



COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION  
COMMITTEE

**Estimates**

(Public)

TUESDAY, 26 OCTOBER 2021

CANBERRA

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**LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE****Tuesday, 26 October 2021**

**Members in attendance:** Senators Carr, Cox, Faruqi [by video link], Griff [by video link], Grogan, Henderson, McAllister, McKim [by audio link], Molan, Patrick, Rice, Scarr, Dean Smith, Steele-John [by video link], Thorpe [by video link], Van, Waters [by audio link], Watt.

**ATTORNEY-GENERAL'S PORTFOLIO****In Attendance**

Senator Cash, Attorney-General, Minister for Industrial Relations

Senator Stoker, Assistant Minister to the Attorney-General, Assistant Minister for Industrial Relations, Assistant Minister for Women

**Attorney-General's Department****Commonwealth Director of Public Prosecutions**

Ms Sarah McNaughton, Director (Interstate)

Mr Scott Bruckard, Acting Commonwealth Solicitor (Interstate)

Mr James Carter, Deputy Director, International Assistance and Specialist Agencies

Ms Sabeena Oberoi, Chief Corporate Officer, Enabling Services Group

Mr John Barnes, Acting Chief Financial Officer

**Proceedings suspended 12:36 to 13:39 Commonw**

**Senator KIM CARR:** I will pursue a couple of matters that I have raised on previous occasions concerning the Bernard Collaery issue and Witness K. I understand that it has been confirmed that the Commonwealth prosecution in this matter has now cost \$3,670,379.91; that's correct, isn't it?

**Ms McNaughton:** Not the prosecution, with respect. Our costs are quite different to that. Our internal costs are \$501,607 and our external costs are \$110,304.

**Senator KIM CARR:** Does the Commonwealth DPP consider that you have sufficient resources to investigate and proceed with all the prosecution briefs that come before you in a timely manner, as well as having sufficient contingency set aside for any major matters that may come before you requiring substantial additional resources?

**Ms McNaughton:** We don't investigate. Our role is to prosecute. In the short term we have sufficient resources. Some of our funding measures end at certain times, so there's a little bit of uncertainty there. They do normally get renewed, but we feel we have sufficient resources in the short term to do our work in a timely fashion.

**Senator KIM CARR:** It invariably means, though, that you have to set some priorities. Would that be a fair description?

**Ms McNaughton:** We have a target of 90 days for all our brief assessment matters, so we try to progress our matters as much as we can and not prioritise in that sense. We try to give all our matters priority.

**Senator KIM CARR:** They're all of equal priority, are they? Is that what you're suggesting?

**Ms McNaughton:** Because we are operating through the state and territory courts in the main, and to a small extent in the Federal Court, we clearly have court deadlines that we have to work towards. We clearly have issues such as terrorism matters et cetera which may have particular urgency at particular times. But we do try to conduct our duties in a fair and equal manner, yes.

**Senator KIM CARR:** I've been particularly concerned about the cases of Bernard Collaery and Witness K for some time. I notice that this month the ACT Court of Appeal overturned a ruling in that matter. Is it correct that the Commonwealth has intervened at several stages to argue for greater secrecy in the prosecution of Witness K and Bernard Collaery?

**Ms McNaughton:** It's very important to define what the Commonwealth means in this context. The Commonwealth DPP is my office. Then there's the Commonwealth attorney, and they have certainly intervened in relation to the issues of what is appropriate to keep out of the public sphere. So there are various aspects in matters involving national security which require an assessment as to what is appropriate and what is not appropriate.

**Senator KIM CARR:** Many commentators have suggested that the interventions, though, did in fact originate from the Attorney-General's office. Is that assessment correct?

**Ms McNaughton:** That's the role that they take in relation to matters under the National Security Information (Criminal and Civil Proceedings) Act 2004. And it's a role that is regularly performed in matters concerning national security, for example. It's certainly not unique to the Collaery and Witness K matter. Can I also footnote that Witness K has concluded, and—

**Senator KIM CARR:** I understand that. I've just noticed in the press reporting that, in the Collaery case: ... the court cited the importance of open justice in preventing 'political prosecutions', allowing scrutiny of prosecutors, and giving the public the ability to assess an accused's conduct.

Do you think that's a fair description of the court's ruling?

**Ms McNaughton:** That is part of the court's ruling, as I understand it. Well, it's part of the summary. I don't believe that the full ruling is public yet. It is our view, though, that the prosecution of Mr Collaery should be in the public eye as much as possible.

**Senator KIM CARR:** Sure. So you would agree with the principle of open justice? It's not an absolute requirement, but it is a vital principle in our justice system. Beyond that, it's essential to our concepts of democracy.

**Ms McNaughton:** It's a terribly important concept, and, of course there's a balance in all matters involving terrorism, national security or the like. There is a balance to be struck, and it's where that balance falls.

**Senator KIM CARR:** At the previous estimates, I raised some issues in regard to the prosecution policy of the Commonwealth DPP. The policy provides a two-stage test which must be satisfied for a prosecution to commence. The first is that there is sufficient evidence to prosecute the case, and the second is that the prosecution must be in the public interest. Do you recall that discussion at the last estimates, back in May?

**Ms McNaughton:** Yes. I wasn't present, but my colleague Mr Bruckard was. And, yes, I have heard that evidence.

**Senator KIM CARR:** I notice that the court decision spared Witness K a prison sentence. It was a three-month suspended sentence and a 12-month good behaviour order. The ACT court took into account that he was unlawfully revealing confidential information about Australia's action in East Timor, and Witness K, the magistrate said, was 'motivated by a desire for justice rather than for any personal gain'. Similar matters were, I think, canvassed in regard to Collaery defending himself against the charges. It's about understanding that Collaery is not the primary offender, and he's been charged only in relation to his actions in representing Witness K as his lawyer. That's correct, isn't it?

**Ms McNaughton:** It's hard to summarise it in as few words as those. I suppose it's proper to say that Collaery's involvement came about during the course of him being a lawyer in relation to Witness K.

**Senator KIM CARR:** Remember that we did canvass this whole issue about what is the nature of public interest in terms of your responsibility. The public interest must have been considered in this matter—you made that clear—but I think the office conceded that it did not consider the broader public interest in regard to prosecution and what damage it was doing to Australia's relations with East Timor. Would that be correct?

**Ms McNaughton:** Yes. Can I also reiterate—as I've said this at a previous estimates as well—that the prosecution policy also contains clause 2.13:

... a decision whether or not to prosecute must clearly not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- (b) personal feelings concerning the alleged offender or the victim;
- (c) possible political advantage or disadvantage to the Government or any political group or party; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

That's part of the prosecution policy, too.

**Senator KIM CARR:** I agree. You did also confirm, though, that it's possible for the Director of Public Prosecutions to discontinue a prosecution if it's no longer in the public interest to proceed. In fact, you're obliged to do so. Is that also correct?

**Ms McNaughton:** Absolutely, yes. That is correct.

**Senator KIM CARR:** I was wondering if we could go through that. I asked back in May for you to take on notice whether the Attorney-General, whose consent was required to commence these prosecutions, could also withdraw her consent in the prosecution of Mr Collaery, at which point it would cease. I don't recall—did we get an answer on that?

**Ms McNaughton:** The Attorney, I understand, provided an answer.

**Senator KIM CARR:** There was an answer, was there?

**Ms Chidgey:** Yes, we did provide an answer to that question.

**Senator KIM CARR:** Alright. I'll get our assistants here to dig that out for me. I just want to be clear about how this works, then. I'm just wondering how it remains in the public interest given these following propositions. I'll put these to you and you tell me. There's been a lack of progress in the prosecution, with no trial date apparently set, despite the prosecution having commenced almost three years ago now and there being dozens of hearings. There's been an enormous and continuing expenditure of limited Commonwealth resources on this matter, in excess of nearly \$5 million with the various costs involved. These prosecutions, in fact, go to matters concerning events that occurred 17 years ago and relate to allegations that implicate senior members of the Howard Liberal government in wrongdoing. Noting that, having pleaded guilty, the primary offender in these matters, Witness K, was given a three-month suspended sentence, which has already concluded, and a 12-month good behaviour bond, which the ACT court acknowledged when he unlawfully revealed confidential information about Australia's actions in East Timor. Witness K, it was stated, was motivated by a desire for justice rather than any personal gain. Noting that there's been no suggestion that Mr Collaery, who is a respected lawyer and former Deputy Chief Minister and Attorney-General in the Australian Capital Territory and who will turn 74 this year, poses any threat to the country. Given that the court found in relation to Witness K there was no suggestion Mr Collaery was motivated by personal gain in any of his actions, how is it that there's a continued public interest in the prosecution of Mr Collaery given those circumstances?

**Ms McNaughton:** First of all, with respect, I can't confirm some of those circumstances you've put. But I do accept that there is delay in this matter. Part of that delay is because of the particular nature of the matter involving national security matters and also the pandemic. So that has been some of the delay in the last few years. The matter of public interest is a complex one. It is one where a whole lot of matters are balanced by our office. We continue to review matters, whether or not they're in the public interest, and we have determined, on the material known to us and the seriousness of the alleged conduct, that it remains in the public interest to proceed. Given the matter is before the court, it's not appropriate for me to comment further.

**CHAIR:** Senator Carr, we will need to move to other senators. Could you perhaps wrap up with this last question?

**Senator KIM CARR:** I've asked the Attorney-General this. Given those circumstances, and given some of the other actions that the government's taken in regard to court action on robodebt and various other things, there's a remarkable double standard here, surely?

How do you see it? Is there a continuing public interest served by ongoing prosecution in this matter?

**Senator Cash:** As the Commonwealth Director of Public Prosecutions has stated, the matter is currently still before the court, so we do need to be very careful in what we say. But you would be aware—because you have prosecuted this at a number of estimates and obviously you've made statements in the Senate as well—the CDPP considered the briefs of evidence and made an independent decision that a prosecution was appropriate having regard to the prosecution policy of the Commonwealth. In relation to your further question, I would refer you back to the evidence that has just been given by Ms McNaughton in her capacity as the Commonwealth Director of Public Prosecutions.

**CHAIR:** Thanks, Attorney. I give the call to Senator McKim, who is attending by video link.

**Senator McKIM:** Good afternoon to the witnesses. Ms McNaughton, I want to explore a similar issue to Senator Carr. I note that you've confirmed to Senator Carr that there is the capacity for the DPP to make a decision to discontinue a prosecution if it is in the public interest that that occur. Could you confirm, please, that in your consideration of that matter, you are considering all 24 criteria that are listed in regards to public interest in the prosecution policy?

**Ms McNaughton:** In relation to that, they're non-exhaustive matters, first of all. There are matters in addition to that which will always be taken into account. I don't know whether they all apply, so, we consider those matters which we believe are relevant.

**Senator McKIM:** I'm happy for you to take this next question on notice so you can think about it and have some time to consider it. Could you please provide the committee with a list of which of those matters you do believe are relevant in your consideration of whether it is in the public interest to continue with Mr Collaery's prosecution? Could you also please provide the committee, on notice, with any other considerations that you have applied that are not listed in that non-exhaustive list?

**Ms McNaughton:** As we are all aware, this is a matter which is before the court. For me to start discussing various matters which go to my decision on whether or not to institute a prosecution, when the matter is before the courts as to whether or not the matter is made out, is, with respect, a matter where I would claim public interest immunity.

**Senator McKIM:** Alright. I look forward to you providing a detailed claim for public interest immunity in writing so that it can be considered by this committee and, potentially, the Senate, ultimately. On the face of it, I can't see how you justifying that it is in the public interest to continue this prosecution could possibly compromise, in any way, proceedings before the court. So I do look forward to you providing that public interest immunity claim in writing.

I want to put to you—and I may get the same response—the comments from the ACT Chief Justice when a ruling was made to overturn a decision of the trial judge that some of the relevant material in Mr Collaery's trial should remain classified. The Chief Justice of the ACT said:

... there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed.

Is public confidence in the administration of justice a consideration in assessing the public interest in this matter?

**Ms McNaughton:** Yes, of course it is. It's one of the many matters. There's a balance of a whole range of matters—non-exhaustive matters—which need to be considered. At the end of the day, it's a judgement call by those in my office making the decision. We balance a whole range of matters, including the seriousness of the offence and the need for deterrence, as well as other matters. There's a whole range of matters, Senator.

**Senator McKIM:** I do appreciate that there's a whole range of matters. I'm aware that there is a list of 24 in the prosecution policy and that that is a non-exhaustive list, and I accept that you will need to make judgement calls. What I'm trying to find out on behalf of the committee, so far unsuccessfully, is which specific issues you considered and how you could possibly come to the view that it is in the public interest to continue with Mr Collaery's prosecution? That's what I'm trying to find out, but you have made a public interest immunity claim, which means that I can't explore that any further in today's hearing. But, as I said, I look forward to reviewing the claim that you will make. I will ask, then, in relation to specific matters: is the sentence allocated to Witness K in an associated matter relevant to consideration of the public interest?

**Ms McNaughton:** Is the sentence in relation to Witness K relevant to our assessment of the public interest in continuing our prosecution against Mr Collaery? Is that your question?

**Senator McKIM:** Correct.

**Ms McNaughton:** That's one of the factors which it would be proper for us to factor into the very many factors, yes.

**Senator McKIM:** Attorney-General, does the Attorney-General, separate to the DPP, review the public interest in continuing with the prosecution of Mr Collaery on an ongoing basis?

**Senator Cash:** As I've stated, the Commonwealth Director of Public Prosecutions have considered the briefs of evidence and they have made an independent decision that a prosecution was appropriate, as the CDPP have stated, in accordance with the Prosecution Policy of the Commonwealth.

**Senator McKIM:** That wasn't my question, Attorney. My question was: do you, independent of the DPP, also consider whether it is in the public interest to continue with Mr Collaery's prosecution?

**Senator Cash:** The Commonwealth's position is clear, and I have advised the Senate committee previously of the Commonwealth's position. The Attorney-General's power to discontinue a prosecution is reserved for very unusual and exceptional circumstances. In fact, there has not been an intervention by any attorney-general since the establishment of the Commonwealth Director of Public Prosecutions, either under section 71(1), I believe it is, of the Judiciary Act 1903 or under the powers provided to the Attorney-General by section 8 of the Director of Public Prosecutions Act 1983. Again—I believe I did advise the committee of this last time—such an intervention

would therefore be extraordinary and would necessarily, by its nature, represent political intervention in a process which, as I have articulated, has conventionally been one that is independent. If I go back to what I stated in response to both Senator Carr and now you, the CDPP themselves considered the brief of evidence, and they made an independent decision—taking into account everything that the CDPP herself has now referred to—that they would prosecute the matter.

**Senator McKIM:** I've asked you twice now, and twice you've just answered a completely different question, so I'm going to take that as a no.

**Senator Cash:** I think, Chair, I directly answered that question.

**Senator McKIM:** Can I ask you—

**CHAIR:** Senator McKim, I would ask that you not reflect on the Attorney in that way. The Attorney has answered the question as she sees fit.

**Senator McKIM:** She most emphatically hasn't answered the question. Can I ask, then: Attorney, is it the position of the government that the bugging of the Timor-Leste cabinet in 2004 did occur, or is it the position of the government that it did not occur?

**Senator Cash:** Senator McKim, as I have already stated, firstly, the matter is before the court, so we do need to be very careful with what we say. Secondly, this was an independent decision, after the CDPP had considered the briefs of evidence, made by the CDPP that prosecution was appropriate, having regard to the prosecution policy of the Commonwealth.

**Senator McKIM:** Attorney, is it the position of the government that the Australian government bugged the Timor Leste cabinet deliberations in 2004, or is it the position of the government that it did not bug the Timor Leste cabinet deliberations in 2004?

**Senator Cash:** Again, Chair, this is a matter that is currently live before the courts. I do not propose to comment any further than what I have already stated.

**Senator McKIM:** I'm going to take that as a claim for public interest immunity, so, once again, Attorney, I look forward to you substantiating that claim in writing.

**CHAIR:** Senator McKim, while I have great deference to senators, it's not a matter for you to make that determination or impose that on the Attorney, so I'll take that as a gratuitous comment. We've got one minute left before I need to go to other senators.

**Senator McKIM:** We can talk about that later, Chair, but the Attorney is refusing to answer a legitimate question—or at least a question—

**Senator Cash:** Chair, that's a complete mischaracterisation of my answer.

**Senator McKIM:** that needs to be taken as a claim for public interest immunity. But we can discuss that in a private committee meeting. I'm very comfortable with that.

**CHAIR:** That's not an accurate characterisation of the minister's response. Minister, do you want to add anything further to that?

**Senator Cash:** No. I've provided an answer to the question.

**CHAIR:** Senator McKim, do you have one last question?

**Senator McKIM:** No, Chair, I don't, because the minister is refusing to answer my questions.

**CHAIR:** Thanks very much, Senator McKim. Just before I go to Senator Van, Ms McNaughton, could you remind the committee and those who are listening, and for the purposes of *Hansard*, what this prosecution is about.

**Ms McNaughton:** In relation to Mr Collaery?

**CHAIR:** That's right.

**Ms McNaughton:** Yes. He has been charged with offences relating to communicating ASIS information contrary to the Intelligence Services Act.

**CHAIR:** Thanks very much, Ms McNaughton. Senator Van.

**Senator VAN:** Thank you, Chair. Ms McNaughton, does the CDPP make prosecution decisions independent of government?

**Ms McNaughton:** Yes.

**Senator VAN:** In the matter of Mr Collaery, did the CDPP make the decision to prosecute?

**Ms McNaughton:** Yes—subject to seeking the consent, as we're required to do under the legislation, from the Attorney, as a final step.

**Senator VAN:** How many matters did the CDPP prosecute in the financial year 2020-21?

**Ms McNaughton:** I don't know that I've got those precise numbers with me, I'm afraid, Senator.

**Senator VAN:** Please take that one on notice, if that assists.

**Ms McNaughton:** Yes.

**Senator VAN:** What are the different legal practice areas that the CDPP brings to a prosecution?

**Ms McNaughton:** I don't quite understand your question, Senator. I can indicate that my office is divided into a number of different practice groups and that they're broadly under different crime types. Is that what you're getting at, Senator?

**Senator VAN:** Yes.

**Ms McNaughton:** We've got Organised Crime and Counter Terrorism. We've got Revenue and Benefits Fraud. We've got Commercial, Financial and Corruption. We've got Human Exploitation and Border Protection and Illegal Imports and Exports. We've also got IASA, which stands for International Assistance and Specialist Agencies—our other, or miscellaneous, matters.

**Senator VAN:** Got it. Organised crime and counterterrorism are a key priority of the government and for the safety of our community.

**Ms McNaughton:** Yes.

**Senator VAN:** How many referrals were made to the CDPP in 2020-21?

**Ms McNaughton:** I'd have to take that on notice. Organised crime and counterterrorism are two different crime types that we deal with together because they've got certain similar aspects to them.

**Senator VAN:** Okay. How many matters does the CDPP currently have on hand?

**Ms McNaughton:** Again, unless one of my team can provide that to me quickly, I'd have to take that on notice; I'm sorry.

**Senator VAN:** That's fine. Could you also take on notice how both the referrals and matters currently on foot compare to the previous financial year for me, please.

**Ms McNaughton:** Yes. Are you interested in the complexity, because we have noticed a change in complexity of the matters over a period of time. Reflecting I think a previous conversation today, numbers aren't necessarily reflective of the full picture.

**Senator VAN:** Is that something you want to comment on now, or is it something you will take on notice?

**Ms McNaughton:** We'll take it on notice. I'm just saying that, if we give numbers, numbers are not necessarily reflective of actual workload, because the complexity is changing.

**Senator VAN:** Okay. Thank you kindly. Thank you, Chair.

**CHAIR:** Thank you very much, Senator Van. I'll just check whether any other senators are seeking the call. No? In that case, we might thank officers from the Commonwealth Director of Public Prosecutions. Ms McNaughton, thank you very much for your time and for your evidence today.

**Ms McNaughton:** Thank you, Chair.