

**Submission to:**

**The Acting Independent National Security  
Legislation Monitor**

**Regarding:**

**The Impact on Journalists in the operation  
of section 35P of the Australian Security  
Intelligence Organisation Act 1979**

**20<sup>th</sup> April 2015**

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This submission by independent senator Xenophon and political scientist Fernandes is directed at offences for the disclosure of information relating to a 'special intelligence operation.' Corresponding author: email

In this submission we make four core propositions.

## **1. Intelligence agencies and their secrecy requirements.**

It is a truism that the most important task of the Federal Government is to ensure the defence of the Commonwealth and the security of its citizens. Virtually everyone can agree with the proposition that this is the true national interest, even whilst disagreeing on precisely how this objective is to be achieved. The term ‘national interest’ should be restricted to this limited formulation of the state’s core function because people have differing views as to the level of priority to be awarded to other worthy objectives such as economic growth, environmental protection, taxation, social services, political liberties, trade policy, scientific research and so on.<sup>1</sup>

In securing this national interest, Australia’s intelligence agencies are as much a part of the Australian Defence Force’s capability as aircraft, tanks and submarines. These intelligence agencies need a high degree of operational secrecy to function. The Australian Security Intelligence Organisation (ASIO), for example, needs to assure all its current and future sources and all current and future partners here and abroad that it will keep their secrets as well as its own, in accordance with the relevant laws. Failure to do so in one case may affect its credibility in other cases.

It follows, therefore, that unauthorised disclosure of classified information that compromises an operation and harms the safety of intelligence officers is and should remain an offence. Nothing in the rest of this submission should be interpreted in a manner contrary to our first proposition.

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<sup>1</sup> This is one of the insights of Kenneth Arrow, who described it as the ‘impossibility theorem’. It suggests that no reliable link can be made between individual preferences and collective choices, and that therefore the public interest may be impossible to define in practice through any existing constitutional or electoral arrangements.

## 2. The public's need to know.

It is also a truism that in the modern world, representative democracy requires government to be based on the consent of the governed. For such consent to be meaningful, it has to be informed consent. The media play a crucial role in this regard.

Our second proposition, therefore, is that the newly-enacted Section 35P could potentially see journalists jailed for undertaking and discharging their legitimate role – reporting in the public interest. We test our proposition by examining a range of real-world cases in order to evaluate the consequences if similar operations today and in the future were designated as ‘special intelligence operations’ to which the punitive force of Section 35P would apply.

The first case is the 1983 mock hostage rescue conducted by ASIS, the Australian Secret Intelligence Service, at the Sheraton Hotel in Melbourne. On that occasion, the ASIS team failed to notify – let alone seek permission from – the management of the hotel. The hotel manager called the police after they used a sledgehammer to break down a door. The ASIS officers brandished semi-automatic weapons, traumatized staff and guests and physically assaulted the hotel manager. If a similar operation today by any intelligence agency were designated as a ‘special intelligence operation’ to which the punitive force of Section 35P would apply, then a journalist who reported on it could face ten years in prison. There is no public interest exemption to the laws.

The second case is the 1987 *Spycatcher* episode. Peter Wright, a counterintelligence officer from Britain's MI-5, which is the UK's counterpart to ASIO, wrote a book – *Spycatcher*. The British government, in particular the British Attorney General, Sir Michael Havers, in consultation with the Director of Public Prosecutions, decided to prosecute Wright for unauthorized disclosure of classified information.

Heinemann, the UK publishing house, tried to avoid an injunction preventing publication by transferring the book to their Australian subsidiary. The British government decided to take legal action in both in Australia and the United Kingdom.

Accordingly, in September 1985, the British Attorney General began proceedings in Australia against Peter Wright and the publisher, Heinemann Australia, seeking an injunction to prevent publication on the grounds that Wright was in breach of his duty of confidentiality to the Crown.

The Attorney General admitted – for the purpose of those proceedings only – that all the allegations in *Spycatcher* were correct. The admission that Sir Roger Hollis – a former MI-5 Director General – had been a Soviet spy – was of considerable public interest in Australia since Hollis had had a major role in the foundation of ASIO, the Australian Security Intelligence Organisation.

The *Spycatcher* trial lasted five weeks. Peter Wright's counsel was a brash 32 year-old lawyer named Malcolm Turnbull. On that historic occasion, Malcolm Turnbull was able to make fun – and rightly so – of the exaggerated levels of British secrecy. The British Cabinet Secretary, Sir Robert Armstrong, would not acknowledge the existence of MI-6 (Britain's Secret Intelligence Service, the counterpart to ASIS). He was only able to say that Sir Dick White had been its head during the events described in the book, but that he could not confirm or deny that MI-6 had existed before or after that period!

The Australian cabinet secretary, Michael Codd, in evidence at the trial, claimed that if *Spycatcher* were to be published in Australia, the intelligence agencies of Britain and other friendly countries would be unwilling to exchange secret intelligence with Australia. Mr Turnbull described Codd's evidence as 'codswallop'. *Spycatcher* was published, and the sky did not fall in. The intelligence agencies of Britain and other friendly countries are quite happy to exchange secret intelligence with Australia.

One of the deplorable consequences of Section 35P is that a book like *Spycatcher* could not now be published in Australia. This is matter of considerable alarm, particularly in light of the claim in *Spycatcher* that 'we bugged and burgled our way

across London at the state's bequest, while pompous, bowler-hatted civil servants looked the other way.'<sup>2</sup>

The third case is the series of reports in News Corporation publications in the 1990s that 'ASIS regularly flouted laws, kept dossiers on Australian citizens ... and hounded agents out of the service with little explanation.'<sup>3</sup> Other media outlets also reported claims by former ASIS officers that Australian embassy staff had compromised intelligence activities, and that ASIS had acted in Hong Kong and Kuwait potentially to the detriment of Australian interests. *The Australian* reported that the government of Papua New Guinea was bringing in foreign mercenaries to suppress its citizens on Bougainville by force. It would have been a profoundly destabilizing event for Australia and the region. It was later alleged that our intelligence agencies had failed to collect this intelligence, or that our government had failed to act on it.<sup>4</sup>

If operations relating to these events were designated as 'special intelligence operations,' then the punitive force of Section 35P would apply, and the absence of a public interest exemption means that a journalist who reported on them could face ten years in prison.

The fourth case is perhaps the biggest intelligence scandal of the past 15 years – the revelations that a former Australian government may have breached international law by bugging East Timor's cabinet rooms during the 2004 bilateral negotiations over the Timor Sea Treaty. A key witness for East Timor is a former spy, known as Witness K, who is said to be the Director of all technical operations for the Australian Secret Intelligence Service, which allegedly conducted the bugging operation using the Australian aid program as a cover.

The most perplexing aspect of this espionage operation is that East Timor is a fragile, new state, barely more than a decade old. It poses no threat to Australia. We acknowledge that there may be a good reason that is unknown to us – a subject to which we turn in the 'Oversight' section – but it would appear that the operation

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<sup>2</sup> Peter Wright, *Spycatcher: The candid autobiography of a senior intelligence officer* (Melbourne: Heinemann, 1987: 54).

<sup>3</sup> Brad Crouch, 'ASIS "like the KGB"', *Sunday Telegraph*, 26 December 1993.

<sup>4</sup> Sean Dorney, *The Sandline Affair* (Sydney: ABC Books, 1998) and Mary-Louise O'Callaghan, *Enemies Within: Papua New Guinea, Australia and the Sandline Crisis* (Sydney: Doubleday, 1999).

could not have been justified on national security grounds.

Moreover, the operation has likely endangered the safety of thousands of legitimate aid workers by exploiting the trust that aid agencies must build with their host country. Thousands of well-intentioned Australians go overseas to many parts of the globe in order to work with those who are less fortunate. As *The Age* editorial of 11 December 2013 stated:

... deceit of this kind brings suspicion on all non-government aid workers, irrespective of who they are and what they do. It runs the risk of endangering all legitimate aid workers who seek to help the disadvantaged.

...

Aid agencies operate in extreme and difficult conditions, often on the front line of danger and often in countries where they are constantly at risk from brutal regimes. They dare to help when no one else will. To deploy intelligence agents under the cover of aid workers is to exploit the fragile trust that aid agencies must forge with their host country. It weakens their security because it discredits their altruism.

Once again, we acknowledge that there may be a good reason for the espionage operation that is unknown to us, but we also note that it occurred at a time when the Australian government was assuring the people that the country's intelligence efforts were being overwhelmingly focused on the terrorist threat from *Jemaah Islamiyah* and related groups in Southeast Asia. We note that there is no evidence of *Jemaah Islamiyah* activity in East Timor, and that there has never been any other indication of terrorist activity there, then or now.

For these reasons, it would appear to us that the operation could not have been justified on national security grounds. If so, and we are not in possession of all the facts, then Australia owes a debt of gratitude to the ex-ASIS whistleblower and to others like him. The whistleblower may well have shone a light on a most disreputable episode in Australia's foreign policy. It may well be the case that he was moved by the dictates of his own conscience to the scandal of Australia's intelligence services being used to deprive the people of East Timor of their principal economic asset. East Timor seeks to draw a maritime border half way between the Australian

and East Timorese coasts, as it is entitled to do under the UN Convention on the Law of the Sea. However, in March 2002, just two months before East Timor became independent, Alexander Downer, then Australia's foreign minister, announced that henceforth Australia would exclude all disputes relating to the delimitation of maritime zones from the compulsory jurisdiction of the International Court of Justice and the International Tribunal on the Law of the Sea. This meant that East Timor has the law on its side but can derive no benefit from that fact.

In 2004, Australia agreed to a median line boundary – with New Zealand, when we established a maritime boundary to resolve overlapping claims off the coast of Norfolk Island. Since 1999, Australia has taken more four billion dollars in oil revenue that should rightfully belong to East Timor. Having taken a large portion of the wealth of one of the poorest countries in Asia, the Australian government has given back about \$0.4 billion in bilateral and multilateral assistance, and about \$0.5 billion in military assistance. This means that East Timor, believe it or not, is Australia's largest international donor. This is not a typo.

If this is what has motivated Witness K, then it is unjust to pass a law that would send someone like him to prison for up to 10 years without any consideration of his motivations – or, indeed, of the public interest considerations in respect of his actions. Whistleblowers like him do not appear to be motivated by money or career prospects. Rather, they appear to be moved by a sense of duty to answer the call of basic human morality. The absence of a public interest exemption in Section 35P means that there is no distinction between people like him and people who would do Australia harm.

The fifth case is the 2<sup>nd</sup> July 2007 arrest at Brisbane Airport of an Indian national, Dr Mohamed Haneef, in connection with a failed Glasgow bomb plot. Dr Haneef was held for 12 days before being charged with providing support to a terrorist organisation. This is an offence for which he could have been jailed for up to 15 years. The charge was unsustainable and was quickly dropped. Meanwhile, his immigration visa was cancelled on character grounds. This was later found to be unlawful. The Hon. John Clarke QC conducted an inquiry into the Haneef case. He concluded that Haneef was 'wrongly charged' because an individual AFP officer, Commander Ramzi Jabbour, had 'lost objectivity' and was 'unable to see that the

evidence he regarded as highly incriminating in fact amounted to very little'. No disciplinary action was recommended against Commander Jabbour.

We emphasise here that the inquiry found that Commander Ramzi Jabbour was 'impressive, dedicated and capable', yet he was acting selectively, even cynically. He was keeping evidence that might exonerate Dr Haneef from the magistrate who was detaining the doctor in the Brisbane lockup, and also keeping evidence from immigration minister Kevin Andrews, who cancelled his visa. This is where this bill is weak: it assumes a best-case scenario at all times and impeccable behaviour by all concerned. Yet Commander Jabbour was not a bad person. Indeed, the inquiry found that he 'presented as a committed, professional and competent individual, and was held in high esteem by the officers he led'.

The Haneef case was an overt, not a covert, operation, but we are applying it in this submission in order to test our proposition as to the impact on journalists in the operation of Section 35P. Accordingly, if this operation or something like it had been designated a 'special intelligence operation', then details could not have been reported unless the reporter was willing to risk up to 10 years in prison.

We submit that it should not be left to prosecutorial discretion whether a reporter should be tried in such a case. The law assumes a best-case scenario and impeccable behaviour by all concerned. Yet the foundation of Western political thought is that we do not rely solely on individuals to be good or rulers to be righteous but on institutions to provide checks and balances. This has been known since at least the second half of the 18th century when Montesquieu, a French political philosopher, championed the need to resist tyranny by fragmenting government power, particularly through the device of the separation of powers. Section 35P must be repealed or – failing that – there must be a public interest exemption.

A public interest exemption was proposed as an amendment in the Senate in the debates on the *Telecommunications (Interception and Access) Amendment (Data*

*Retention) Bill 2015*. It is reproduced along with the accompanying extract from Hansard in Annex A to this submission.<sup>5</sup>

We submit that Section 35P must be repealed or – failing that – public interest exemptions must be written into the legislation according to the amendments at Annex A.

### 3. Oversight

Our third core proposition is that Section 35P has been enacted in circumstances where oversight of the intelligence services is alarmingly poor. Australia lacks institutionalised review of surveillance programs from both the legislative and judicial branches of government. The Royal Commissions of the late 1970s and early 1980s were watershed moments in Australian intelligence history, but the modern environment is a very different one.

Currently, the Inspector-General of Intelligence and Security (IGIS) has oversight of the intelligence agencies. Yet IGIS is located within the Executive arm of government – in the Department of Prime Minister and Cabinet. Inquiries in Senate Estimates have established that IGIS played no oversight role whatsoever in the case of an order by the International Court of Justice that ‘Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the *Timor Sea Treaty* of 20 May 2002 between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.’<sup>6</sup> IGIS referred questions about the interpretation of International Court of Justice orders to the Attorney-General’s Department. Yet it was none other than the Attorney-General who authorised the 3<sup>rd</sup> December 2013 raid by the Australian Security Intelligence Organisation on the home of Witness K and on the office and home of Bernard Collaery, a former Attorney-General of the Australian Capital Territory who is providing legal advice to Witness K.

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<sup>5</sup> *Commonwealth, Parliamentary Debates – Senate*, 26 March 2015: 102 (Nick Xenophon, Senator).

<sup>6</sup> International Court of Justice, *Order*, 3 March 2014: 15. (<http://www.icj-cij.org/docket/files/156/18078.pdf>)

Australia has no judicial oversight. This is a deficiency in comparison with the United States of America, where judicial oversight of the intelligence services occurs via the Foreign Intelligence Surveillance Court. Known as the FISA Court, it consists of 11 federal judges who are appointed by the Chief Justice of the United States. It meets in secret, allows only the government to appear before it and provides an annual report to Congress concerning its activities. Here, too, we note that the chief judge of the FISA Court has spoken out about the limits of its ability to provide oversight, and said that it must trust the government to self-report because it ‘lacks the tools to independently verify how often the government’s surveillance breaks the court’s rules.’ In a written statement to the *Washington Post*, Judge Reggie B. Walton said, ‘The FISC is forced to rely upon the accuracy of the information that is provided to the Court. The FISC does not have the capacity to investigate issues of noncompliance, and in that respect the FISC is in the same position as any other court when it comes to enforcing [government] compliance with its orders.’<sup>7</sup> Australia does not have even this level of judicial oversight.

Despite claims that Australia’s courts may be unable to evaluate intelligence expertly, Australian courts routinely evaluate complex evidence in other areas from complex corporate transactions to elaborate taxation schemes and highly structured trust arrangements. Courts do not typically object that they lack expertise in the complex areas of commercial litigation, taxation, mergers and acquisition deals. We submit that Australia’s judicial officers are at least as competent and professional as their counterparts in the USA. The impact of Section 35P on journalists is exacerbated by the fact that Australia has no judicial oversight.

Oversight in the legislative branch of government is also comparatively feeble, with the Parliamentary Joint Committee on Intelligence and Security (PJCIS) ordinarily restricted to the administration and financing of the intelligence agencies. The PJCIS does not examine any past, present or proposed operations, or the sources and methods. This is a deficiency in comparison with the United States of America and also Germany.

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<sup>7</sup> Carol D. Leonnig, Court: Ability to police US spying programs limited. *Washington Post*: 15 August 2013.

There is clear legislative oversight in the United States. The Intelligence Committees and Judiciary Committees in the Senate and House of Representatives exercise general oversight over all intelligence collection programs and committee members are regularly briefed. Relevant members of Congress receive detailed briefings prior to each reauthorisation.

There is also excellent legislative oversight over the intelligence agencies in Germany through the Parliamentary Control Panel, the G10 Commission and the Confidential Committee of the Budget Committee. The Chancellery is obliged to inform the relevant persons in the legislative branch at least once every six months about the activities of the intelligence services. The Confidential Committee can request documents and data and can conduct hearings with members of the intelligence services. The Committee's deliberations are kept secret. The Parliamentary Control Panel also appoints the four standing and the four deputy members of the G10 Commission, which serves as a permanent control body for intelligence activities. (G10 refers to the section of the German Constitution dealing with these matters.)

The Commission reviews and authorises all requests for surveillance activities subject to the G10 law. The chair of the G10 Commission needs to have the qualifications to serve as a judge. It meets at least once a month and can schedule on site 'control visits' at German intelligence facilities. The G10 Commission not only authorises surveillance programs but also controls how these programs are implemented regarding the collection, storage and analysis of personal data. The intelligence agencies have to justify their surveillance requests and specify their scope and targets. The German oversight mechanism belongs to the legislative branch and does not include judicial review. These safeguards exist in Germany as a result of the excesses of the Stasi in communist East Germany and its enormous surveillance of citizens. It is the world's best practice, and Australia should consider learning from it. The impact of Section 35P on journalists is exacerbated by Australia's exceedingly weak legislative oversight mechanisms.

## 4. The combined effect of Section 35P and the new data retention laws

Our fourth and final core proposition is that Section 35P has been enacted in circumstances where the new Data Retention law has created a ‘perfect storm’ against investigative journalists and whistleblowers. This will have a suffocating effect on the free press in Australia.

Recent amendments to the *Telecommunications (Interception and Access) Act 1979* require telecommunications service providers to retain and to secure a range of telecommunications data for two years. The laws will provide the authorities with a comprehensive digital picture of everyone’s movements, contacts, interests, hobbies, associations, etc over a period of years. This information will remain in the Australian Federal Police database forever.

It will be almost impossible to guarantee confidentiality to a source. Even if a few journalists are technically proficient enough to encrypt their communications – and most are not – the ‘first contact problem’ (the fact that a whistleblower has contacted a journalist or MP) remains.

In practice, whistleblower investigations are treated as leak investigations. Such investigations are carried out under Section 70 and section 79 of the *Crimes Act*. Section 70 forbids disclosure of certain information by Commonwealth officers (‘any fact or document’ in their knowledge or possession ‘by virtue of having been a Commonwealth officer’). It attracts a penalty of up to two years in jail.

Section 79 of the *Crimes Act* prohibits the disclosure of ‘official secrets’, which include ‘a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information’. It attracts a penalty of up to seven years in jail.

Sub-sections (5) and (6) of Section 79 are ‘secondary disclosure’ provisions. They criminalise the receipt of leaked documents by journalists. In the past, police and prosecutors have not been able to prove the mental element – that the journalist in question knew or was reckless to the fact that the disclosure was made without authorization. The new data retention laws now tip the balance against the media.

They make it much easier to prove the mental element of the offence.

This ‘perfect storm’ against investigative journalists will not be calmed by the proposal to establish a system of security-cleared ‘Special Advocates’ who will be allowed to argue against police access to a journalist's metadata for the purpose of identifying their sources. The key potential drawbacks of the ‘Special Advocates’ system that any law establishing it must be aware of are:

- (1) If the Special Advocate cannot disclose confidential material to the affected journalist or receive instructions from them about how to deal with it, it limits the journalist’s ability to test any adverse evidence.
- (2) Unlike the police, who benefit from a permanent secretariat with researchers and analysts, Special Advocates may lack the resources of an ordinary legal team for the purpose of mounting a proper case in secret.
- (3) Unlike the police, who have a long corporate memory, the lack of a searchable database of secret judgments would mean that individual Special Advocates are unaware of what arguments are likely to sway the judge who decides whether to issue the warrant.
- (4) Special Advocates may have no power to call witnesses.
- (5) The police tactic of prejudicially late disclosure – observed in other jurisdictions that have such a system – may eliminate the Special Advocate's practical ability to call evidence.

We would appreciate the opportunity to meet with you to discuss this submission in person.

**SENATOR NICK XENOPHON**

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