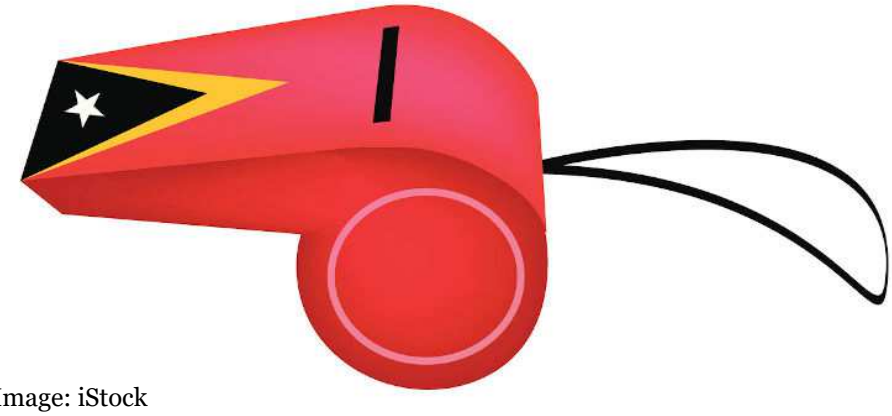
Pardoning Witness K a no-brainer, but then what?

By Andrew Fraser in Pearls and Irritations, July 11, 2022



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In this week of fiery church politics, perhaps Attorney-General Mark Dreyfus is doing as the Good Lord himself does – moving in mysterious ways.

Perhaps today, while some of us unnecessarily worry about the matter, he is sitting back in his electorate office in Isaacs, relaxed and comfortable in the knowledge that Governor-General David Hurley will shortly announce a free and absolute pardon for Witness K.

On Thursday, Dreyfus, finally, ended the prosecution of Canberra lawyer Bernard Collaery, who had represented Witness K, the former Australian Secret Intelligence Service operative who blew the whistle on the 2004 bugging of the Cabinet room of Timor Leste. Collaery had been heading to trial in October after years preparing to defend himself against four charges of unlawfully communicating classified information in media interviews, plus a single conspiracy allegation.

That conspiracy (to reveal information about the spying by Australia) was allegedly with Witness K, who pleaded guilty and was sentenced last year to three months' imprisonment, wholly suspended upon his entering a 12-month Good Behaviour Order.

That conviction should not be allowed to stand.

Yes, the Commonwealth Criminal Code provides (Section 11.5) that a person may be found guilty of conspiracy to commit an offence even if:

"(a) committing the offence is impossible; or …

(c) each other party to the agreement is at least one of the following:

(i) a person who is not criminally responsible…; or

(d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) a person cannot be found guilty of conspiracy to commit an offence if:

(a) All other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal …

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so".

Surely, having the nation's first law officer determine that Collaery's prosecution not be pursued is equal to Collaery being "not criminally responsible" or having been effectively "acquitted of the conspiracy".

A conviction for Witness K is "inconsistent" with the course taken for Collaery and "the interests of justice" require, in my view, that he receive a free and absolute pardon, given it is too late to have the Court dismiss the charge.

As mentioned in a recent piece in Pearls, this can be done at Dreyfus's initiative. In 1979, Governor-General Sir Zelman Cowan granted a free and absolute pardon to a woman on the basis of evidence she was thought to be able to give in a prosecution for alleged social-security fraud. The operating convention is of course that the Governor-General acts on the advice of his constitutional advisers, his ministers, in this case his first law officer, acting, at least since May, with the support of the parliament.

If such a pardon were possible for a whistleblower whose evidence helped merely protect the revenue, surely one should be granted Witness K, who exposed state-sponsored espionage?

But, as suggested at the outset, let's hope Dreyfus has already done his bit, and all that remains is the statement from Yarralumla, exonerating the man who did as he was commanded, but realised it was palpably wrong; who knew there was a far greater good in exposing a despicable act of state sabotage.

A pardon for Witness K should be the easy part – a long-riven loose end that just has to be put right.

Beyond the vindication of Collaery and the restoration of Witness K lies, as others such as Jack Waterford and Bernard Keane have quickly identified, the real wrong-doers. Might there be a Royal commission? Conventions against investigating, let alone prosecuting, previous governments would suggest perhaps not – but what a list of co-accused it might be.

John Howard and Alexander Downer: prime minister and foreign minister at the time of the bugging, which was carried out for the benefit of energy giant Woodside in its dealings over Timor's resources. Downer retired and went on to the Woodside board.

Ashton Calvert: secretary of Foreign Affairs at the time, who also went into Woodside's employ; now deceased.

David Irvine: head of ASIS: deceased.

Dreyfus, George Brandis, Christian Porter and Michaelia Cash: all were AG at some point in the saga – Dreyfus, when Collaery and Witness K were bugged; Brandis who authorised raids on K and Collaery, but who seems to have declined to authorise their prosecution; Porter, who authorised the prosecution and who, with Cash, ran it in a fashion that Dreyfus called "an affront to the rule of law".

Keane goes further, nominating out-of-work treasurer Josh Frydenberg, an adviser to both Downer and Howard at the time and out-of-work MP Dave Sharma, Downer's legal adviser. To say nothing of others in parliament, in the administration, in diplomacy, and at Woodside. They'll need a bigger dock than for the all-singing, all-dancing show that was the Australian Wheat Board inquiry in 2006.

Maybe The Hague is the place. After all, Collaery was taking up Timor's case there in 2013 to get the espionage-compromised resources treaty with Australia terminated. That was in the International Court of Justice, whose role is to settle, in accordance with international law, legal disputes submitted to it by nation states and to give advisory opinions on legal questions referred to it by authorised United Nations organs and specialised agencies. Maybe Timor could file a new dispute?

The ICJ is only 3km south-east of the International Criminal Court, which tries individuals for genocide, war crimes, crimes against humanity and aggression. The definition of aggression was adopted only recently, by amendment in 2017 of the Rome Statute (1998) which constitutes the ICC. It declares that the crime of aggression "is the use of armed force by a state against the sovereignty, integrity or independence of another state."

Absent just that one word, "armed", we might have had a pretty fair case against a whole conga-line of defendants.