauthorised publication of the identity of ASIS staff members.

**12.** The Inspector-General of Intelligence and Security (IGIS) is an independent statutory office holder appointed pursuant to section 6 of the *Inspector-General of Intelligence and Security Act 1986* (Cth), who reviews the activities of agencies including ASIS. The IGIS can investigate any matter pertaining to the legality or propriety of all of the activities conducted by ASIS including: complaints about ASIS's compliance with the laws of the Commonwealth, State and Territories, directions or guidelines provided by the responsible minister, or the propriety of particular activities. The IGIS can also investigate matters pertaining to staff grievance processes.

**13.** The former Inspectors-General of Intelligence and Security, Mr Ian Carnell and Dr Vivian Thom, did not receive and have no record of any complaint from any serving or former ASIS staff members about any alleged Australian Government activities undertaken in Timor-Leste.

## APPLICATION FOR PROMOTION AND COMPLAINT TO IGIS

14. On 24 June 2005, whilst acting in the position, Witness K applied for promotion to the position of \_\_\_\_\_ but was unsuccessful. Witness K subsequently made a complaint to the ASIS Ombudsman on 14 October 2005, stating that he was set up for humiliation and was overlooked for promotion because of age discrimination on the part of ASIS. The ASIS Ombudsman wrote to the Director-General of ASIS outlining Witness K's complaint (along with that of another applicant), and making comments to the effect that there should have been better communication before the selection process took place.
15. Sometime in 2005, Witness K confided in Sandra Keating (a staff member with ASIS) about a workplace grievance. On 21 October 2005 Witness K commenced a period of sick leave. This period of leave continued until he was issued with an invalidity retirement certificate by the Commonwealth Superannuation Scheme and he was retired from ASIS with effect from \_\_\_\_\_.
16. On \_\_\_\_\_ Witness K participated in a separation interview with ASIS staff member Sandra Keating. Witness K was reminded that his security undertakings previously signed by him were still in force even after leaving ASIS, including existing security undertakings and obligations under the *IS Act* and *Crimes Act 1914*. The following day, Witness K reconfirmed his secrecy obligations, when his access to certain compartmentalised information was rescinded. He signed 8 debriefing forms, acknowledging that he continued to be bound by the *Crimes Act* and agreeing not to communicate the relevant information. Witness K also signed a delisting form in which he acknowledged the application of offences in the *Crimes Act* and the *IS Act* to the communication of any protected information about ASIS, and undertook to maintain the secrecy of ASIS information.
17. During the separation interview, Witness K expressed disappointment about being overlooked for promotion, and stated that he had no feedback from the selection panel other than a phone call telling him he was unsuccessful and "*that they wanted a younger person.*" He did not raise any grievances relating to ASIS operations that he may have undertaken.
18. On 25 March 2008, Witness K wrote to the IGIS, Ian Carnell, requesting that he pursue an inquiry into "*my concerns*". On 12 May 2008 Witness K again wrote to the IGIS, setting out the detail of his concerns which related to the selection process he was involved in. Witness K said "*As a result of the selection process that I was involved in, I found myself totally consumed by the injustice of the*

*manner in which the process was handled”, and that he was unable to work or face any situation which placed stress upon him. He requested that his solicitor, Mr Collaery, receive the necessary briefing so that Collaery could assist Witness K with the preparation of his submission for the inquiry. Witness K also wrote “I remain aware of my security obligations and await your advice that Mr Collaery has been briefed”.*

#### ASIS briefings for Bernard Collaery to act for Witness K

19. On 29 May 2008, ASIS staff member James Cheyne attended the office of Collaery. Approval had been given by ASIS to brief Collaery so that he could act for Witness K in relation to a complaint to the IGIS concerning the selection exercise, as well as for another ASIS staff member in relation to an unrelated matter. Collaery was provided with briefing information consistent with ASIS briefing guidelines, regarding the receipt of ASIS information and secrecy requirements. Collaery was advised that information about ASIS was protected information under the *IS Act*, and told that the officers would not be able to discuss with him other aspects of their ASIS work which were not related to their claims.
20. Mr Cheyne was advised that Witness K’s complaint to the IGIS related to a personal grievance in connection with his dissatisfaction with an internal promotion round and restructure of the                      branch in which he worked. Collaery was also advised that neither he nor the ASIS officers could discuss these matters with any other persons who did not have an appropriate security clearance, briefing, and a ‘need to know’. Collaery was also advised that IGIS had full independent powers to access information about ASIS and that Witness K could approach IGIS or his office at any time.
21. Collaery indicated that he understood these obligations and spoke of his previous interactions with intelligence agencies. Collaery was provided extracts of sections 39 and 41 of the *IS Act*, and on 29 May 2008, he signed a secrecy undertaking document in which he confirmed that he had perused and understood sections 39(1) and 41(1) of the *IS Act*, and he undertook not to disclose or communicate any protected information in circumstances which would constitute an offence against sections 39(1) and 41(1) of the *IS Act* or against any other law.
22. On 28 August 2008 the IGIS Ian Carnell wrote to the Director-General of ASIS enclosing a report which had been sent to the Minister for Foreign Affairs summarising the complaints about ASIS handled by the IGIS by way of preliminary inquiry or administratively during the 2007/2008 financial year. The entry which concerns the complaint by Witness K (referred to as ‘ASIS3’)

lists it as a 'watching brief' and states that the complaint relates to *"concerns about a purportedly corrupted selection process and issues associated with their separation from the Service...ASIS3 has retained a lawyer but not as yet provided this office with any additional information. IGIS will not take this matter further unless ASIS3 provides the information which has been requested."*

23. On 17 February 2010 John Rover of ASIS conducted a further security briefing with Collaery in relation to an unrelated matter. Mr Rover reminded Collaery of his security obligations including the disclosure and communication of certain information pursuant to sections 39 and 41 of the *IS Act*. Collaery stated the requirements were clear to him.

#### **COUNT 1 – CONSPIRACY TO COMMUNICATE ASIS INFORMATION**

24. On 5 December 2012, the Prime Minister of the Democratic Republic of Timor-Leste wrote a letter to the Prime Minister of Australia regarding the Timor Sea Treaty, which included:

25. On 26 February 2013 Collaery wrote to Witness K enclosing copies of:

- a. The letter dated 5 December 2012 from the Prime Minister of the Democratic Republic of Timor-Leste.
- b. A letter dated 12 December 2012 from the Prime Minister of Australia to the Prime Minister of the Democratic Republic of Timor-Leste.

26. The letter from Collaery to Witness K stated, amongst other things:

- a. That Witness K will not secure justice by making submissions to the IGIS and he has very limited common law prospects for a lawsuit; and that an ex gratia payment is his *"best chance"* but *"money for your lost career is not your objective. It is vindications and I set about for you a process of vindication"*.

- b. *"The interlocking issues are that you seek a remedy through the scope of the Timor-Leste Government to have an independent inquiry into the actions that you most disapproved of, namely the activities of your clandestine mission in Timor-Leste that had nothing to do with national security and was principally serving commercial interests exterior to the national interest."*
- c. *"You seek a remedy.... I have told you that I cannot find you a remedy that would generate an independent and searching inquiry into the conduct of the Australian Government with respect to its use of ASIS in Dili outside its proper function"*
- d. *"... The Prime Minister of Timor-Leste has dealt judiciously, prudently and carefully with the information with respect to the unlawful and improper activities of the Australian government."*
- e. *"... I was troubled for some considerable time about the knowledge you unwittingly passed to me in my dual role as adviser to the Timor -Lest Government."*
- f. *"I have no difficulty whatsoever in pursuing the interests of Timor-Leste over this issue"*
- g. *"...I have no conflict of interest in representing the two interests."*
- h. *"... it will be necessary to provide greater detail than has been provided to date."*

27. On 23 April 2013 the Republic of Timor-Leste instituted arbitral proceedings in the Permanent Court of Arbitration against the Commonwealth of Australia, alleging the negotiated Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) was invalid because Australia failed to conduct the treaty negotiations in good faith by engaging in espionage. Collaery was involved as a legal adviser to Timor-Leste, and the information and evidence of Witness K was central to the Timor-Leste case.

28. In a joint media release issued on 3 May 2013 by the then Attorney-General of Australia, Mr Mark Dreyfus, and the then Minister for Foreign Affairs, Mr Bob Carr, it was confirmed that arbitral proceedings in relation to CMATS had been initiated by Timor-Leste against Australia. Extensive media reporting occurred following this confirmation of the arbitral proceedings by the Australian government.

29. On 29 May 2013 commentary from Collaery was aired on ABC Radio (PM with Mark Colvin). Collaery identified himself as part of the Timor-Leste litigation team and made public statements asserting that ASIS had engaged in certain acts in Timor-Leste.
30. In May 2013 the Australian Secret Intelligence Organisation (ASIO) commenced an investigation into a potential breach of security, including possible acts of espionage or foreign interference.
31. On 3 December 2013 ASIO executed search warrants, issued under section 25 of the *Australian Security Intelligence Organisation Act 1979 (Cth)*, on the home of Witness K, and on the office and home of Collaery. Items were seized from both premises by ASIO.
32. During the execution of the search warrant at Witness K's premises, the letter from the Collaery to Witness K dated 26 February 2013 and the two enclosed prime ministerial letters were found in the handbag of Witness K's wife.
33. Also at Witness K's premises in a camera tripod bag in the hallway linen cupboard, a signed copy of an affidavit was found and seized. The affidavit was dated as having been signed on 7 May 2013, and the header read "*In the matter of an arbitration between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*" ('the May 2013 Affidavit').
34. Witness K used his name in the May 2013 affidavit, identifying himself as a former staff member of ASIS, and the affidavit included information which relates to the performance by ASIS of its functions. The affidavit is generally consistent with the statements later made to the media by Collaery. Witness K made two handwritten amendments to the Affidavit, being an alteration to the date, which was changed from the 6<sup>th</sup> of May 2013 to the 7<sup>th</sup> of May 2013, and an alteration to his address on page 1. Witness K signed the affidavit on 7 May 2013. Collaery signed the Affidavit as a witness to Witness K signing the document.
35. On 20 November 2013 Witness K signed a further affidavit ('the November 2013 affidavit'). This affidavit was a further version of the May 2013 affidavit. Collaery signed the affidavit as a Witness to Witness K signing the document.
36. It is alleged that Collaery and Witness K conspired to communicate information

which relates to the performance by ASIS of its functions to the government of Timor-Leste **(Count 1)**.



38. Commentary made by Alfredo Pires, Minister, Petroleum and Mineral Resources, Timor-Leste, during the ABC 4 Corners program confirms that upon receipt of the information, Timor-Leste undertook an investigation to confirm the accuracy of the information provided to the Timor-Leste Government. Timor-Leste claimed that their investigation confirmed the bugging operation in Timor-Leste occurred, and that they had identified those ASIS officers involved in the operation.

#### **NO APPROVAL TO COMMUNICATE ASIS INFORMATION**

39. Approval has never been given by ASIS or the Commonwealth to Witness K or Collaery to disclose to any employee or associate of Collaery, to other lawyers, to the Government of Timor-Leste (including its officials or representatives), to any person associated with the Permanent Court of Arbitration in the Hague, to the ad hoc Arbitral Tribunal established to hear the matter between East Timor and Australia, or to the public:

- a. That Witness K was a staff member of ASIS;
- b. Information which could reveal the identity of a current or former ASIS staff member; or
- c. Information relating to the performance by ASIS of its functions, or that had been prepared by or on behalf of ASIS in connection with its functions.

40. On 13 December 2013 the Australian Federal Police (AFP) received a referral for investigation from ASIO.

41. On 10 July 2014, a section 3E *Crimes Act 1914* search warrant was executed by the AFP on the premises of ASIO in the ACT. AFP seized property from ASIO which had been seized from Witness K's premises on 3 December 2013, including the affidavit dated 7 May 2013.

42. On 30 May 2018, Collaery and Witness K were each served with an information and Summons.

## INJURY, LOSS OR DAMAGE

### Security protocols and complaints and grievance protocols

43. Witness K and Collaery's conspiracy to disclose ASIS information has undermined the credibility of security protocols, which depend on ASIS staff not taking it upon themselves to determine whether and if so how sensitive information is to be disclosed.
44. Witness K and Collaery's conspiracy to disclose ASIS information has undermined existing complaints and grievance protocols, which provide a secure and formal avenue for ASIS staff to resolve their concerns in relation to ASIS matters.
45. It is not possible to quantify the injury, loss or damage constituted by the matters in paragraphs 43 and 44 above.

### Morale

46. Witness K and Collaery's conspiracy to disclose ASIS information has caused some ASIS staff to express a sense of betrayal of trust, because ASIS staff operate in secret without public recognition for their work.
47. Some \_\_\_\_\_ have expressed concern that their identities could have been identified if the conspiracy led to actual disclosures.

### Potential injury, loss or damage from conspiracy

48. That an ASIS staff member would conspire to disclose ASIS information had the potential to damage ASIS's foreign liaison relationships, which are built on trust that information \_\_\_\_\_ will be kept confidential.
- 49.
50. It is not possible to quantify the potential injury, loss or damage constituted by the matters in paragraphs 48 and 49 above.

### Risks created

51. Witness K and Collaery's conspiracy to disclose ASIS information created a risk of actual disclosure of ASIS information. Such disclosure, had it occurred, could have resulted in the following injury, loss or damage:
- a.

- b.
- c.
- d. reluctance on the part of new agents to join ASIS  
due to the possibility of future disclosures contrary to security protocols
- e. adversaries and foreign powers may analyse information disclosed as a result of the conspiracy as part of a mosaic analysis to the detriment of Australia's national interests  
and
- f. the disclosure of Witness K's identity could put him and other former and current ASIS staff members who could be linked to him at risk of being a target for adversaries.

**19 May 2021**