Drop the Collaery Prosecution: An Interview With the Human Rights Law Centre's Kieran Pender

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Bernard Collaery was back before the courts on Wednesday, as attorney general Michaelia Cash had her lawyers arguing that she wants to introduce new "super-secret" evidence that's so sensitive in nature that the ACT barrister wouldn't be able to look over it himself.

According to the Guardian, this new evidence purportedly shows why it would be a national security risk to hear the barrister's case in open court. And Cash is suggesting that a government hired lawyer could peruse the details on Collaery's behalf.

This new line of argument comes just a month after Collaery successfully appealed a mid-2020 court ruling that his case should be held behind closed doors, after former attorney general Christian Porter exercised national security powers that enabled the case to be shrouded in secrecy.

Collaery is facing five counts of conspiring to disclose ASIS information in connection with its functions, contrary to section 39 of the Intelligence Services Act 2001 (Cth). This disclosure is in relation to the Howard government having illegally bugged Timor-Leste cabinet offices.

Inconvenient truths

In 2008, former ASIS officer Witness K went to the Inspector General of Intelligence and Security over a work dispute. And his complaint included the details of the 2004 bugging operation, which aimed to give Australia the upper hand in oil and gas treaty negotiations with East Timor.

K had been in charge of the operation. And the inspector recommended he speak to ASIS-approved lawyer Collaery. Fast forward to 2013, and just as K was about to join Collaery at the Hague to testify against Australia on behalf of East Timor, ASIO raided both men's Canberra premises.

However, the Coalition government did not greenlight the prosecution of both K and Collaery until mid-2018, about six months after Christian Porter became the nation's chief lawmaker. And not only did he approve the cases to proceed, but he applied never before used secrecy powers.

In its mid-October judgement summary, the ACT Court of Appeal outlined that concerns around the "very real risk of damage to public confidence in the administration of justice" trumped the "risk of prejudice to national security". So, the secrecy measures were lifted.

Opaque justice

The Court of Appeal further emphasised that it's important criminal trials take place in open court as it deters political prosecutions. And it remitted the matter to primary judge ACT Justice David Mossop to consider further matters not yet put by the attorney general.

The Coalition is now reeling over the prospect of Collaery's case proceeding in open court. And Cash has had her lawyers arguing for parts of the transcript of the recent appeal judgement to be withheld from the public, and there's even talk of her taking this matter to the High Court.

Sydney Criminal Lawyers spoke to Human Rights Law Centre senior lawyer Kieran Pender about the secrecy shrouding the Collaery case, why the Australian public should be concerned about whistleblower prosecutions and the national security laws permitting all this to happen.

Human Rights Law Centre senior lawyer Kieran Pender

Attorney general Michaelia Cash currently has lawyers arguing to have parts of the appeal court ruling that saw the lifting of secrecy measures relating Collaery's case be withheld from the public.

It would seem most of the cat is out of the bag in relation to the 2004 bugging operation. The ACT Court of Appeal has ruled there's no reason to keep these matters secret.

In your opinion, Kieran, why is the government so keen to see all matters relating to the Collaery case kept secret?

The Human Rights Law Centre finds it concerning that the attorney general is seeking to have broad secrecy applied to the prosecution of Bernard Collaery.

In our view, there is no public interest in prosecuting whistleblowers, and even less public interest in prosecuting whistleblowers behind closed doors.

We welcomed the recent decision of the ACT Court of Appeal to insist that the majority of the trial of Mr Collaery has to be heard in open court.

And it was particularly powerful of the court to mention the risk if it was to be held otherwise, as public confidence in the court would be eroded and it would open the door to political prosecutions.

Unfortunately, we still haven't seen the judgement. We've only had a brief summary published by the court. And it remains a matter of contention between the parties as to how much of that judgement is going to be redacted.

I understand it was supposed to be handed down last week. And the attorney general has threatened to appeal to the High Court, which is rather remarkable when it is in relation to an interlocutory decision, about how much of the judgement should be redacted.

We wait to see what the court actually said. But it's certainly a very promising development in this case – that the court has insisted that most of it be heard in public – particularly when the apparent motive of the attorney general is to ensure secrecy in relation to the underlying subject matter.

In the first instance decision, Justice Mossop effectively said the attorney general was seeking this order so they can maintain a position of neither confirm nor deny.

What that means when you unpack it is to successfully prosecute Collaery the Commonwealth Director of Public Prosecutions will have to demonstrate that Australia did spy on East Timor.

But the government's position is that it will neither confirm nor deny that. So, it seems that they want to use secrecy to admit in closed court that Australia did spy on East Timor, while continuing to neither confirm nor deny it publicly.

That's an extremely concerning use of secrecy – to subvert the truth in relation to the Australian population at large – and it's very promising that the Court of Appeal has reached the position that it has.

As you've mentioned, the Court of Appeal found it's important to keep cases like Collaery's open as it prevents political prosecutions.

There are a number of prosecutions currently before the courts that have been labelled political in nature.

Why is it important that such prosecutions don't go ahead?

Political prosecutions are the hallmark of an authoritarian regime, not a robust liberal democracy, like Australia.

In principle, Australia has an independent prosecutorial system, where the prosecutor makes decisions independent of government.

But what we're seeing in cases like Collaery's is an unfortunate blurring of those lines. So, we have a situation where the attorney general was required to give consent to the prosecution.

Now, the former attorney general George Brandis did not give consent. It sat on his desk, as I understand, for most of his term.

When the subsequent attorney general took over from George Brandis, he then approved the prosecution. So, in a way, the egg – the political nature of this prosecution – was scrambled when the matter was approved by then attorney general Christian Porter.

The problem is the attorney general retains the ability under law to discontinue a prosecution, but, most recently, in estimates, current attorney general Michaelia Cash has repeatedly said that she refuses to discontinue the prosecution because that would amount to political interference.

That in a sense is true. We don't want the government discontinuing prosecutions, but the problem here is they permitted the prosecution to go ahead in the first place.

So, once the egg is scrambled, the question is how to unscramble it without making things worse.

The Commonwealth Director of Public Prosecutions retains the ability to discontinue a prosecution at any time.

So, that's why the Human Rights Law Centre has been calling on the CDPP to exercise that discretion.

It is our firm view that there's no public interest in prosecuting whistleblowers. And therefore, this prosecution should not be going ahead.

At the time ASIO raided Witness K and Collaery in 2013, George Brandis was attorney general and, as you've pointed out, he chose not to prosecute.

It wasn't until mid-2018, five years later, that then new attorney general Christian Porter gave the go ahead to the prosecutions, and he exercised national security powers never used before to shroud the cases in secrecy.

How do you consider the delay in the decision, as well as the first time use of these secrecy measures?

Ultimately, the way the approval took place is problematic. And it speaks to the need for clearer prosecutorial guidelines.

For example, following the raids on the ABC and Annika Smethurst, we saw then attorney general Christian Porter introduce some changes that required his approval before such things can take place in the future.

That was marketed by the federal government as an added layer of safeguard. But, in effect, it just adds a layer of politicisation.

So, what we need to see moving forward is prosecutorial safeguards and guidelines that recognise the importance of press freedom and the importance of whistleblowing that go above and beyond the ordinary public interest test.

There is a reason we shouldn't prosecute whistleblowers. There is a reason we shouldn't prosecute journalists. And that's because they play a particularly important role in our democracy.

It's important that it's taken into account by prosecutors. So, we would call for specific prosecutorial guidelines to recognise that situation.

But Collaery and K are not alone. Along with their prosecutions, those of David McBride and Richard Boyle have cropped up at the same time.

Why is this all happening at once? And why should it be of concern for the Australian public?

It's definitely an unfortunate coincidence that all of these prosecutions are taking place at the same time. It speaks to a few things.

Firstly, it speaks to whistleblowing law that's not fit for purpose. In the case of Bernard Collaery and Witness K, the Public Interest Disclosure Act – the federal whistleblowing law – provides no ability for intelligence whistleblowers to speak publicly.

There is no safety valve at all. Even if intelligence officers witness the gravest of human rights violations, and feel that they're not being adequately dealt with internally, they're unable to go public.

So, that is a problematic limitation in the legislation.

Similarly, in the case of David McBride and Richard Boyle – the alleged war crimes whistleblower and the tax office whistleblower respectively – both of them tried to do the right thing.

They followed the Public Interest Disclosure Act. They went up the chain internally, but that didn't work. Then, ultimately, they went public only when the internal disclosure failed.

Now, that's what the PID Act says to do. So, the fact that both of them are now on trial suggests that the PID Act is not working.

The PID Act is not sufficiently robust and the safeguards against prosecution are not particularly strong, when two people who tried to do the right thing in blowing the whistle, according to law, subsequently end up on trial.

That speaks to a need for whistleblowing reform. And it's deeply concerning that the federal government has sat on whistleblowing law for over five years now.

In July 2016, the independent Moss review told the government that the experience of whistleblowers under the PID Act was not a happy one and that the law needed reform.

They sat on that for many years. And last December, just before Christmas, they released their belated response. The government accepted the recommendations and said that they would implement them, and another year later we still haven't seen the draft of those changes.

Yet, all the while, the government has ratcheted up secrecy laws and continues to oversee these whistleblower prosecutions that, indeed, in the cases of Bernard Collaery and Witness K, it explicitly approved going ahead.

We've got a situation where the government continues to put the cart before the horse. We need stronger whistleblowing laws, and we need them now, because whistleblowers make Australia a better place and they should be protected, not punished and certainly not prosecuted.

And lastly, Kieran, the powers exercised by Porter in relation to the Collaery and K cases are only the tip of the iceberg in terms of the mass of national security laws that have been enacted over the last two decades.

How do the political prosecutions that are taking place reflect on this wider situation?

Since 9/11, Australia has seen almost unprecedented expansion of our national security state and the laws that underpin it.

Since 9/11, we've had almost 100 pieces of national security legislation enacted, with often insufficient safeguards.

To give an example, the NSI Act – which is governing the layers of secrecy in the cases of Collaery, Witness K and David McBride – was enacted to address problems that had arisen out of the prosecution of a spy in the early 2000s, and also, with a view to terrorist prosecutions following 9/11.

That was the context in which it was enacted. And yet, we've seen in the case of Witness J, an intelligence officer, who was charged, gaoled and prosecuted in complete secrecy.

We only found out about that case as a result of a fortunate coincidence.

This suggests that the laws that were rapidly enacted lack sufficient safeguards, and often have unintended consequences.

I suspect that if you ask those who drafted the NSI Act in 2004, the idea of a fully secret trial would have been unthinkable, and yet that was the consequence of these overbroad laws that are then applied in situations to an end that was perhaps not anticipated.

It is promising that the NSI Act, and the relevant section that led to the Witness J secret trial, is currently under review by the Independent National Security Legislation Monitor.

But it points to a wider problem in Australia, which is a lack of fundamental protections for our human rights. We don't have a charter of human rights and freedoms in our constitution or in federal law.

What that means is that laws that impinge on our rights are not checked automatically by a wider rights protection framework.

If we don't deal specific rights protections into each and every law, we have situations like the Witness J secret trial and the ongoing prosecutions of whistleblowers that potentially in other jurisdictions would fall foul of more fundamental laws than statutory whistleblowing laws.

So, that points clearly to the need for a charter of rights to be enacted under federal law at a fundamental level.

Then, more specifically, we need reform to whistleblowing law and to secrecy law and stronger prosecutorial guidelines that reflect the public interest in whistleblowing and in journalism.

Those things are all critically important because, ultimately, journalists and whistleblowers make Australia a better place, and when we prosecute them, we are undermining our very democracy.