Politicians and Prosecutions

Susan Connelly – *Pearls and Irritations* – 16 December 2020

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Straining gnats and swallowing camels is not reserved for biblical Pharisees. Australians in the 21st-century witness pious adherence to matters that have certain importance, but which are secondary to, and meant to serve, the great human principles of 'justice, mercy, good faith' (Matt. 23:23-24).

A striking example occurred on Monday 30 November 2020, when Andrew Wilkie MP moved for a debate about David McBride, whose concerns between 2014 and 2016 about the misconduct of some Australian troops in Afghanistan were ignored by authorities but are reflected in the recent Brereton Report. Mr Wilkie referred to the similar situations of Witness K and Bernard Collaery. These men are accused of disclosing information between 2008 and 2013 about the 2004 Australian government spying on Timor-Leste, and both face jail.

Attorney-General Christian Porter and Richard Marles, Deputy Leader of the Opposition, argued against having a debate, citing the independence of the Commonwealth Director of Public Prosecutions (CDPP), the separation of powers, and the dangers of political intervention in criminal prosecutions. The McBride motion was rejected 43 votes to 5.

How does the 'separation of powers' operate in the prosecutions of Witness K and Bernard Collaery? Unlike ordinary criminal cases, these prosecutions are directly connected to the unlawful activity of a previous Coalition government which planned, ordered, and materially supported espionage against Timor-Leste, a poorer and weaker neighbour just emerging from a brutal occupation. Politicians and department heads decided to commit acts of fraud on this new trading partner with whom they had promised 'good faith' treaty negotiations. They directed government agencies to overstep their proper functions and engage in unlawful activity. The spying was a political decision.

The difficulty of separating political and prosecuting powers is great in this case, as the political party responsible for the spying now forms the government and supplies the nation with its Attorney-General. It is true that Commonwealth policy requires the CDPP to initiate prosecutions as part of its responsibility under the criminal justice system. Yet the Attorney-General's consent was required for the prosecutions to take place under the National Security Information Act (NSIA), a situation not required for most criminal cases. The consent was given by the current Attorney-General within five months of his assuming office, despite the previous A-G's reluctance to commence prosecutions.

It is intriguing that the Director, Ms Sarah McNaughton SC, applied to the Attorney-General for consent to file charges on 19 March 2018, up to ten years after the alleged crimes took place, but a mere two weeks after the finalisation of the maritime boundary between Australia and Timor-Leste, on 6 March 2018. To what extent was legal action separate from political issues in that timing decision?

The politician who is now the First Law Officer of the Commonwealth has extensive legal power: he could discontinue the cases under Section 71 of the Judiciary Act. Regarding Mr McBride, the Attorney-General said that it would be 'utterly extraordinary' to employ this hitherto unused power. Increasingly outraged Australians think it far more extraordinary that over $3 million dollars of their money are being used to finance the prosecutions of Witness K and Bernard Collaery to conceal government wrongdoing. The power given to the Attorney in the Judiciary Act exists precisely for this type of situation. The choice not to exercise that power is clearly political.

This costly political process is secretive. The NSIA allows that evidence can be withheld not only from the public but from the accused, the defence team and witnesses for the defence. It is not even clear that a *jury* would be given access to all the evidence. Additionally, the NSIA requires that 'national security', as determined by the Attorney-General, be given greater weight than any other consideration. The threat thus posed to foundational principles of law, such as open justice and fairness, are of concern to many in the legal profession, including the Law Council of Australia.

Witness K and Bernard Collaery are Australians of great integrity and courage. In their regard, Australians can choose either to be dazzled by the political games of gnat-straining and camel-swallowing or demand the open justice that would place responsibility for the Australia/Timor-Leste debacle where it rightly belongs.