

## Dan Oakes, Witness K and Bernard Collaery

By Ian Cunliffe in Pearls and Irritations, 23 October 2020

*Dear Commonwealth Director of Public Prosecutions, please demonstrate that the decisions whether or not to prosecute, and the decisions to continue the prosecutions of Collaery and K, are not influenced by possible political advantage, disadvantage or embarrassment to the Government. Please apply the Prosecution Policy to the facts in front of you, uninfluenced by what Porter and the Government so obviously want. Do your lawful duty! Drop the prosecutions!*

The very belated but welcome decision by the Commonwealth Director of Public Prosecutions (CDPP) that she will not prosecute ABC investigative journalist Dan Oakes for bringing to the public's attention that their Special Forces military allegedly murdered numerous people in Afghanistan raises important questions.

The CDPP, Ms Sarah McNaughton, has apparently not made any statement in the matter. Rather the Australian Federal Police (AFP) made a fairly opaque statement on 15 October 2020 (reordered here for the sake of clarity):

*"The CDPP determined the public interest does not require a prosecution in the particular circumstances of this case. In determining whether the matter should be prosecuted, the CDPP considered a range of public interest factors, including the role of public interest journalism in Australia's democracy."*

The CDPP's website includes the "Prosecution Policy of the Commonwealth" (the Prosecution Policy). The website says:

*"the Policy ... underpins all of the decisions made by the CDPP throughout the prosecution process and promotes consistency in decision making. ... The Prosecution Policy outlines the relevant factors and considerations which are taken into account when our prosecutors are exercising their discretion. The Prosecution Policy also serves to inform the public and practitioners of the principles which guide the decisions made by the CDPP. ... The decision to prosecute must not be influenced by any political advantage or disadvantage to the Government."*

The Prosecution Policy itself, inclusive of attachments, runs to 25 printed pages and more than 13,000 words. What does it tell us?

First, that the pivotal test is whether "the public interest requires a prosecution to be pursued".

The parts of the Prosecution Policy most relevant to this article follow in italics:

*"The decision whether or not to prosecute is the most important step in the prosecution process. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system .... the objectives [of fairness and consistency] are of particular importance."*

The Prosecution Policy emphasises that the cost of prosecuting a case is an important consideration: *"The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases."*

*A decision whether or not to prosecute must clearly not be influenced by possible political advantage, disadvantage or embarrassment to the Government or on the personal or professional circumstances of those responsible for the prosecution decision.*

*The Policy lists factors which can properly be taken into account in deciding whether the public interest requires a prosecution. These include:*

*(a) the seriousness of the alleged offence*

*(d) the alleged offender's antecedents and background*

*(e) the passage of time since the alleged offence*

*(g) the effect on community harmony and public confidence in the administration of justice*

*(i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute*

*(k) the prevalence of the alleged offence and the need for deterrence, both personal and general*

*(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive*

*(m) whether the alleged offence is of considerable public concern*

*(q) the likely length and expense of a trial; and*

*(u) the necessity to maintain public confidence in the rule of law and the administration of justice through the institutions of democratic governance including the Parliament and the Courts.*

In the absence of any statement of reasons from the CDPP, we are left to guess at the factors which have led to the decision not to prosecute Dan Oakes. The possible charges were certainly serious in terms of the penalties they carry. They were also matters of high controversy in the community, playing into the widespread concern that the Commonwealth is quick to kill the messenger, but not to punish the person whose guilt is the subject of the message – in this case, special forces who as members of the Australian military allegedly murdered multiple people in Afghanistan. Any criminal case against Oakes would, however, likely have been fairly simple, and accordingly, short.

### **Collaery, Witness K, and the Prosecution Policy**

What does the Oakes decision tell us about the conduct of the prosecution in the cases of Witness K and Bernard Collaery? The prosecution of Oakes will now not commence. Those of K and Collaery are advanced, although apparently still have a long way to run. However, the Prosecution Policy emphasizes that cases should be kept under continuous review: "New evidence or information may become available which makes it no longer appropriate for the prosecution to proceed."

How do the above factors from the Prosecution Policy apply in the cases of K and Collaery?

They are charged with *serious offences*.

What of the alleged offender's *antecedents and background*? Collaery is a person of impeccable antecedents and background. So apparently is K.

A little oddly, three of the 18 factors which the Prosecution Policy lists seem to overlap: *the effect on community harmony and public confidence in the administration of justice; whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute; and the necessity to maintain public confidence in the rule of law and the administration of justice through the institutions of democratic governance including the Parliament and the Courts*. I will deal with these three factors together.

All the concern which has been expressed about the K and Collaery cases seems to be that the prosecutions are inappropriate, and of the way they are being conducted and treated – rather than public support being expressed in favour of the prosecutions.

*Crikey* has described the prosecution as a vexatious pursuit of Collaery by Attorney-General Christian Porter. It has reported on “bizarre secrecy orders [sought by the Commonwealth] that would see Collaery prosecuted, with the risk of jail, using documents that neither he nor his legal team, nor the jury, would even be allowed to see”.

As with Oakes, in fact probably more so, there has been a large amount of community consternation that in relation to K and Collaery, the Commonwealth is seeking to kill the messenger, but not to punish the people whose guilt is the subject of the message – in their case, Ministers of the Crown and senior officials who are credibly alleged to have committed very serious criminal offences by planning and authorising illegal bugging of the Timor-Leste Cabinet to gain commercial advantage for Woodside Petroleum. There is widespread belief in the community that the prosecutions of K and Collaery are politically motivated – specifically, to avoid embarrassment to the Government by punishing those who embarrassed it.

A separate but related point is that, in order to prosecute K and Collaery, the prosecution is resorting to approaches which, in the view of many credible and even conservative observers, involve serious attacks on the Rule of Law and on the deeply entrenched Australian tradition of fairness in the conduct of criminal trials. These approaches not only affect the reputation of the Attorney-General, they also bring the Commonwealth DPP into disrepute, and seriously risk also bringing the courts in which the prosecutions are being conducted into disrepute. These matters collectively have a real potential to very seriously and adversely affect community harmony and public confidence in the administration of justice, and to bring the law into disrepute, particularly in a prosecution which is seen by many to be politically motivated. Because of the secrecy of the trials, we know virtually nothing of the obstacles being put in K’s path. We get limited glimpses of what is happening in Collaery’s proceedings. Those glimpses include that the charges against Collaery don’t identify – even to Collaery himself – what secret he is alleged to have disclosed.

Much has been made in Collaery’s case about the enormous risk that his trial will result in serious disclosure of security and intelligence information which will do great harm to Australia. However, the risk that a prosecution will lead to Australia’s national security being put in jeopardy is not a factor explicitly listed in the Prosecution Policy. But surely it is a relevant consideration for the CDPP in deciding whether the prosecution should be discontinued. Justice Mossop said in a recent decision in relation to Collaery that “[w]hen and how that prejudice will occur [in the event that the national security material which will be before the court in the case is disclosed] and how grave it will be is impossible to identify with certainty”.

Another listed factor in the Prosecution Policy is the *prevalence* of the alleged offence and the need for deterrence, both personal and general. The alleged crimes of K and Collaery arise out of quite unique circumstances – K having been apparently the senior technical person in Australian Secret Intelligence Service (ASIS) – who was ordered to do the Timor-Leste bugging operation, and his grave concern when he became aware that the fruits of that bugging were being used to advance the commercial interests of Woodside Petroleum, and that both the then Secretary of the responsible Department (Foreign Affairs and Trade (DFAT)) – Ashton Calvert) and its Minister, Alexander Downer shortly thereafter were put on the Woodside payroll. Calvert became a Director of the company and Downer, when he left Parliament, became a highly paid consultant to Woodside. K sought and was granted permission by the Inspector-General and Security to get legal advice and representation from Collaery in relation to issues arising out of his concerns about what was going on. The “prevalence” of those circumstances would seem to be nil.

Another listed factor is whether the *consequences of any resulting conviction would be unduly harsh and oppressive*. If found guilty, both K and Collaery are liable to imprisonment. Collaery is 76. K is presumably getting towards the usual retirement age. Both have gone through a personal hell. Will they – should they – be sent to prison?

The likely *length and expense* of a trial is listed as another factor listed by the Prosecution Policy. Figures released by the Commonwealth at the 12 month mark of the prosecution – at the start of June this year – were that more than \$2 million had been spent by the Commonwealth on *external* legal costs in the prosecutions of K and Collaery. So that figure does not include the time and energies of the CDPP and the Commonwealth Attorney-General's Department on the case.

The prosecution of Collaery is nowhere near completed. Indeed, a lot has happened in the four and a half months since the \$2 million figure for the cost of external barristers was released. That figure has probably grown to \$3 million by now, and will likely double before any jury decision. That represents a very large proportion of CDPP's external spend each year.

Expense alone would seem to strongly favour the CDPP discontinuing the prosecution of Collaery – and probably also of K. Or is the Prosecution Policy just all words, signifying nothing (to paraphrase the Bard). Do the factors all count for nothing against the obvious determination of Christian Porter – and presumably other Ministers – to punish Collaery and K. Against such determination, does the much touted and statutorily entrenched independence of the Director of Public Prosecutions stand for anything?

As the Prosecution Policy for the Commonwealth emphasizes: “A decision whether or not to prosecute must clearly not be influenced by possible political advantage, disadvantage or embarrassment to the Government”. The CDPP was appointed by the present Government after she came to its apparently favourable attention as Counsel Assisting the highly political Dyson Heydon Royal Commission into trade unions.

I end with a plea: Dear Commonwealth Director of Public Prosecutions, please demonstrate that the decisions whether or not to prosecute, and the decisions to continue the prosecutions of Collaery and K, are not influenced by possible political advantage, disadvantage or embarrassment to the Government. Please apply the Prosecution Policy to the facts in front of you, uninfluenced by what Porter and the Government so obviously want. Do your lawful duty! Drop the prosecutions!



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