

**ANNEX A TO THE SUBMISSION BY SENATOR NICK XENOPHON AND
DR. CLINTON FERNANDES DATED 20 APRIL 2015**

Commonwealth, Parliamentary Debates – Senate, 26 March 2015: 102.

Senator Nick Xenophon: I move amendment (13) on sheet 7672:

(13) Page 84 (after line 31), at the end of the Bill, add:

Schedule 4—Disclosure by journalists

Australian Security Intelligence Organisation Act 1979

1 Subsections 35P(1), (2) and (3)

Repeal the subsections, substitute:

Unauthorised disclosure of information

(1) A person commits an offence if:

- (a) the person discloses information; and
- (b) the information relates to a special intelligence operation; and
- (c) the person knows that the information relates to a special intelligence operation.

Penalty: Imprisonment for 5 years.

Unauthorised disclosure of information—endangering safety, etc.

(2) A person commits an offence if:

- (a) the person discloses information; and
- (b) the information relates to a special intelligence operation; and
- (c) the person knows that the information relates to a special intelligence operation;

and

(d) the person intends the disclosure of information to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

Penalty: Imprisonment for 10 years.

Exceptions

(3) Subsections (1) and (2) do not apply if:

- (a) the disclosure was in connection with the administration or execution of this Division; or
- (b) the disclosure was for the purposes of any legal proceedings arising out of or otherwise related to this Division or of any report of any such proceedings; or

- (c) the disclosure was in accordance with any requirement imposed by law; or
- (d) the disclosure was in connection with the performance of functions or duties, or the exercise of powers, of the Organisation; or
- (e) the disclosure was for the purpose of obtaining legal advice in relation to the special intelligence operation; or
- (f) the disclosure was to an IGIS official for the purpose of the Inspector-General of Intelligence and Security exercising powers, or performing functions or duties, under the Inspector-General of Intelligence and Security Act 1986; or
- (g) the disclosure was by an IGIS official in connection with the IGIS official exercising powers, or performing functions or duties, under that Act; or
- (h) the disclosure was:
 - (i) by a person who was working in a professional capacity as a journalist, or an employer of such a person; and
 - (ii) published in good faith in a report or commentary about a matter of public interest; and
 - (iii) the report was not likely to enable an ASIO employee, ASIO affiliate, a staff member of ASOS or an IGIS official to be identified.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the Criminal Code.

(3A) Without limiting paragraph (3)(h), a disclosure is about a matter of public interest if it relates to one or more of the following:

- (a) a matter that increases the ability of the public to scrutinise and debate issues of national security;
- (b) a matter that would promote the integrity and accountability of the Organisation, ASIS or the Inspector-General of Intelligence and Security in relation to national security and other related issues;
- (c) conduct that:
 - (i) contravenes a law of the Commonwealth, a State or a Territory; or
 - (ii) contravenes a law of a foreign country; or
 - (iii) is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or
 - (iv) is engaged in for the purpose of corruption; or
 - (v) constitutes maladministration; or
 - (vi) constitutes an abuse of public trust; or

(vii) involves an official of a public agency abusing his or her position as an official of that agency; or

(viii) could, if proved, give reasonable grounds for disciplinary action against an official of a public agency.

Crimes Act 1914

2 At the end of subsection 3ZZHA(2)

Add:

; (g) the disclosure is:

(i) made by a person who is working in a professional capacity as a journalist, or an employer of such a person; and

(ii) published in good faith in a report or commentary about a matter of public interest; and

(iii) the report or commentary is not likely to enable an officer of the Australian Security Intelligence Organisation, a staff member of the Australian Secret Intelligence Service, or a staff member of the Inspector-General of Intelligence Services to be identified.

3 At the end of section 3ZZHA

Add:

(3) Without limiting paragraph (3)(h), a disclosure is about a matter of public interest if it relates to one or more of the following:

(a) a matter that increases the ability of the public to scrutinise and debate issues of national security;

(b) a matter that would promote the integrity and accountability of the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service or the Inspector-General of Intelligence Services in relation to national security and other related issues;

(c) conduct that:

(i) contravenes a law of the Commonwealth, a State or a Territory; or

(ii) contravenes a law of a foreign country; or

(iii) is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or

(iv) is engaged in for the purpose of corruption; or

(v) constitutes maladministration; or

(vi) constitutes an abuse of public trust; or

(vii) involves an official of a public agency abusing his or her position as an official of that agency; or

(viii) could, if proved, give reasonable grounds for disciplinary action against an official of a public agency.

Criminal Code Act 1995

4 Paragraph 119.7(2)(b) of the Criminal Code

Repeal the paragraph, substitute:

(b) the person publishes the advertisement or item of news intending to encourage the recruitment of persons to serve in any capacity in or with an armed force in a foreign country.

5 After paragraph 119.7(3)(b) of the Criminal Code

Insert:

; (c) the publication of the advertisement or item of news was not in the public interest.

This amendment addresses issues relating to disclosures of information by journalists, through amendments to the Australian Security Intelligence Organisation Act 1979, the Crimes Act 1914 and the Criminal Code Act 1995. These amendments address changes to these acts made by the previous bills in this tranche of legislation, primarily the National Security Legislation Amendment Act (No. 1) 2014.

Make no mistake about it, these issues go to the heart of press freedom in this country in relation to the ability of investigative journalists to do their work. These bills insert into these acts new offences relating to the disclosure of information relating to a special intelligence operation, as well as for publishing advertisements or items of news that contain information about recruitment of people to armed forces in a foreign country. I want to make it clear that, in relation to any publication of information in respect of a special intelligence operation that could endanger the lives of those involved in the operation or other lives directly as a result of that disclosure of information, I do not oppose the imposition of a penalty. If we are talking about endangering lives—if, for instance, there is an ASIS or ASIO officer whose life is put in real danger by the disclosure of their identity—then that is a serious matter. But we are talking about a whole range of other circumstances where there can be no such consideration; where there is no question of any lives being endangered; and where, in fact, what is being endangered by not publishing that information is very much the

public interest and some key democratic principles.

At the time that the bills were being considered in respect of section 35P, I expressed my concerns about the provisions relating to disclosure of information and how this would impact on journalists reporting on matters in good faith and in the public interest. At the time, I also moved an amendment to include the consideration of the public interest as a defence to these offences. This amendment expands on these original concerns to address the matter more fully. I am grateful to the mainstream media organisations that I have spoken to—major media organisations which have been very helpful with useful suggestions as to how this clause could have real protections for journalists who are doing their job in the public interest.

Firstly, in relation to disclosure of information, these amendments introduce a concept of 'knowingly disclosing information relating to a special intelligence operation, disclosing information with the intent of endangering the health or safety of any person, or prejudicing the effective conduct of a special intelligence operation'. Further, the amendments provide exceptions to this offence which are consistent with existing whistleblower protections. They also include an exception where the person was working in a professional capacity as a journalist and published in good faith as a matter of public interest, and where the report was not likely to enable staff of security organisations to be identified.

The amendments also provide an extensive definition of what matters can be considered to be in the public interest. These include matters that increase public debate and promote the integrity and accountability of security organisations or officials, and matters relating to conduct that contravenes certain laws or standards. These amendments provide the same defences in relation to disclosing information about delayed notification search warrants under the Crimes Act.

The amendments also address issues relating to the publication of certain matters under the Criminal Code. The new offences in the act relate to the publication of recruitment material, and, in essence, I believe these offences are suitable. However, there is capacity for these offences to capture media organisations in the following ways. Firstly, it is possible that a journalist could publish a story that contains information about recruitment—for example, an investigative piece that looks at recruitment strategies of terrorist groups or how an individual has been personally affected by this. Secondly, it is possible that a major news organisation with many publications could unwittingly publish an advertisement that, while it does

not overtly seem so, relates to recruiting activities—for example, for a town meeting that turns out to have recruiting elements, unbeknownst to the news organisation.

To address these concerns, the amendments in this item change the existing offence from a person being reckless to the fact to a person publishing with the intention of encouraging recruitment. Further, in relation to the offence of publishing more detailed information about recruiting, these amendments provide that the offence can only apply where the publication is not in the public interest. This would, for example, come into effect when a story is published about recruitment taking place at a certain location and time for the purpose of raising public awareness.

I want to briefly raise a matter that relates to ASIS, not ASIO, but the principles are the same. There is, of course, the issue in respect of the allegations that ASIS planted electronic surveillance, electronic bugs, in 2004 in the East Timorese cabinet room, allegedly to gather information regarding negotiations of the Timor Sea treaty, the sharing of energy resources between Australia and Timor. That cannot be seen, on any reasonable basis, as a national security issue. In March 2014 the International Court of Justice ordered Australia to stop any such behaviour. Bernard Collaery, a former Attorney-General of the Australian Capital Territory, representing East Timor, alleged in 2013 that his offices had been raided by ASIO. A key witness, known as Witness K, was detained and had his passport cancelled, which of course has all sorts of consequences for Witness K. I am not sure whether he has been charged.

My concern is with cases such as that, cases of botched operations, and it does happen from time to time. As good as our intelligence agencies are, as good as the AFP is, there are occasions when they get it wrong, where they have exceeded their powers, and it is in the public interest to expose that. There is no protection for journalists, as I see it, under the current legislation or 35P. We know what the Media, Entertainment and Arts Alliance, representing journalists in this country, have said about this. And leading academics are concerned that section 35P in its current form is simply too restrictive and draconian and needs to be amended.