



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE

Estimates

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In attendance: Attorney-General's Department Executive

Mr Chris Moraitis PSM, Secretary, Attorney-General's Department

Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group

Integrity and Security Division

Ms Ayesha Nawaz, Assistant Secretary, Security Law and Policy Branch

Senator KIM CARR: Can I go to the questions around witness K and Bernard Collaery, please. How much has the prosecution of witness K cost taxpayers?

Ms Chidgey: We've got those figures. I'll ask Ms Nawaz whether she wants to outline those costs.

Ms Nawaz: As at 6 October, the figure I can provide you for total Commonwealth external legal costs in the Collaery and witness K matters is \$3,094,583. That figure includes the services of the Australian Government Solicitor. It also includes counsel fees and legal disbursement costs, including for the Commonwealth Director of Public Prosecutions.

Senator KIM CARR: I just want to be clear about this. The prosecution of witness K had to attract the consent of the Attorney-General. Is that correct?

Ms Nawaz: That's correct.

Senator KIM CARR: That's under section 41A of the Intelligence Services Act?

Ms Nawaz: I don't have that act in front of me. I can check that for you and come back in this hearing.

Senator KIM CARR: Thank you. So the offences occurred back in 2013 and 2014, and witness K and Collaery were not charged till June 2018. That's when the Director of Public Prosecutions filed criminal charges. Is that accurate?

Ms Nawaz: That's correct.

Senator KIM CARR: Essentially there were four counts of unauthorised disclosures. Is that the nature of the charges?

Ms Nawaz: I'd just like to distinguish between the charges against witness K and the charges against Mr Collaery. If you just give me a moment I'll be able to provide that to you. I just preface my comments by noting that the Commonwealth Director of Public Prosecutions did make independent decisions in these regards. Mr Collaery was charged with an offence of conspiracy to communicate ASIS information contrary to section 11.5 of the Criminal Code and section 39 of the Intelligence Services Act, and there were also further offences of communicating ASIS information contrary to section 39 of the Intelligence Services Act. I think I've then answered the question that you asked me earlier about the charges.

Senator KIM CARR: Yes, thank you. Has the Attorney-General made a public statement as to why it was in the public interest to prosecute Witness K?

Mr Moraitis: I'd have to take that on notice.

Ms Nawaz: I'm not aware that he has.

Senator KIM CARR: Can you indicate to the committee why that—I'm going to put it to you—has not occurred?

Mr Moraitis: Okay.

Senator KIM CARR: I'm sure there's someone here who can tell me if I'm right or wrong. Are you aware of a statement?

Mr Moraitis: I can't recall that, but as I said I'll take that on notice. But, for the sake of argument—

Senator KIM CARR: Is there an explanation as to why there has been no public statement as to what is the public interest served by these prosecutions?

Ms Chidgey: I think that kind of commentary could well be inappropriate in the context of criminal proceedings, because discussion of those matters could well go to the content of the matters that are being considered by the court.

Senator KIM CARR: So, in the case of Witness K—

Senator PATRICK: On a point of order.

CHAIR: We've got a point of point of order. Senator Patrick.

Senator PATRICK: The Senate rules on this are that just because it's before the court doesn't mean that you can't answer the question. The witness can, of course, adopt a public interest immunity but only in the circumstances where it would substantially prejudice the matter.

Ms Chidgey: I think I was giving the reason why there hasn't been a statement on the public record. I don't think I was not answering the question.

Senator KIM CARR: No, no.

Senator PATRICK: Apologies. Thanks. I'll preserve it then.

CHAIR: I've heard your point of order. I don't think that's precisely what Ms Chidgey was going to. I'm going to let her keep going for bit and if you're still concerned let me know.

Senator PATRICK: Thank you.

Senator KIM CARR: I'm seeking an explanation as to why there's been no statement, in general terms, as to what damage would result to the public interest in this prosecution not proceeding. I'll put it the other way: I think we're owed an explanation.

Ms Chidgey: I think I've given you an explanation to the best of my ability.

Senator KIM CARR: What is the current status of the prosecution of Witness K?

Mr Moraitis: Witness K—do you have the latest?

Ms Nawaz: Yes, I do. Senator, just a moment. In terms of Witness K, as you'd be aware, he's been charged with an offence of conspiracy to communicate ASIS information contrary to section 11.5 of the Criminal Code and section 39 of the Intelligence Services Act.

Ms Chidgey: I think the most recent aspect was that on 6 August 2019 the legal representative for Witness K informed the court of an intention to plead guilty. That has not yet occurred, and obviously COVID matters, I understand, are also an issue in the proceeding, just in terms of consultation with legal representatives for that individual.

Mr Moraitis: We'll take on notice whether there were any further directions in the recent past.

Senator KIM CARR: Thank you very much. If I might turn to the situation regarding Mr Collaery: what's the cost been of prosecution of Bernard Collaery?

Ms Nawaz: If I could refer you to the figure I provided earlier. We're unable to separate the costs at this time between the Collaery and the K matter because when the matters started they started together and our solicitors at the Australian Government Solicitor had one file, and to some extent the matters progressed together at the same pace and the same issues were considered, so we're unable to separate those figures for you.

Senator KIM CARR: So the total cost is in excess of \$3.9 million.

Mr Moraitis: \$3.09 million.

Senator KIM CARR: I want to be clear about this: under the Intelligence Services Act the Attorney-General here had to agree to the prosecution of Mr Collaery as well.

Ms Nawaz: Yes.

Senator KIM CARR: This is a matter that related to the alleged bugging of the government of East Timor, isn't it?

Ms Chidgey: We don't want to discuss any of those details.

Senator KIM CARR: So Mr Collaery's been—can you refresh my memory? You did say to me he had four counts of unauthorised disclosure. Is that right?

Ms Nawaz: That's correct.

Senator KIM CARR: They're relating to media interviews. Is that the case?

Ms Nawaz: As Ms Chidgey said, it goes to intelligence matters that we don't comment on.

Senator KIM CARR: Has the Attorney-General made a public statement as to what the public interest is or what is served by the prosecution of Mr Collaery?

Mr Moraitis: I would echo what Ms Chidgey said in previous answers on that matter: they apply equally.

Senator KIM CARR: There's been no explanation, has there?

Mr Moraitis: For the reasons Ms Chidgey explained in the context of another matter, witness K.

Senator KIM CARR: This is a case where it's reasonable to assume that the government takes the view that an example has to be made of this individual, isn't it?

Mr Moraitis: I don't—

Ms Chidgey: We're not going to comment on that.

Senator KIM CARR: What troubles me is that there aren't authorised disclosures through this government, and there have been on repeated occasions. What distinguishes this matter from those that are undertaken, I put it to you, by ministers in this government?

Mr Moraitis: I can't comment. I'm not aware of the facts. It's a matter for the AFP and the DPP. They're the people who pursue these matters.

Senator KIM CARR: It just seems to me a bit of a double standard here.

Mr Moraitis: I think they apply the law as they see it.

Senator KIM CARR: Can you indicate to me what the current status is of the prosecution of Mr Collaery?

Mr Moraitis: Ms Nawaz, can you tell us the latest on that? I recall there were proceedings relating to the NSI Act, and I think there's an appeal following a decision by the judge in the Supreme Court. That's my recollection. I don't know what's happened in the last few months.

Ms Nawaz: If I could just add to that, there has been a section 27 hearing, in the ACT Supreme Court, in the Collaery matter.

Senator KIM CARR: You'll have to explain to me what a section 27 hearing is.

Ms Nawaz: A section 27 hearing relates to whether the court would make an order around the disclosure of information in the matter, following consideration by the Commonwealth government through the Attorney and through the defendant—in this matter, Mr Collaery. What's at issue here is whether national security information is included in the matter and whether the Attorney or the defendant, Mr Collaery, would seek to have that considered protected or disclosed.

Senator KIM CARR: So this is a secret trial.

Mr Moraitis: No, that's not a fair description.

Ms Nawaz: It wouldn't be accurate to call it a secret trial.

Senator KIM CARR: It's not a secret trial?

Mr Moraitis: No, it's not a secret trial. It's in accordance with the NSI Act, which balances the rights of national security matters and the rights of defendants as well. It's up to the judge of the day to make a call on that after listening to the evidence produced by both sides. That's what's happened in this case, as far as I know.

Senator PATRICK: The court has been closed in certain hearings.

Mr Moraitis: Of course, and that's the nature of the NSI Act, but it's not a secret criminal trial. My understanding of the NSI is that the defendant or defendants are allowed to see the evidence. Juries are certainly allowed to see the evidence. Some parts of hearings will not be made public, but that's the nature of this material and the nature of the issues. That's not my definition of a secret trial.

Senator PATRICK: I was just clarifying that there have been closed sessions.

Mr Moraitis: Of course. That's subject to the judge's determination of how the NSI Act works.

Senator PATRICK: I asked a question about Collaery and K about three months ago and the cost, at that point, was \$2.4 million. So in three months this case has gone up \$600,000—\$200,000 a month. Is that correct?

Mr Moraitis: It calculates activity that's invoiced, so we can't assume that in that period that expenditure's occurred. It's about the crystallisation of those expenses in a forward period. There has been activity in the last period because of the NSI discussions, and I'm sure there were counsel engaged.

Senator PATRICK: To the taxpayer, I don't think it make much difference.

Mr Moraitis: Well, I'm trying to explain to you how it accrues—I guess that is the accounting term.

Ms Chidgey: And we would get invoices periodically as well, so it could be that one happened to come in at a particular time.

Senator PATRICK: It just goes to the extraordinary cost to the taxpayer for this matter.

Mr Moraitis: Criminal trials—all trials—cost. We've shared with you the costs to the dollar in this matter, as distinct from the other matter.

Senator PATRICK: I'm just surprised at the rate of climb.

Mr Moraitis: Hopefully we can decelerate that rate.

Senator PATRICK: Thank you, Chair.

CHAIR: I'm about to go to Senator McKim. Just before I do, can I clarify one thing: was the ruling from that hearing made public?

Ms Chidgey: Yes, there is a public ruling from the section 27 hearing.

CHAIR: And that's searchable by anybody?

Ms Chidgey: That's correct.

CHAIR: Thank you. Senator McKim, you have the call.