

Commonwealth prosecutors wrong on Witness K case, former NSW DPP says

Nicholas Cowdery doubts the prosecution of Bernard Collaery and Witness K is in the public interest and believes it could undermine confidence in the justice system

By Christopher Knaus in the Guardian, 31 March 2021

The former New South Wales director of public prosecutions, Nicholas Cowdery, has slammed the prosecution of lawyer Bernard Collaery and Witness K, saying the case undermines confidence in the justice system, and commonwealth prosecutors were wrong to deem it in the public interest.

Speaking during an [online event](#) held by the Australian National University on Wednesday, Cowdery said Witness K and Collaery were being prosecuted for exposing the “harm the government did in our name”.

“The wrong parties are being prosecuted,” he said.

Collaery and Witness K, a former Australian Secret Intelligence Service officer, are being [pursued through the courts](#) for their role in exposing a bugging operation against an ally, Timor-Leste, for commercial gain during sensitive oil and gas negotiations in 2004. The pair’s actions helped Timor-Leste mount a case against Australia in The Hague, which eventually led to a renegotiation between the two nations, and a better deal for Timor-Leste.

After the new deal was completed, the Australian government launched prosecutions of both Witness K and Collaery for allegedly disclosing intelligence information.

The prosecutions required the Commonwealth Director of Public Prosecutions to deem the case in the public interest. They also required [sign-off from the then attorney general](#) Christian Porter.

Cowdery, the NSW DPP from 1994 to 2011, said the CDPP was wrong to deem the prosecutions in the public interest. In fact, he said, the prosecutions served to undermine confidence in the justice system.

“Both are being prosecuted in a way that serves to undermine the community’s confidence in the criminal justice process, without which it is weakened and may fail,” he said.

“What messages does that send to the public? That we should always turn a blind eye to official misconduct? That if we do blow the whistle, we can expect no support – and worse – from the authorities?”

“Rather than these prosecutions serving the public interest, in my view they harm the public interest. We the electors of the commonwealth have a right to know if our government has done the wrong thing in our name.”

He said it was also “seriously concerning” that the attorney general, a member of the same party in power at time of the 2004 bugging operation, was able to exercise discretion to give his consent to the prosecutions.

“What happened to independent prosecution?” he said.

Cowdery said the problems with the prosecutions had only been compounded by the [secrecy surrounding the proceedings](#).

The Human Rights Law Centre senior lawyer Kieran Pender said there were “strong grounds” to believe Australia’s bugging operation contravened international law.

The government was attempting, he said, to shroud the case in secrecy so it could admit secretly to a court that it bugged Timor-Leste to aid its prosecution, while publicly refusing to confirm or deny such a proposition.

“That raises profound constitutional and democratic concerns,” he said.

Pender said the cases exposed the failure of federal whistleblowing law, which gives no proper protection to intelligence whistleblowers.

“The failure of federal whistleblowing law to adequately protect intelligence whistleblowers, and the message the Morrison government sends to all whistleblowers when it prosecutes Witness K and Bernard Collaery, is chilling,” he said. “Don’t speak up, this government says. When whistleblowers suffer, our democracy suffers.”

Rebecca Ananian-Welsh, a legal academic with the University of Queensland, said the prosecutions were both “jaw-dropping” and “unsurprising”, and spoke of the creeping secrecy across Australia’s court system, by virtue of the national security information act (NSI act) and other state laws designed to target organised crime and outlaw motorcycle gangs.

Ananian-Welsh’s law career began with government, working on developing the NSI act. The NSI act is being used in both the Witness K and Bernard Collaery prosecutions to keep material and parts of the proceedings secret. It has frequently led to journalists, and by extension the public, being excluded from observing both cases.

Ananian-Welsh said the act, introduced in 2004, amid the global war on terror, was designed to allow the use of protected intelligence information in the prosecution of terrorists.

“K and Collaery are decidedly not terrorists and personally I don’t think they qualify as ‘dangerous’ individuals,” she said.

Pauline Wright, the NSW Council for Civil Liberties president and former Law Council of Australia president, revealed that the Law Council had attempted to secure “observer” status for the cases, to monitor the application of the NSI act in the proceedings. The ACT courts refused.