

# Transcript

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**00** This is an ABC podcast.

**Hamish MacDonald:** Between them our panel tonight hold some of the nation's biggest secrets. So who decides what you can know and what you can't? Since the 9/11 attacks sweeping changes to National Security laws have been introduced radically shifting power towards the intelligence agencies. We're now seeing whistleblowers pursued, trials held in secret and in one case that we know of, a secret prisoner. So who's watching over all of this—who holds them accountable?

**00:56 Hamish MacDonald:** Joining me tonight are counter terrorism expert Jacinta Carroll, ex-military intelligence officer Clinton Fernandes, former director general of ASIO Dennis Richardson who's just completed the biggest National Security review in four decades. His report is still under wraps. Journalist, Annika Smethurst whose Canberra home was raided by the AFP, and lawyer and former independent Senator, Nick Xenophon, and later in the program we'll cross to the former ACT Attorney General Bernard Collaery. He's being prosecuted behind closed doors largely, for revealing allegedly national secrets.

And we should at this point know that we did invite both the Attorney General Christian Porter and the Home Affairs Minister Peter Dutton to join in this discussion tonight—both of them declined. And the man known as “Witness J”, a secret prisoner, did wish to take part in this program tonight, but ultimately could not due to the extreme secrecy around his case, a situation that he's described to us as appalling. And remember you can stream this on iView, YouTube, Facebook, Twitter and Instagram. QandA is the hashtag. Please do get involved.

First question tonight is a video. It comes from Chris Round in Bellevue Hill.

**2:00 Chris Round:** *In the context of our troubled relationship with China can the recent cyber attacks be considered an act of war by them.*

**Dennis Richardson:** No.

**Hamish MacDonald:** Why?

**02:16 Dennis Richardson:** Well, for a start, the government hasn't confirmed that it is China. I think it's reasonable to assume that it was, but I think the government is wise not to say anything publicly on that front.

**Hamish MacDonald:** How do you characterize Australia's relationship with China right now?

**02:34 Dennis Richardson:** Oh, it's a mix of positives and negatives, more on the negative side at the moment. The big difference is the fact that China has changed over the last eight years or so. It wasn't Australia that said it wouldn't militarise the South China Seas and then went ahead and did so. It wasn't China that broke an International .... It wasn't Australia that broke an international agreement on Hong Kong. And there are simply a range of issues here on which we differ. The key challenge is going to be to find areas where we can productively work together.

**03:18 Hamish MacDonald:** I want to read you something that's been said tonight in relation to you by Andrew Hastie the Liberal MP who sits on the Joint Parliamentary Committee on Intelligence and Security. He described you and Alan Gyngell as “foreign policy elites” who set the agenda for the past 15 to 20 years and who failed to appreciate the implications of an authoritarian China and an expansionist China, and who now don't want backbenchers to have a view on it, and he points to your role as Secretary of Defence in overseeing the lease of the Port of Darwin to a company owned by China as evidence of that. Did you underestimate China's Ambitions in this region?

**03:59 Dennis Richardson:** Not at all, and I would simply note that I would have thought that it was the government of which Andrew Hastie is part that oversaw the lease of the Port of Darwin. I certainly supported it, as did the Chief of the Defence Force and the Chief of the Navy and I have defended that. I don't think in any way we have underestimated China's rise and the implications of an authoritarian government acting in an increasingly assertive way and I think what I've got on the public record in the last 10 years would support that.

**04:45 Hamish MacDonald:** Nick Xenophon, do you see there as being a re-evaluation underway in Australia right now of China, among the “elites” or whatever you want to describe them as, in the way that Andrew Hastie did?

**04:56 Nick Xenophon:** Well, of course there has been a revaluation but it's an issue of we need to be cool-headed based on the facts and to look at what is in our national interest and that we don't blindly follow what the Trump Administration says or does and respect of China. We need to do what is in our national interest.

**05:12 Hamish MacDonald:** And how do we make those determinations? I mean, it's such a ferocious political environment around this, everybody has interests here—your new law firm, and what you've taken on a role with Huawei, the Chinese Telco, and clearly people will question your motivations in saying what you've just said.

**05:31 Nick Xenophon:** Well my motivations are that Xenophon Davis acts for Huawei Australia, a company that is not state-owned, that is privately owned, and that has been meticulous in doing the right thing by Australian laws and by the laws of all the nations it operates in. I have no time for authoritarian regimes wherever they are, whether it's China or any other country, or authoritarian tendencies. So we have seen hysterical campaign against Huawei. It's the most maligned company, unfairly maligned company in Australian history because the debate has just gone hysterical, because Andrew Hastie and others have been irrational, and I think we need to have rational voices based on the facts.

**06:10 Hamish MacDonald:** Why are they irrational then? I mean you've just pointed out that Huawei follows the rules in every country they operate in, but their home country is China and China's national intelligence laws would indicate that they have to cooperate with requests from the intelligence and security agencies in China to supply information.

**06:28 Nick Xenophon:** And Huawei's made it absolutely clear that their primary role is to comply strictly with the laws of Australia, in the countries they operate in, and in fact, they have gone to intelligence agencies and said we will do everything you need us to do to cooperate, to ensure that there are no breaches of cybersecurity. So I think...

**06:48 Hamish MacDonald:** Would you say all this if they weren't paying you?

**06:50 Nick Xenophon:** Yes I would, yes, I would. I mean the fact is it has been an unfairly maligned company, but the issue is we are seeing a debate that is not based on reason or facts but it's been quite, quite irrational without due process and that's one of the reasons I'm here because our Law Firm is representing David McBride who is going through a Kafkaesque legal nightmare, and I think Australians need to know what David McBride is going through.

**07:17 Hamish MacDonald:** We are going to get to a question on David McBride. But our next question tonight comes from John Whitehall in the studio audience.

**07:23 John Whitehall:** *Good evening panel. My question is for Annika Smethurst. Do you believe that you are above the law and do you believe if you have committed a breach of that law that you are unable to be investigated for that breach simply because you are a journalist?*

**07:40 Hamish MacDonald:** And I should note you are a former cop. (*Whitehall: Thank you.*) So you have a view of this sort of thing. I will come to you, Annika, but I'd like your view on this first Jacinta Carroll. Are journalists above the law?

**07:52 Jacinta Carroll:** Yes. Thanks Hamish and thanks for the question John. I think one of the things that has come out through the public reaction and the media reaction to the search warrants or the raids, as they are usually described, last year, is that there seems to be a lack of understanding. I would say, I would observe with the media and this comes from my reading all of the submissions that have gone to the current parliamentary inquiry but also amongst the Australian public, about why things are classified and what the role of whistleblowers is, and where the media comes into that, and it really begs the question in the case of the person who provided, the Commonwealth official who provided this information to Annika or persons. Are there enough mechanisms for them to safely raise concerns where those matters are official secrets, and I'd have to say that the answer is "yes". However, it's not clear that that is well understood broadly in Australia, and that probably leads to another issue of how well educated are the Australian public on where security sits, and whether it is accountable in our society, and also

**09:11 Hamish MacDonald:** So, so do you think that Annika deserved to have her home raided in that circumstance?

**09:15 Jacinta Carroll:** Ah, I don't know the details of the case or the, or the details of the particular details of the information.

**Hamish MacDonald:** There's a principle.

**09:25 Jacinta Carroll:** Well, that's a principle that, since we've had a Crimes Act, which is more than a hundred years, it has been a crime to release official information, and for decades it's been a crime to publish that information. So that's fairly clear and they're very old, standard laws and they're laws that exist in every liberal democracy. The issue for us, then, is of course, the courts have upheld that the search warrant in, in Annika's case wasn't well-written, wasn't appropriate, so that's pushed to one side. But still there would be investigations that are ongoing and it does appear from what's in the public arena that a Commonwealth Official who had, was very well-placed, had a security clearance had stated—I would say on my experience on a number of occasions through their career that they understood that they couldn't use Commonwealth information and Commonwealth goods, public goods, these are, this is information the same as anyone who works at Centrelink or in the Police are ...

**10:26 Hamish MacDonald:** ...you're, you're talking about the source here, the alleged source. This is a question about the journalist and whether they deserve to be pursued.

**10:34 Jacinta Carroll:** If you're holding that information, classified information you don't have the authority to, then that's something that can be investigated, and publishing that information, which appears to have been done, is something that can be investigated and potentially prosecuted.

**10:48 Annika Smethurst:** I do, I think I'm above the law John. Well, the police came to my house with a warrant that was illegal and trespassed. So do they think they're above the Law would be the first thing there. I understand the reason for secrecy in certain things. I'm not the sort of person that

just thinks publish, you know, we're entitled to know everything that happens out there. But back to the law. The law is a hundred years old and it does say that you can't give information. If this relates to anything it could be the amount of paper clips kept at ASIO. If that information is sent to me, that then puts me at fault. It's actually as soon as it lands in my inbox or anywhere.....(*unclear*)

**11:28 Hamish MacDonald:** Dennis Richardson is shaking his head and saying...

**11:30 Annika Smethurst:** One more point I want to make about the being above the law. There are a lot of professions that actually have carve-outs, whether that's doctors and patient confidentiality. Let's not forget politicians have a privilege that makes them above the law. It's not about being above the law. It's that the laws don't work to allow journalists to do the job that they want to do.

**11:48 Hamish MacDonald:** Dennis Richardson, why are you shaking your head and saying....

**11:51 Dennis Richardson:** Well, I would simply say it trivializes it enormously to talk about the number of paper clips in ASIO being classified. Secondly, members of Parliament are not above the law. The same laws which allowed a journalist's home to be visited by the police are the same laws that would allow them to visit the home of a member of parliament.  
(*Talking*)

**12:21 Annika Smethurst:** Yeah, and they can claim privilege over that.

**12:23 Clinton Fernandes:** Can I address that question, please? You know, nobody voted for Annika Smethurst. Nobody voted for the media. People voted for the government to keep the country secure, and so the government really has to bear the consequences of any leaks that occur or any information that gets released. And so media doesn't get to decide what level of classification any piece of information has, or ought to have—unclassified, secret, top secret— but also under our system that government doesn't get to decide, not exclusively anyway, what information we the public need to hold it accountable.

It doesn't get to make that call, okay. So there's this dynamic tension, a metabolic interaction if you like, between self-government and self-defence, between self-rule and the information we need. So sections 7 and 24 of our Constitution require all of us to directly elect our representatives, in the House and the Senate, and we need certain information in order to hold governments accountable. The government doesn't get to limit what kind of information we need to hold them accountable. Now, there are some times when the media has to exercise independent judgment. If for example, during the war on terror when Jemaah Islamiyah, the terrorist group, is attacking the Australian Embassy in Jakarta and ASIS efforts are instead being diverted away to spy on Timor for corporate....

**13:49 Dennis Richardson:** They weren't diverted.

**13:51 Fernandes:** In 2004, ASIS's budget was 3.9 million. Now it's about 500 million. To go to a foreign country and bug the government is a diversion of resources. Even if there is infinite resources, it takes a certain amount of resources. On the 9th of September 2004, the Australian Embassy in Jakarta got hit by a car bomb and that's exactly the time at which the ASIS team in September and October 2004 was spying on the Timorese government. That's a diversion.

**14:21 Hamish MacDonald:** Okay. Let's take our next question. It's on this issue of press freedom. It was first put to Annika. This comes from Peter Greste the journalist in Brisbane.

**14:30 Peter Greste:** *Press freedom is an essential part of National Security in a democracy. Now since 9/11 we've had about 80 pieces of legislation that strengthen security, but some of those laws have also undermined press freedom. My organization, the Alliance for Journalists' Freedom believes that we need to get that balance right by protecting press freedom in law in Australia, in the way that*

*our national allies and national security allies already do. So my question is, does the panel agree, and how should it be done?*

**15:02 Hamish MacDonald:** Jacinta...

**15:04 Jacinta Carroll:** Thanks very much. Ah, the... I'll go back to the question I posed a bit earlier. Are there other ways that issues of concern, whether they're security concern or issues in the national interest can safely be brought forward without removing the protections around capabilities, methods and others that are the basis for classification, and Clinton talked about the Constitution. We had from 1974 a series of Royal Commissions in this country that examined exactly that issue of how do we balance Intelligence and Security in a liberal democracy with responsible government and accountability, and there were some things that had happened that weren't good in Australia's history that had led to these Royal Commissions. And those Royal Commissions and many independent, we have regular independent reviews of security intelligence—Dennis has been involved in one recently—came to the finding that it is absolutely essential, even in a liberal democracy with responsible government, to be able to undertake some things that must be protected, but it's equally important that those agencies that do that, and the way they do it, are accountable. So what we have, to ensure that accountability are, through laws from our elected officials, we have an Inspector General of Intelligence and Security whose job is to sit outside the intelligence agencies and overview them. She can be approached at any time by anyone about issues. A Commonwealth Ombudsman, some agencies such as ASIO have an ombudsman, and we also have the Public Interest Disclosures Act which only came in in 2013, but that's a mechanism to safely provide any advice of any concerns and for that person importantly to be told what has happened as a result of them raising this. So that means that there are measures that... look, Nick's shaking his head, and I'd say one thing that is important here and it does come to... I think it will have some scrutiny in the case of the ASD matter that that Annika reported, and also in David McBride's matter because Mr McBride has said publicly that he raised concerns. There will be scrutiny into how well these mechanisms work.

**17:15 Nick Xenophon:** Look, I've asked questions of the Inspector-General of Intelligence Services Vivian Thom a number of years ago, one of the former directors. I asked her can you investigate these serious allegations, concerns and she said no, all we can do is to see whether it's in the purview of the power of the agency as per the ministerial directions. In other words, it is not even a toothless tiger, not even a paper tiger. It does, it does nothing that's effective in terms of appropriate scrutiny, a level of scrutiny of these intelligence services are woeful and Dennis of course is doing his report which we eagerly await to see the redacted version of that, or whatever we can see. But the issue here is this: when does it have to be a secret in terms of our national security for the protection of Australian citizens, and when are secrecy laws used as part of a political cover-up to prevent politicians and bureaucrats being embarrassed.

**18:09 Hamish MacDonald:** Is it, in your view, appropriate that the Parliamentary committee with oversight for our intelligence agencies can't initiate its own investigations into individual incidents, that they only effectively can look at their accounting and operations of a limited range operation..... *(Interjection ....of scope.)*

**18:28 Nick Xenophon:** I think Clinton said not the operations. I think what we should be looking at is we should be doing what the United States is doing. As much as people are willing to criticize the US, the United States' system of oversight of intelligence agencies is much more comprehensive, leaves us in the dust. We don't have any of that level of scrutiny and we need to have that for the public interest, and for the good of good governance.

**18:52 Hamish MacDonald:** Dennis Richardson, do you agree?....oversight?

**18:55 Dennis Richardson:** A couple of points here. First of all the Inspector General of Intelligence and Security has the, essentially the powers of a standing Royal Commission. The Inspector General can require people to give evidence under oath. Indeed, I appeared before the Inspector General as

part of an inquiry she was conducting in 2011. I spent 10 hours being questioned by two QC's under oath and the subsequent report made certain criticisms of, er, of myself, the..which was public and on the front page of different newspapers.

**19:41 Hamish MacDonald:** But why, why don't, with respect Dennis Richardson, why don't we do what our security allies do in the other five eyes?

**Dennis Richardson:** Well, well....

**Hamish MacDonald:** ...and give greater powers to the Parliamentary committees to learn more than just, more than just the accounting of these intelligence agencies and go into their operating procedures.

**19:59 Dennis Richardson:** Okay, first of all, in the United States, Congress has powerful intelligence committees of oversight in part because the accountable cabinet officials are appointed by the president and are not members of the Congress. In Australia, ministers are part of the parliament and they are accountable to the parliament. We have an, in the United States the inspector Generals that they have can be dismissed by the President and in some cases can be dismissed by the head of agency. They do not carry the same power or weight. The United States does not have an have an equivalent to the Inspector General of Intelligence and Security in Australia. Neither does the United Kingdom. So our arrangements are different but they are equally powerful and our Inspector General does have the authority to launch Own Motion Inquiries. The Inspector General does not require the approval of the government to launch an inquiry.

**21:19 Hamish MacDonald:** But the Inspector General is not answerable to the people of Australia in the way that politicians are, therefore there's not that that stream of accountability is there?

**21:29 Dennis Richardson:** That's right. The, the Inspector General ah, reports ah, to the, to the attorney and the attorney is then accountable to the parliament, which is in turn accountable to the people.

**21:42 Hamish MacDonald:** Annika, you were asked earlier if you're above the law. Is it your view that the intelligence agencies are themselves operating in a way which doesn't have the same sort of oversight that perhaps other institutions do?

**21:54 Annika Smethurst:** Yes, and going back to the original question about our allies or five eyes or like countries. If you look at New Zealand or the UK or Canada just that...firstly we've had the most... as you said at the opening of the show, National Security laws and amendments come in in some sense since September 11. Well, we should ask ourselves why and why these aren't reviewed more regularly. FOI is another one. In many countries that we consider ourselves similar to, Freedom of Information laws take in national security agencies. They're exempt here. The ah, shield laws are much stronger in places like New Zealand and in England warrants when you go into a journalist's home....if you try and do that in England firstly, it has a higher bar that it needs to be passed off by, it has to be ticked off by the director of public prosecutions, and also journalists can challenge it there and then and not go through a year-long expensive taxpayer-funded, in many cases, um, High Court battle. So if we want to look at like countries, I think we definitely do struggle and we need to, you know, step up. At the moment Australia in terms of press freedom is sitting at about 21. We were at 19. We're going backwards. I don't think that's what anybody wants.

**22:58 Hamish MacDonald:** Okay. I..

**22:59 Dennis Richardson:** Could I just mention New Zealand passed new laws in 2017, and those laws appointed an Inspector-General of Intelligence and Security, and the powers of that position are modelled on our own.

**23:17 Hamish MacDonald:** Okay. Let's take our next question tonight. It's from Helen White in our studio audience.

**23:22 Helen White:** *Thank you Hamish. Australia bugged Timor-Leste's cabinet room and spied on Timor-Leste during negotiations over oil and gas fields. Instead of charging the people who ordered the illegal spying, the government is prosecuting Witness K and his lawyer Bernard Collaery, who told the public about this crime. My question to the panel is: do you support this prosecution? And do you agree with the government that the case should be held in secret?*

**23:53 Hamish MacDonald:** Clinton Fernandes I want to put this to you, but just for anyone watching who's not familiar with this, Bernard Collaery is the former ACT Attorney-General. He's pleaded not guilty to charges that he breached National Security laws by communicating with ASIS information er, communicating ASIS information and conspiring with his former client, an ex-spy known as Witness K. Witness K is being dealt with in separate proceedings. How do you respond to that?

**24:19 Clinton Fernandes:** Thank you for the question. Well, I'm going to now quote from material that's been released in Parliament just in order to ensure that I myself am now covered by parliamentary privilege. It's a matter of fact that shortly after the bugging of the Timorese cabinet rooms, the Council of Ministers', and the conclusion of a treaty that was manifestly unfair, the secretary of the Department of Foreign Affairs and Trade resigned and joined the board of directors of Woodside. The first job that we know of that was taken by the former foreign minister Alexander Downer was as a consultant of some kind to Woodside. The Parliamentary Committee on Intelligence and Security can't examine that. It cannot examine the operations of agencies, the priorities of the agencies. They can't examine any operation past, present or proposed. If the trial were held in secret we would not be able

to see questions being asked of policymakers about what were your share purchases with the, with the benefit— not naming any one in particular here— people who are in the know, what share purchases did you make knowing that there was an advantage going to be given to a particular group of people. What about the former DFAT negotiator Professor Andrew Serdy who stated before Parliament that senior officials assumed automatically that the national interest was identical with Woodside's. Those questions ought to be asked in open court under cross-examination. A secret trial or trial that prevents this from being heard by the jury ah, will not be ... will not allow those issues to be ventilated.

**25:54 Hamish Macdonald:** Dennis Richardson. Do you agree with parts or large parts of this trial being held in secret including the pre-trial hearing?

**26:02 Dennis Richardson:** Well, first of all, the government has neither confirmed nor denied any operation in respect of East Timor. Leaving that aside, if an operation was indeed carried out it would not have been a crime. Secondly, in terms of the current legal proceedings, it is ultimately the court that will determine that which is kept privileged and that which is made public. Under the National Security Intelligence Information Act, the government, ah, the Attorney-General can issue a conclusive certificate. That is taken forward by the prosecution. The defence can argue an opposite case and ultimately it, it is the court that makes the decision that which is public and that which is kept secret.

**27:01 Hamish MacDonald:** Can you explain Dennis Richardson though why this National Security Intelligence Information Act is being applied here? It was introduced in 2004 as part of a broad suite of counter-terrorism law.

**27:15 Dennis Richardson:** Hamish, that is one of the great myths that the media over the last few weeks have tried to perpetrate. The National Security Information Act was introduced into the parliament in May of 2004 against the backdrop of a failed espionage case against a Simon Lappas in 2001. As a result of that failed espionage case, ah, the, the law, a review was conducted by the Law Reform Commission which found that there needed to be clearer and more refined procedures for

courts, tribunals and government agencies in the handling of highly sensitive material going before the courts. And our law on that, which came into effect in 2005, it has been primarily utilised in respect of counter terrorism prosecutions, but it was introduced against the backdrop of espionage and it was always intended to apply to the full sweep of intelligence agencies.

**28: 45 Hamish MacDonald:** Nick Xenophon.

**28:46 Nick Xenophon:** Well, I mean, I think there's a bit of revisionism on the part of Dennis Richardson. In the Hansard, during the parliamentary debates, Dennis Richardson was quoted favourably by Coalition MPs to say we need this, we need these laws particularly in the context of terror trials. What we're seeing is that these laws have been weaponised against good, decent Australians—Bernard Collaery, Witness K, David McBride—because these laws, this Act really skews and tilts the playing field completely against the defence because Dennis talks quite rightly about the context, but what he doesn't say is that the trial within the trial to determine whether something is a matter of National Security, evidence can be withheld. There can be information that the defence can't access. They are limited in what they can cross-examine...in terms of their cross-examination. It's a bit like having a footie match with one side with one hand tied behind their backs and they're blindfolded - at key parts of the trial. That to me is fundamentally wrong. *(Hamish tries to speak.)*

**29:46 Dennis Richardson:** Hamish, okay, can I just say that with due respect to Nick that is true in respect of the Senate. However, if you go to the Hansard, the Attorney General Philip Ruddock introduced the National Security Intelligence legislation on the 27th of May 2004, and he specifically referred to the Lappas case as the reason for the legislation. It is true that it has been primarily been used in counter-terrorism cases. I'll just give you one quick... *(Efforts by Hamish MacDonald to move on were not successful).* ...up, up until December.... important, it is important.... up and up until December 2019, there were 140 counter terrorism prosecutions in Australia, only 11 of which utilised the NSI act.

**30:45 Hamish MacDonald:** Okay, we've received a contribution to this discussion from the former President of East Timor, José Ramos-Horta tonight. This is what he has to say about it. He says the secrecy surrounding the cases of Witness K and Bernard Collaery brings to mind the North Korean and Soviet Europe political trials. Witness K and Bernard Collaery did no harm to Australia's vital national security interests. If anything, he says, they rescued Australia from moral depravity as they helped roll back a criminal, illegal order to carry out an illegal wire-tapping of a friendly government. The case against them should be summarily dismissed. Jacinta Carroll, amid all the arguments around these laws have we lost sight of some of the core principles of our democracy, which is open justice.

**31:29 Jacinta Carroll:** Well, I think the thing is with this case, we do have a case being held by trial in a court and that is being upheld by this system. As Dennis alluded to, the reason why we have the NSI Act is because prior to that, National Security information could just be withheld.

**31:49 Hamish MacDonald:** But do you say is not in the public interest to know what is before this court?

**31:54 Jacinta Carroll:** Again it comes back to... does everything need to be transparent or in the case.....

**32:00 Hamish MacDonald:** But I'm asking you in this instance, is it not in the public interest that we as a country know what our leaders made a decision to do or not to do?

**32:09 Jacinta Carroll:** That will be up to the judge to determine. So the judge will get...

**32:11 Hamish MacDonald:** But I'm asking your view on it.



**32:14 Jacinta Carroll:** It always depends. So when we look at any case, and I'm not deeply familiar with the case, I'm broadly familiar, but typically in a case like this we look at what are the capabilities that were being used at the time. They might be capabilities that are still being used in other operations by the agencies involved. What other, what people were involved, all these sorts of things might be classified. What other sources of information were being used. This is about technical capability but likely there would be human source information as well. There may be things that relate to privileged conversations or other information coming from partner countries, that still has to be protected. The great thing about the NSI Act, and this is why it was the Law Reform Commission that recommended that we have something like this, is that prior to that, the government just could close information and say we're going to prosecute but you're not going to see anything. This was a recommendation to say well, the judge should be the one to make the decision on that, and a judge is the one to make a decision.

**33:13 Hamish MacDonald:** But in this instance they have to take the advice of the Attorney General with the greatest weight on in determining that.

**33:18 Jacinta Carroll:** As the expert on security in Australia that, that is appropriate. **Hamish:** Okay... **Jacinta:** so there's still expert advice. (*Slightly unclear.*)

**33:23 Hamish MacDonald:** Let me bring in Bernard Collaery who's standing by in Canberra for us tonight. He's at the centre of all of this. Bernard Collaery, do you know who it is that's pursuing you and why?

**33:32 Bernard Collaery:** No, I don't, but may I thank Jacinta for letting me, at this late hour, get a bit of a laugh.

**33:38 Hamish MacDonald:** Why?

**33:40 Bernard Collaery:** Is the attorney the expert on intelligence? And the fact is, that it's not a judge balancing exercise. The NSI Act mandates and gives the attorney's certificate the greatest weight. The judge must apply the greatest weight. It's not a weighing and balancing exercise at all. I can't talk about the proceedings involving myself, but I must say there are no challenges to the accepted notions of national security in that case....there are no challenges.

**34:17 Hamish MacDonald:** Do you think Bernard Collaery, that it's in the public's interest to know the substance involved in this trial?

**34:24 Bernard Collaery:** Well, you've got to see Hamish, the overall picture of this. This issue, about which I'm forbidden from speaking, is part of failed foreign policy.

When one speaks of economic well-being for Australia, and it being lawful for Australia to use its agencies to pursue economic well-being, do you look at that in the macro sense about achieving a short-term profit from something, or do you look at the overall benefit in our region to have a stable prosperous nation for example, and to have an unsinkable aircraft carrier, that's an island on our shipping trade routes, for the next part of the millennium. Is there a short-term aspect to economic benefit or is there a long term? And intelligence agencies, Hamish, must be accountable, but above all they must be effective. I'm a proponent of the intelligence functions and it's well known that I am, but there must be a line drawn at times where the function is not effective and is not proper, is not necessary, and it follows, may not be lawful.

**35:40 Hamish MacDonald:** You're the one that's living through all of this at the moment. You heard the statement given to us by José Ramos-Horta comparing this to Soviet-era and North Korean trials. Is that how it feels to you?

**35:52 Bernard Collaery:** Well, I must say, I've been calling in recent times for a specific penalty to be introduced for the smearing of so-called whistleblowers. If that's part of an attempt to prevent a public disclosure that is in the public interest, that is genuine, then there should be penalties for the deliberate smearing of whistleblowers. I feel very strongly about a lot of the media that's getting a run on. I think Dennis mentioned there were some issues that weren't the case about staff being pulled off the job for something else. Now, look I may not cavil with some of those issues. The principal function is, our intelligence agency, especially our overseas agency, must be effective. It will not be effective if it's involved in foreign policy, if its functions are overtaken by short-term trade issues that are fundamentally flawed, are morally flawed, but as well, unprincipled in terms of us developing respect in our region. And you've got to face one thing, Hamish, the Timorese were unhappy from the very beginning, way back before this Witness K issue arose, very unhappy with their lot over a suite of treaties that they'd inherited or had re-signed under difficult conditions. The fact is that we must not signal to the region that we will use both our foreign policy diplomacy together with our intelligence agencies in the pursuit of policies that bring down our reputation in the region.

**37:42 Hamish MacDonald:** To be specific though, Bernard Collaery, who was most embarrassed by these revelations when they came out?

**37:48 Bernard Collaery:** Well, of course, it's an embarrassment for Mr. Howard and an embarrassment or worse for Alexander Downer. I can't... I'm precluded from commenting further on the question of lawfulness. I can't comment, I'm prevented. I mean I yearn for the day when I can defend Witness K and myself in open court. This is the democracy. This is the democracy that my father gave his life, in the war for. This is a disgrace to Witness K and a disgrace to myself. And as for the alleged independence of the Inspector-General of Security, I mean that's laughable. Why did the Inspector General of Security approve a person to see me, as an approved person, that I would have not had a clue about that person's operational record, to see me. There's a fundamental answer that must be given in open public court as to who flicked me the hospital pass, and why that wasn't tackled up the line at the time.

**38:55 Hamish MacDonald:** Bernard Collaery, thank you very much. I'm going to put that to you Jacinta Carroll. He's essentially saying the claims you've made tonight about accountability, about oversight, are laughable.

**39:04 Jacinta Carroll:** Well, I think that the court will determine whether that's the case or not. I would say from that case, because it has been ongoing for some time, and our laws have changed since then, and many mechanisms have changed, that when there's a consideration of how do our intelligence agencies work, how does the accountability regime work, then of course, this case will be looked to. It would have been one of the things that Dennis would have looked at, for example, in his review. It would have informed the way we're doing things and are they done well. I think that it's reasonable though, to understand that not everyone will have access to all aspects of knowledge about every case, so there are some very good reasons for that. One...

**39:49 Hamish MacDonald:** It's not really a debate here is it, it's about...

**39:51 Jacinta Carroll:** .... open court is the question that Bernard has come up with. It depends because not everything would be. Matters of an operation that involved technical intercepts in relation to negotiations. I'm sure that there are many elements of that being an ASIS operation that would be classified and would continue to be. But there are other elements of that case that wouldn't be. So again, and a judge will make the decision on that, will take the advice from the Attorney-General into account. But then the judge will actually look at that and will compare, will look at the case, will look at what the judge deems to be relevant to security in terms of content and will probably look at the expiry of time as well, to determine whether these things need to be.. to remain.....

**40:37 Dennis Richardson:** Hamish... I'm just going to hold you up there...

**40:40 Hamish MacDonald:** Dennis..... we do need to move on to our next question which comes from Cleveland in Ohio.

**40:43 Taylor Hudak:** *Hi I'm Taylor Hudak from the United States and I have a question concerning Australian whistleblower David McBride. Now, Major David McBride was a legal officer with the Australian armed forces, and it was his job to ensure that the army was adhering to legal and ethical standards. Now similar to the case against Australian journalist and publisher Julian Assange, McBride is being charged on counts related to releasing classified material. Now, how is this exactly fair considering the fact that it really is in the Australian public's interest to know about crimes being committed in their name?*

**41:21: Hamish MacDonald:** I should point out that Tyler is the founder and editor of Activism (*Unique...Eunuch?*), an independent, non-profit online media network in the United States. Nick Xenophon.

**41:30 Nick Xenophon:** Well, from Cleveland to Canberra, this is an issue that is very important. David McBride is our client, Xenophon Davis client, I just want to put this in context. Australians need to know about this case. Here is a man who was a Major in the Australian Army. He was a lawyer. He was in Afghanistan. He actually was awarded a combat service medal. He was at the frontline. He had his life on the line.

And he became aware of serious systemic issues in our Defence Forces, issues that he raised in terms of unlawful killing of civilians, unarmed adults, unarmed children, where he took that to his superiors. It went up the chain of command including to the delegate of the Chief of the Defence Force Major General Hurley, now the Governor-General. He then went to the Australian Federal Police and made a formal complaint. That was ignored. After that, he went to senior politicians, very senior politicians, and raised this issue saying there is something seriously wrong here, you must investigate this. He eventually got a response by the Australian Federal Police three and a half years later, when they raided his home and they charged him for leaking information to the media. He admits that he gave information to the media because he exhausted all remedies available to him.

He now faces a trial, and as bad as Bernard Collaery and Witness K's trial is, where they face a two-year jail term, David McBride faces life imprisonment, because that's what the penalty is. It's a limitless penalty under the Defence Act. Here is a man who served his country with honour, passionate about his country. He's a good, decent Australian and now he's being dragged through the courts and faces life imprisonment, all in the name of National Security. How can that be? And how can it be that the ABC publishes that in 2017, and the ABC was raided in relation to that, and I'm glad that it's still online. So, it's so secret and so sensitive it's still in the ABC website, may it stay on the ABC website. How can that be? How can it be in this country that good, decent people, patriotic, passionate about their country, about Australian values, are now being caught up in terror laws that were designed for Al Qaeda and Isis. It is an abomination.

**43:46 Hamish MacDonald:** Annika.

**43:47 Annika Smethurst:** I think it comes down to how whistleblowers are treated in this country and not just legally, but how we treat them socially. I think something about the way Australia is....we see them as doblers or squealers or people that just won't get on with it, and they want to highlight bad things they see. I think we've all walked past standards we don't necessarily accept and not all of us will speak up about that, and that's not necessarily a good thing. (*Unclear*) but there's some research that's come out from Griffith University about whistleblowers and 97% of them try and raise it with an employer first if they say an issue at a hospital or wherever it is. Sixteen percent go on to try and raise it with an overarching body or watchdog. One percent end up going to the media and usually after they've exhausted every other option. We don't have this crisis with people, you know, with too many whistleblowers. We don't have enough people speaking up because of the way we treat them.

In other countries, some countries, reward them with financial, you know, sort of grants if they have... (*Hamish comment*)... the way we treat whistleblowers in this country is appalling and press freedom in this country will not be, you know, even if they enshrined things and shield laws, it will never be right until we have the same protections for people that speak up and whistleblowers.

**45:00 Hamish MacDonald:** Again, Dennis, you've been shaking your head and saying "rubbish". What's the problem with what they're saying?

**45:06 Dennis Richardson:** Well, well, it's simply wrong to say that McBride is caught up in counter-terrorism laws. He is caught up in the National Security Information Act, which was introduced against the backdrop of a failed espionage case. That is a fact, whether people like it or not. But look, a broader point here—and all these cases I realize the different sides involved, but what you're trying to do is to balance out the accused's right to a fair trial, the principle of open justice, and the community's interest in protecting National Security. All liberal democracies have that dilemma when matters go to court which involve highly classified material. We have set up a process in our case. The United States has a different process. Canada has a different process. In both cases, they're not dissimilar to our own. The UK has different processes again. These are real dilemmas for liberal democracies and ultimately in our case it will be a judge that makes the decision. It will not be the government.

**46:27 Nick Xenophon:** (..the laws are skewed) can I just say that in David McBride's case we are seeking, that my instructions are to issue a subpoena against Dennis as well as others to give evidence in that case. But the rules are stacked against my client and he faces life imprisonment for doing his job. And just under these NSI Act orders, from 2004 to 2017—I doubled checked on this today—not one order was issued under the NSI Act. Since then—we don't know because the Attorney hasn't published the details as he's required to in the legislation—they've been falling from the sky. How can that be? What has happened now, and these aren't case against terrorists. They're against decent Australians.

**Hamish McDonald:** All right. Our next question tonight is from Peter Boyle.

**47:10 Peter Boyle:** *This is a question to the panel. We have accidentally discovered that there was a secret trial of a "Witness J" – for what, we don't know. So what about the secret trials involving Witnesses A-I? Will the public ever know? How many secret trials have there been and what does this say about the state of democracy in Australia?*

**47:33 Hamish McDonald:** Clinton Fernandes, "Witness J" was charged, tried, convicted, imprisoned, without public knowledge. If this happened in another country as a journalist, we would probably describe him as being disappeared. How does this happen in Australia?

**47:51 Clinton Fernandes:** Look, I don't know the agency that "Witness J" worked for but I can guess. If people were to find out, especially hostile governments were to find out his real identity, they would be able to put together a pattern of his life to work out who he'd contacted in their own country, and then roll up any agent network that he'd established, if he in fact worked for an agency that I think he might have worked for. That's the best defence I can give you of that position. It's not good, but it's the best defence I can give you.

**48:28 Hamish MacDonald:** But we've been told this evening that there are all sorts of measures in place that ensure there's not overreach by intelligence agencies, that there is accountability. But in this instance the ACT Attorney-General didn't even know that this prisoner was being (*Clinton interjection*) housed in a prison in his territory.

**48:48 Clinton Fernandes:** That's not a good look, but look, the reason for the best defence explanation I can give of that, is the one I've just given. And this also applies to the Collaery/ Witness

K thing. What needs to be kept secret is the identity of Witness K for a similar reason, and any techniques and tactics and procedures that were used in an operation.

**49:09 Hamish MacDonald:** But...the independent National Security Legislation monitor, again one of these instruments of accountability that's been mentioned tonight.... so that they only found out about it not through official channels. It's a quote. He said, "much to my surprise"—this is James Renwick SC, "much to my surprise, I didn't find out about it officially".

**49:30 Clinton Fernandes:** It's not an easy (*Unclear*) defence, though.

**49:32 Hamish MacDonald:** So you can't....

**49:33 Clinton Fernandes:** Look, I'm giving you the best possible defence I can think of.

**49:36 Hamish MacDonald:** Jacinta Carroll.

**49:38 Jacinta Carroll:** Well, Mr. Renwick can undertake an Own Motion Inquiry into any aspects of national security law that he's concerned about particularly in relation to a case.

**49:46 Hamish MacDonald:** But he says should I have been told, well, I would certainly have preferred to have been told. Asked if security agencies had given an explanation as to why he hadn't been told, he said that he received not a very satisfactory one. And there is a serious question of accountability here, isn't there?

**50:05 Jacinta Carroll:** One of the things about that Clinton's alluded to is that a number of agencies have protections around their offices, and all agencies that are involved in the National Security space have activities, information, equipment, and other methods of activity that are best to be protected for a whole range of reasons. A very simple example is the statement about the cyber attacks that Australia has been under recently. The type of capability that Australia deploys in order to protect sensitive systems such as our parliamentary system and other classified systems would itself be protected, as well as the capability to track back and find out who might be attacking those. (*Hamish question*) So those sorts of capabilities would be protected, mapped in with an individual whose identity wouldn't need, wouldn't want to be known, and that individual I would have assumed has also said that they are quite happy to not be made public.

**51:15 Hamish MacDonald:** The questioner here mentioned - well, what about A to I, Witness A to I. Does it concern you that the intense secrecy in a situation like this leads to conspiracy? That when the community can't see, doesn't understand, they fill that information void with their own theories and ideas about what's going on.

**51:35 Jacinta Carroll:** I think this comes back to this point about education, and I would say that anyone who's watching tonight to look at the Parliamentary Joint Committee on Intelligence and Securities (PJCIS) current inquiry into the impact on press freedom of law enforcement and security, and the impact of those laws. And you'll find examples of cases that have concerned various people, but one thing that I see as a thread that's running through most of the public submissions and certainly through the media ones is that there isn't an understanding of the accountability regimes and how they work. They're not perfect. Part of the beauty of a democracy is it's a clunky thing but we do have very regular, very active, independent, broad-ranging reviews as well as very particular focus reviews as well. But the knowledge of how these things work and even that— in the case of the PJCIS, our parliamentary joint committee that is focused on this— they look at every single national security law that is put to Parliament. It has a first reading, it's put straight to a joint committee and they're all subject to public inquiry. So we can all participate in.....

**52:43 Hamish MacDonald:** Dennis has been conducting a review of National Security legislation, which is supposed to be released this year. Even when it does it will be in part. It'll be redacted. I

mean you keep assuring us that everything is hunky-dory in terms of accountability. (*Jacinta interjecting*)

**51:58 Jacinta Carroll:** It's not all hunky-dory because these things are living and breathing. That's why we have reviews and part of the reason of regularly actively reviewing whether our security laws work or whether there's overreach or whether they're inconsistent is just trying to see are they actually working well and trying to get that balance between national interest and our own privacy and our own human rights.

**53:17 Hamish MacDonald:** I'm sorry, there is that...

**53:18 Jacinta Carroll:** I'll just make one other point and that is that we also have to look at how well resourced the media is to be able to deal with this. A real eye-opener for me in the last few years has been engaging with journalists and finding just how thinly spread they are in trying to undertake investigations. Annika mentioned Australia has fallen back in the Press Freedom index. If you look that up, Press Freedom Index 2020, one of the main reasons is that we have basically a duopoly of the media industry.

**53:49 Hamish MacDonald:** One of the main reasons that was noted in that was the AFP raids on Annika's home and the ABC.

**53:54 Jacinta Carroll:** That was noted. There's concern about our national security laws, which has created a fabulous debate in this country, which I think everyone who thinks that national security is important welcomes, because I've never met anyone in the National Security or Defence space that doesn't firmly believe in the fundamental importance of accountable liberal democracy in our system. That's what people are trying to protect. However, (*Hamish interjecting*) one of the issues is that we don't have the capacity within our media industry to really support knowledgeable investigative journalism to a significant point. We have newspapers closing down. We have basically two companies that control the private media industry sector in this country. And that is a concern about how well informed can the public be through the media.

**54:47 Nick Xenophon:** Well, there's another more fundamental issue. Let me just give you the practical consequences of these national security laws, and I've got to be a little bit careful here and whether this will get me in trouble remains to be seen, but Mark Davis, my law partner who's acting for David McBride, we finally got to see the prosecution brief. Thousands and thousands of pages of documents. Eighty percent of those documents have been deemed to be under this conclusive certificate from the Attorney-General to be secret. We finally get—Mark finally gets two hours at the government solicitor's offices to look at these documents, to make notes—only 2 hours for thousands of pages. And then he has to hand those notes back to them. It can't take the notes with him and we have yet to have an opportunity for our client to sit down with us as his lawyers to view those documents and presumably we're going to have members of the government or government solicitors sitting in the room with us. Now honestly, this is the consequence—this is what an authoritarian state does. These are our laws and the practical consequences of them.

**55:54 Jacinta Carroll:** Well, the practical consequences are things that we need to learn from. We had an independent intelligence review back in 2017. One of the key recommendations of that was that we look again at making sure that our national security laws are consistent, but they're easier to use, and I think the thing that you've described is something that should be fed back into that. You know, how easy is that to use?

**56:13 Nick Xenophon:** Well, my client faces a life sentence. He faces life imprisonment. His life has been turned upside down. He has to fund his defence. He's resorted to a Go Fund Me page. The resources of the state are limitless, and we are trying to do everything we can for him on a shoestring. This is not a fair system. It is not a fair system.

**56:32 Hamish MacDonald:** Okay, next question tonight is from Amanda Nguyen.

**56:36 Amanda Nguyen:** *Hi panel. I think given the environmental context in which we all live in, a majority of people are probably willing to forgo some of their individual liberty to ensure the safety of the masses. But where do we define that fine line between the two?*

**Hamish MacDonald:** Annika?

**56:53 Annika Smethurst:** I was actually going to say that in relation to the last question. All of these things to me are a matter of balance. I understand the operational issues that come up with national security. I understand that because we've had a lot of good national security laws it has kept us safe. I think it comes down to balance. We live in a democracy. So if you're looking at freedom of the press or open justice, the balance has to sit with the people. We elect these people and pay their wages to work for us. If it was in East Timor or wherever this is happening, they're doing it in our name, with money we give them every week from our wages, and there is a lot of countries in our region that don't have a free press and open justice and I wouldn't want to be like any of them. This is so fundamental that we have to actually get the balance right and if it's unsure we have to wait it out to give to the people. We're in a democracy. They deserve to know what's happening.

**57:45 Hamish MacDonald:** Thank you.

**57:49 Clinton Fernandes:** The decades of terror, the last two decades of terror, when they started on September 11, the terrorists were confined to a few villages in Afghanistan. The way the war on terror has been prosecuted in the name of national security has seen terrorism and terrorists expand across South East Asia, the Middle East, Africa. The invasion of Iraq resulted in a huge increase in the terrorism threat.

So rather than simply talk about giving more power to the agencies, it is time for a rethink of how we prosecute the so-called war on terror and actually work to defeat it rather than take tactics and come up with a target list of who you're going to hit next. It's just going to expand the number of targets.

**58:32 Hamish MacDonald:** So do we have to accept, though, that our lives have changed in this country because of the legal mechanisms that have been put in place in response to all of that?

**58:43 Clinton Fernandes:** Do we have to accept it? Well, the fact is that our lives have been changed, but there's no reason to take it lying down; one can always change things. These are not laws of physics. They are laws of, social laws, the laws of humans, and we can change those.

**59:58 Jacinta Carroll:** We don't have mass surveillance in this country. Any investigation that's undertaken into a person... that is intrusive has to be undertaken under warrant. And the reason that we have the, um, some changes to that, some enhancements, also some being given away, so there's a current legislation relating to ASIO, for example. where ASIO is saying we don't want to detain people, we don't use that, we don't need to do that. However, we do need to balance with some other powers that will bring us more in line with the Australian Federal Police for example. But the reason we have all of those is to prosecute against terrorism and not against particular targets, but to disrupt plots. Australia looks like, much like we do with the current coronavirus. We look like we're doing pretty well because there's been a lot of work behind the scenes. We've only had around seven small, single actor terrorist attacks in this country since our terror alert level was raised to high/probable, as the terminology is now, but we've had 18, that's one, eight, major plots disrupted. So these are things that would have been the Paris attack but in Sydney or Melbourne. In Christmas 2016 a major mass casualty plot planned for a number of venues through Melbourne that was only found out about a few weeks beforehand. The reason why a case was able to be brought, evidence collected, and that the plot was able to be disrupted without any harm to anyone was because there was the ability to engage some technical interceptions, some communications interceptions, and very, very importantly, and this is fundamental to, from what I understand every counter terrorism case in Australia, because of

people within the community who knew these people talking to the authorities. All of these things need to be protected.

**1:01:03 Hamish MacDonald:** Our next question tonight is a video from John Shipton, who's the father of Julian Assange.

**1:02:07 John Shipton:** *John Shipton here, Julian Assange's father. The question of surveillance of Julian's legal team throughout the world, in Spain, in Brussels, in London and in Australia was all revealed by whistleblowers. Should whistleblowers come forward from Australian institutions to report on what has happened in Julian's case?*

**1:01:31 Hamish MacDonald:** Dennis Richardson.

**1:01:33 Dennis Richardson:** I'm not aware of his legal team being subject to surveillance in Australia. I'm genuinely not aware of that. I would simply note that Julian Assange is currently imprisoned in the UK. The last time I looked the UK was a liberal democracy and he is before the courts in the UK and it'll be up to the learned judges and the UK to determine his fate, and he's receiving consular assistance the same way as any other Australian would. He's entitled to no more and no less.

**1:02:05 Hamish MacDonald:** You are probably Australia's most seasoned diplomat or one of, if not, do you think Australia has done enough to make the case for Julian Assange?

**1:02:16 Dennis Richardson:** It is not the Australian government's job to make the case for Julian Assange....

**1:02:24 Hamish MacDonald:** I'm not talking about in the courts. I'm talking about in terms of their representations on his behalf to both the British and the US governments.

**1:02:32 Dennis Richardson:** Under consular, under long-standing consular arrangements, which you'd be aware of, the government's obligation is to ensure that Julian Assange is treated in the UK consistent with the laws of the UK. And as far as I'm aware that's been the case. I'm not aware of the UK government breaching its own laws in respect of Julian Assange.

**Hamish MacDonald:** Annika Smethurst.

**1:03:00 Annika Smethurst:** I think the Assange case, it's an interesting one. It's not as clear as I think some people try and make it as a clear press freedom case. I think what Assange does is different to journalism. In saying that, the US are trying to get him to the US obviously. If you look at the First Amendment and Free Speech laws in the US, it actually doesn't differentiate between journalists or anybody who wants to speak up. It's an overriding law. So when you look at it like that, I think the way he has been treated, the length of time for this case—I don't think I'd like to see any Australian in that situation and I think that more should have been done.

**1:03:41 Hamish MacDonald:** But the question of whether he's a journalist or not aside, Dennis says Julian Assange has received no more no less than anyone else. But I mean Peter Grete appeared on this program. We can all remember the enormous lengths the Australian government went to to make representations on his behalf. It's quite different. I mean on the face of it.

**1:04:00 Annika Smethurst:** Yeah, and you see I guess not the high levels of government do it. We've obviously seen a few Coalition MPs get behind this cause, cross benchers, and a lot of people are sort of supporting Julian within Canberra. But yeah, I think when you talk about from a government level, there's a lot more that could be done, and I think all Australians should they be in that position over there would expect a higher level of support.



**1:04:20 Hamish MacDonald:** All right. Well, that's all we....

**1:04:22 Dennis Richardson:** Er, Hamish and just very quickly....

**Hamish MacDonald:** Okay, one last time...

**1:04:25 Dennis Richardson:** Julian Assange is being held, Julian Assange is being held in the UK, a liberal democracy which respects the rule of law. Egypt—that was not the case.

**1:04:35 Hamish MacDonald:** All right. We'll leave it there. That's all we got time for tonight. A huge thanks to our panel Jacinta Carroll, Clinton Fernandes, Dennis Richardson, Annika Smethurst and Nick Xenophon. Thanks to those of you at home for sharing your questions as well, and to you here in the studio audience, and we really appreciate the sensitivities involved in some of these topics and to all of you for agreeing to turn up and discuss them tonight. Virginia Trioli will be with you next week. Don't miss it. Good night.