

Guilty parties remain free in ‘chilling’ Witness K prosecution

Naomi Neilson 5 April 2021

Prominent legal professionals have argued that the prosecution of Witness K and Bernard Collaery is targeted at the wrong people and has served only to keep the guilty parties “seemingly above the law” and out of reach of public scrutiny.

A cohort of leading lawyers including former NSW Director of Public Prosecutions and immediate past president of the Law Council of Australia has slammed the Morrison government and former attorney-general Christian Porter for pursuing a prosecution intended to secure “payback for embarrassment” to the Coalition.

Delivering his verdict during an online event hosted by the Australian National University, barrister and former Director of Public Prosecutions Nicholas Cowdery said that while crimes are prosecuted to punish those who cause harm, “here those being persecuted are people who exposed harm the government did in our name” and that, due to their embarrassment, “the wrong parties are being prosecuted”.

In Witness K’s case, he is being prosecuted for actions done after he sought permission from the Inspector-General of Intelligence, who consented to him talking to lawyer Bernard Collaery about his role in the bugging of Timor-Leste. Despite this, both are prosecuted in a way that Mr Cowdery said, “serves to undermine the community’s confidence in the criminal justice process”, which may fail.

“What message 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, they harm the public interest,” Mr Cowdery said. “We the elector of the Commonwealth have a right to know if our government has done the wrong thing.”

Mr Cowdery said it is “seriously concerning” that Mr Porter – as a member of the cabinet and as a member of the same party that was in power during the reported events – could hold the role of approving the prosecution and lobbying for the trials to be held in secrecy, despite the critical practice of open justice.

Human Rights Law Centre senior lawyer Kieran Pender said that the prosecutions are having a “chilling effect” on Australians who witness wrongdoing and are considering speaking up. It also raises concerns about the prosecutions because of a long-standing legal rule that there can be no secrecy around wrongdoing.

“The failure of federal whistleblowing laws to adequately protect intelligence whistleblowers, and the message the Morrison government sends to all whistleblowers when it prosecutes Witness K and Mr Collaery, is chilling,” Mr Pender said. “When whistleblowers suffer, our democracy suffers.”

Through the extent that the *NSI Act* requires the case to be conducted behind closed doors “offends the basis of open justice,” said Law Council former president Pauline Wright. She added that justice must take place in the open, especially when the case itself deals with freedom of speech, open justice and equality before the law.

“Secrecy or suppression is only ever appropriate in carefully considered, exceptional cases,” Ms Wright said, adding that the “avoidance of public embarrassment is not sufficient justification to warrant secrecy”, especially as, to date, there has been no credible evidence of Australia being under threat if the trial is held in open court.

Ms Wright mirrored Mr Cowdery in condemning the people who had actually carried out the bugging and are “seemingly above the law” while the government focuses its attention on Witness K and Mr Collaery. She said that these attacks on lawyers doing their job are a “dangerous threat on the fundamental tenant” of justice.

Ms Wright also took aim at Mr Porter who should have used his responsibilities to ensure that Australian justice operated apolitically. She also criticised the opposition who have yet to take a stand against the prosecution because of their own gains.

“There’s a really important role that oppositions play in holding the government of the day to account, but where you have a silent opposition that doesn’t call out these bad laws, that don’t challenge them, that doesn’t oppose them robustly because it perhaps thinks it wants to use them one day when they are in power, that whole system of governmental accountability gets out of whack,” Ms Wright said.

Ms Wright added it is why lawyers have an important role in the future of the prosecution and the future of secrecy in matters of national security.

“We should be standing up and defending the balance of those powers. We’re attacked for doing our jobs. The justice system rests on a free foundation. When we are under attack, the whole system comes under attack. We have got to defend it,” she said.