Neither Confirm Nor Deny: National Security Secrecy and Australia's Liberal Democracy, 1948-2022

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A thesis submitted for the degree of Doctor of Philosophy of The Australian National University.

Declaration

I declare that this thesis is my own work unless otherwise acknowledged in the text. To the best of my knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

Emily Claire Hitchman

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Abstract

Since the 1940s, the often-controversial policy of successive Australian governments has been to ‘neither confirm nor deny’ (NCND) certain matters of national security. Proponents of the NCND principle have historically argued that the consistent, unchanging use of NCND is critical to national security, and detractors that such ‘blanket’ government secrecy has no place in Australia’s liberal democracy. This thesis uses primary sources to answer the overarching research question: *what role did NCND play in Australian liberal democratic governance between 1948 and 2022?* To answer this question, it examines the evolution of Australian governments’ use of NCND, the factors that shaped this evolution, and the interaction of NCND with bipartisanship on national security. Based on this analysis, this thesis draws three main conclusions. First, it finds that, despite governments’ insistence on unchanging use, NCND has continuously evolved since its adoption in 1948; this evolution was primarily precipitated by the changing dynamic between security and liberal democratic imperatives and further shaped by governments’ ability to maintain information security. Second, this thesis finds both that Australian governments’ commitment to NCND has generally been bipartisan, and that NCND itself developed into an important tool of bipartisanship on national security. Thirdly, it concludes that the key historical role of NCND has been to support Australian governments in navigating the permanent but evolving tension between secrecy and transparency. This thesis ultimately argues that the use of NCND, far from being inherently undemocratic, reveals an ongoing historical commitment of Australian governments to the values and practice of liberal democracy.

Acronyms and Abbreviations

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Corporation
ABF	Australian Border Force
ACLEI	Australian Commission for Law Enforcement Integrity
ACT	Australian Capital Territory
ADF	Australian Defence Force
AFP	Australian Federal Police
AGD	Attorney-General's Department
AGO	Australian Geospatial-Intelligence Organisation
AIC	Australian Intelligence Community (comprising ONI, ASIO, ASIS, ASD, AGO and DIO at time of writing)
ALP	Australian Labor Party
ANZUS	Australia, New Zealand and the United States Security Treaty
APS	Australian Public Service
ART	Administrative Review Tribunal
ASD	Australian Signals Directorate
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
AUSTRAC	Australian Transaction Reports and Analysis Centre
CDPP	Commonwealth Director of Public Prosecutions
CIA	Central Intelligence Agency (United States)
CPA	Communist Party of Australia
CPF	Commonwealth Police Force
DIGO	Defence Imagery and Geospatial Organisation
DIO	Defence Intelligence Group

DSB	Defence Signals Branch
DSD	Defence Signals Division
HMAS	Her/His Majesty's Australian Ship
IGIS	Inspector-General of Intelligence and Security
INSLM	Independent National Security Legislation Monitor
ISAF	International Security Assistance Force
JIO	Joint Intelligence Organisation
KGB	Soviet Committee for State Security (Komitet Gosudarstvennoy Bezopasnosti)
MI5	United Kingdom Security Service
NAA	National Archives of Australia
NARA	National Archives and Records Administration (United States)
NATO	North Atlantic Treaty Organisation
NCND	Neither Confirm Nor Deny
NIC	National Intelligence Community (comprising the AIC, and the intelligence aspects of the Department of Home Affairs, AFP and AUSTRAC at time of writing)
OECD	Organisation for Economic Co-operation and Development
ONA	Office of National Assessments
ONI	Office of National Intelligence
PJCAAD	Parliamentary Joint Committee on ASIO, ASIS and DSD
PJCASIO	Parliamentary Joint Committee on ASIO
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PM&C	Department of the Prime Minister and Cabinet
RCASIA	Royal Commission on Australia's Security and Intelligence Agencies
RCIS	Royal Commission on Intelligence and Security
TNA	The National Archives (United Kingdom)

UK	United Kingdom
UN	United Nations
US	United States of America

Introduction

When the United States (US) Central Intelligence Agency (CIA) joined Twitter[1] in 2014, it chose to open with a reference to its notorious Neither Confirm Nor Deny (NCND) policy: the practice of addressing questions or speculation without revealing any substantive information. It joked that "We can neither confirm nor deny that this is our first tweet," to largely popular reception.[2]

In Australia, on much a less jovial note, NCND was at the heart of the controversial *R v Collaery* case, which until 2022 was before the Supreme Court of the Australian Capital Territory (ACT). Bernard Collaery was charged with a number of secrecy offences in connection with allegations of an historical Australian intelligence operation during economic negotiations with Timor-Leste in the early 2000s. The Morrison Government had argued that due to the national security risks of disclosing elements of its criminal case against Collaery, parts of the proceedings should be conducted in secrecy. The NCND principle, the government argued, was long-standing, well-understood, upheld by successive Australian governments, and in this case should prevail over the liberal democratic principle of open justice.[3]

While these arguments were accepted by the primary judge, this decision was overturned by the Court of Appeal, which in part pointed to the "very real" risk of damage to public confidence in the administration of justice associated with not publicly disclosing the evidence.[4] The proceedings were ended on 7 July 2022 by the incoming Attorney-General, Mark Dreyfus KC, who said his decision was made with regard to both "our national security, our national interest and the proper administration of justice" and our "relationship with our neighbours."[5] Though the new government clearly had a different view of where Australia's national security lay, the Attorney-General reaffirmed a commitment to NCND; "The long-standing practice of government has been to neither confirm nor deny claims made about intelligence matters and I will strictly adhere to that practice."[6]

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[1] The platform now known as 'X'.

[2] Central Intelligence Agency, "We Can Neither Confirm nor Deny That This Is Our First Tweet.," Tweet (7 June 2014).

[3] *Mossop J, R v Collaery* (No 7) [2020], No. ACTSC 165 (ACT Supreme Court June 26, 2020).

[4] Judgment Summary, *Collaery v The Queen* (No 2) [2021] (ACTCA 28) (ACT Court of Appeal October 6, 2021); See also Kylie Weston-Scheuber, "Hear No Evil, See No Evil, Speak No Evil: The Secretisation of Information by Government in Australia," *Bond Law Review* 34, no. 1 (June 30, 2022): 47, https://doi.org/10.53300/001c.34568.

[5] Paul Karp, "Prosecution of Whistleblower Lawyer Bernard Collaery Dropped after Decision by Attorney General," *The Guardian*, July 7, 2022.

[6] Mark Dreyfus, "Transcript: Press Conference on Bernard Collaery," July 7, 2022, https://ministers.ag.gov.au/media-centre/transcripts/press-conference-bernard-collaery-07-07-2022.

The contrast between a Twitter punchline and the fulcrum of criminal prosecution is a stark one. It demonstrates the extent to which NCND is embedded in both democratic government policy and cultural consciousness. NCND remains an active information handling policy of the US, Australia and key democratic allies in relation to security and intelligence activities. However, its use draws strong criticism. Detractors, contemporary and historical, have argued that NCND runs counter to the very values and functioning of a liberal democracy.[7]

How did we get here: witnessing governments decline to confirm or deny key information in legal proceedings on the one hand, and intelligence agencies joking about the controversial information handling policies on the internet on the other? What is the story behind NCND? These are the central questions that prompted this research.

Research questions

This thesis is about the history and evolution of NCND in relation to national security, and the role it has played in Australia's liberal democracy. Australian governments' relationship with, and use of, NCND represents a puzzle; why have successive governments, of different political persuasions, consistently expressed support for a secrecy principle which seems to fly in the face of liberal democratic values and court ongoing controversy? Moreover, why have they sometimes discarded this principle (despite at other times insisting on consistent application), and chosen instead to indeed 'confirm or deny' matters of national security? This thesis sets out to examine the role of NCND in the context of Australian governments' approach to official secrecy and national security. There are many ways to approach the subject of official secrecy, including politically, legally, and certainly philosophically. This thesis will primarily use the historical method to address three broad questions:

1. Whether Australian governments' relationship with and use of NCND has evolved over time, and (if so) why and how
2. Whether Australian governments' relationship with and use of NCND has been politically partisan, and (if so) to what extent; and
3. Ultimately, what role NCND has played in Australian liberal democratic governance.

[7] Sara Robinson and Brett Max Kaufman, "The CIA's Long and Dangerous History of Refusing to Answer Absurdly Obvious Questions," *American Civil Liberties Union* (blog), April 8, 2024, https://www.aclu.org/news/national-security/the-cias-long-and-dangerous-history-of-refusing-to-answer-absurdly-obvious-questions; Kieran Pender, "Prime Minister Anthony Albanese Lagging on Whistleblower Protections," *The Canberra Times*, October 7, 2023; Bernard Bell, "Shhh! Don't Say Glomar Anymore," *Yale Journal on Regulation: Notice and Comment* (blog), March 14, 2022, https://www.yalejreg.com/nc/shhh-dont-say-glomar-anymore/; A Jay Wagner, "Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response," *Communication Law and Policy* 21, no. 4 (October 1, 2016): 539–67, https://doi.org/10.1080/10811680.2016.1216690; Tony Kevin, "Abbott's Spy Games," *Eureka Street*, November 29, 2013, https://www.semanticscholar.org/paper/Abbott%27s-spy-games-Kevin/52aa8b1ec8b6c9bd1cf0cab6067c450435f52a14; Robert Edwin White, "The Neither Confirm Nor Deny Policy: Oppressive, Obstructive, and Obsolete" (Centre for Peace Studies, University of Auckland, 1990).

Though it is outside the scope of this research, findings against these questions may also have the utility of informing the public policy question of whether and, if so, in what circumstances NCND remains appropriate policy in Australian liberal democratic governance. This may assist policymakers in their contemporary approach to official secrecy surrounding national security and the continued use of NCND (further discussed below).

This thesis primarily explores the research questions through a chronological study of key historical developments for Australian official secrecy policy domestically and internationally, from the circumstances surrounding the establishment of the Australian Security Intelligence Organisation (ASIO) in 1949, to the conclusion of the *Collaery* proceedings in 2022. A strong theme that emerges over this period is the interaction between NCND and partisanship across Australia's two major political parties.[8] This interaction had two key aspects. Firstly, this thesis examines the extent to which both major parties supported NCND as official secrecy policy, either through maintaining existing NCND stances, or actively using the language and logic of NCND. Secondly, this thesis examines the role played by NCND in the context of growing bipartisanship on national security. While governments in the studied period have on occasion lacked an outright majority, all have been primarily formed by one of the two major political parties, which are generally recognised as operating with a level of bipartisanship on national security broadly.[9] As the following chapters will explore, early uses of NCND primarily restricted information about Australia's nascent intelligence and security framework from the Parliamentary Opposition. However, as the major parties reached a more even footing on access to such information (through election cycles and changes in government), and as the intelligence and security framework itself was expanded and matured, the use of NCND became more oriented towards restricting information from the Parliamentary crossbench and the public. This history of bipartisanship is key to contextualising NCND within Australian liberal democratic governance, and studying the historical role it has played therein.

However, NCND is far from exclusive to Australia. Often considered its 'origin story', NCND's strong association with US-led nuclear deterrence strategy cannot be overlooked.[10] This thesis will also examine the early uses and institutionalisation of NCND during the Cold

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[8] During the studied period, these were (and remain at time of writing) the centre-left Australian Labor Party (ALP, or Labor), and the centre-right Liberal Party of Australia. While in government, the latter has operated as a coalition with the centre-right National Party of Australia as the Liberal-National Coalition (LNP, or Coalition). Parliamentary Handbook, "Prime Ministers," Australian Parliament House, 2025, https://handbook.aph.gov.au/PrimeMinisters.

[9] While outside the scope of this thesis to examine, the further general implication that national security bipartisanship is a "good" thing has been contested by scholars. See Andrew Carr, "Is Bipartisanship on National Security Beneficial? Australia's Politics of Defence and Security," *Australian Journal of Politics & History* 63, no. 2 (2017): 254–69, https://doi.org/10.1111/ajph.12349.

[10] Wagner, "Controlling Discourse, Foreclosing Recourse," 546.

War in this context, which influenced Australia's domestic approach to official secrecy despite its lack of nuclear-armed assets. It is for these reasons that the research questions capture not only the 'use' of NCND by Australian governments, but their 'relationship' with NCND; this captures both active uses of NCND (or avowal) in relation to Australian national security matters, *and* how Australian governments have approached and interacted with the use of NCND by security partners internationally. As the following chapters will examine, the latter is a key feature of this history. The NCND policies of these partners frequently became a domestic political issue for Australian governments to navigate, from the 1949 establishment of ASIO under the Chifley Government; to the establishment of joint Australian-US signals intelligence facilities in South Australia in the 1960s; to the Australia New Zealand US Security Treaty (ANZUS) diplomatic crisis and 1989 Australian Senate inquiry into visits by nuclear-capable vessels; to 2023 comments by current (at time of writing) Australian Foreign Minister Senator Penny Wong on the nuclear armament status of visiting US military aircraft: "This is the Australian position: We understand and respect the longstanding US policy of neither confirming or denying."[11]

This thesis also scrutinises the apparent reliance of NCND's effectiveness on the preservation of what this thesis terms its core 'logic'. Governments of Australia and its allies have historically affirmed the need for consistent, unbroken application of NCND in relation to national security matters, arguing that even one errant denial would imply all other uses of NCND confirmations (or vice versa). This was no mere rhetoric. Notably, in the 1980s the US government allowed its commitment to the 'logic' of the NCND to shape substantive policy during the ANZUS Crisis, sensationally opting to prioritise the maintenance of NCND over its alliance with New Zealand (as Chapter 5 of this thesis will explore).[12] However, the historical record also shows that Australian governments certainly have, on occasion, confirmed or denied certain classified activities, counter to the supposedly 'iron-clad' logic of NCND. In one of the most archetypal examples (explored in Chapter 4), the Fraser Coalition Government reversed a decades-long policy of neither confirming nor denying the existence of a number of Australia's intelligence and security agencies by officially acknowledging their existence in Parliament in 1977.[13] Such considered and principled disclosures are described in this thesis as 'avowals.' Avowals illuminate much about the role of NCND (and its evolution) in Australia's

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[11] Andrew Greene, "Officials Can Neither 'Confirm nor Deny' US Bombers in Australia Carry Nuclear Weapons," *ABC News*, February 15, 2023, https://www.abc.net.au/news/2023-02-15/defence-wont-confirm-if-us-bombers-carry-nuclear-weapons/101978596.

[12] For a comprehensive exploration of the ANZUS Crisis, see Michael C. Pugh, *The ANZUS Crisis, Nuclear Visiting and Deterrence*, Cambridge Studies in International Relations 4 (Cambridge; New York: Cambridge University Press, 1989).

[13] Malcolm Fraser, "Ministerial Statement: Royal Commission on Intelligence and Security" (House of Representatives: Commonwealth (Austl.), October 25, 1977).

liberal democracy, particularly the limits of its application in practice, and form a critical part of this study.

Two significant factors emerge over this period of study as influenced Australia's approach to official secrecy, as explored in the subsequent chapters. The first is the dynamic between security and liberal democratic imperatives, and extent to which changes in this dynamic triggered changes in not only Australia's substantive national security policy, but official secrecy policy. Though often described in the scholarship as a 'balance',[14] the relationship between security and liberal democratic imperatives is arguably more subtle than a contest of two opposite, mutually exclusive factors (as further explored in the Literature Review); hence the framing of the relationship as a 'dynamic'. As this thesis will explore, while these imperatives were constant, the specific demands of both security and liberal democracy evolved over the studied period, and were interpreted and addressed very differently by Australian governments. The second factor is the practical ability of governments to maintain information security, which most frequently changed in connection with advances in information technology, particularly towards and beyond the turn of the millennium. While some advances in information technology were predictable and manageable, others constituted more significant 'step-changes' in the information security environment. This second factor was less associated with triggering major policy change, but rather shaped governments' approach to NCND and official secrecy policy over time. As this thesis will explore, governments' approaches to these two factors consistently influenced their official secrecy policy and approach to NCND over the studied period.

Original contribution and research impact

This thesis contends that NCND and its operation is not only a substantive phenomenon worthy of scholarly consideration, but a key conceptual 'organising principle' in Australian governments' approach to official secrecy policy more broadly, and an index of the evolution thereof. It makes an original contribution to knowledge in two main ways. First, this thesis develops a scholarly understanding of the historical relationship of Australian governments to NCND and how this has evolved over time. Second, in scrutinising the use of NCND in the

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[14] Jeremy Waldron, "Security and Liberty: The Image of Balance," *Journal of Political Philosophy* 11, no. 2 (2003): 191–210, https://doi.org/10.1111/1467-9760.00174; Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism," *Journal of Comparative Policy Analysis: Research and Practice* 8, no. 1 (March 1, 2006): 43–62, https://doi.org/10.1080/13876980500513335; Keiran Hardy and George Williams, "Terrorist, Traitor, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information," *UNSW Law Journal* 37, no. 2 (2014): 784–819; Kieran Pender, "Open Justice, Closed Courts and the Constitution: Australian and Comparative Perspectives," *University of Queensland Law Journal* 42, no. 2 (2023): 155–89, https://doi.org/10.38127/uqlj.v42i2.7355.

context of liberal democratic imperatives and across governments of different political persuasions, it offers an analysis of the role NCND has played in Australia's liberal democratic governance.

As explored in the literature review below, these two contribution areas cover gaps in the current research, despite the extensive historical and ongoing contemporary usage of NCND in Australia (and associated public criticism). These gaps currently leave scholars and policymakers alike without an evidence base from which to evaluate the appropriateness and inform the use of NCND as contemporary Australian policy. While normative conclusions are outside the scope of the historical study of this thesis (as explored above), a key part of the research is to put forward such an analytical foundation. It is hoped that this will not only assist further scholarship, which could include normative inquiry, but support evidence-based public policymaking on official secrecy and the use of NCND both contemporarily and in the future.

Scope

The scope of this thesis is limited to a historical study of Australian governments' relationship with NCND and approach to official secrecy, as studied through the research questions set out above. Unless stated otherwise, all uses of 'NCND' and 'official secrecy' in this thesis refer to these concepts in respect of national security matters. While this thesis does not include a specific study of the concept of 'national security,' this term is understood as a historically evolving concept, the scope of which is frequently relevant to and discussed as part of the substantive analysis contained in this thesis.[15] As such, this thesis does not advance or employ a fixed definition. For the purposes of general orientation, however, the subject matter contained in the formulation in Australia's Commonwealth Criminal Code is a useful referent:

> **90.4 Definition of *national security***
>
> (1) The *national security* of Australia or a foreign country means any of the following:
>
> (a) the defence of the country;
> (b) the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by subsection (2);
> (c) the protection of the integrity of the country's territory and borders from serious threats;
> (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or an activity covered by subsection (2);

[15] For an overview of the evolving concept of "national security" in the Australian context, see Melanie Brand, "In the Name of National Security: Press Censorship in Cold War Australia," *Australian Historical Studies*, 2024, 1–19, https://doi.org/10.1080/1031461X.2024.2347841, particularly p. 10 and 17-18. For a conceptual analysis and survey of usage from 1881–1921, see James Mortensen, "On the Historical Breadth of Australian National Security," *Australian Historical Studies* 55, no. 1 (January 2, 2024): 115–33, https://doi.org/10.1080/1031461X.2023.2212669.

(e) the country's political, military or economic relations with another country or other countries.

(2) For the purposes of subsection (1), this subsection covers the following activities relating to a country, whether or not directed from, or committed within, the country:

(a) espionage;
(b) sabotage;
(c) terrorism;
(d) political violence;
(e) activities intended and likely to obstruct, hinder or interfere with the performance by the country's defence force of its functions or with the carrying out of other activities by or for the country for the purposes of its defence or safety;
(f) foreign interference.[16]

The Criminal Code is intended to "provide an integrated and coherent statement of the major offences against Commonwealth law,"[17] criminal offences being the "ultimate sanction" for breaches of the law.[18] This formulation, then, gives an indication of the matters considered by Australian governments to be important enough to national security to engage the most serious sanctions available under Australian law. Relatedly, this thesis also makes reference to Australia's intelligence and security 'framework.' While not defined in legislation, this term is used descriptively in primary and secondary sources.[19] For the purposes of this study, this is also understood to be historically evolving, generally capturing the key operational, policy and oversight agencies (or functions thereof) which support the maintenance of national security, together with their governance structures, associated legislation, Directions or Charters, and cooperative arrangements with foreign intelligence and security frameworks. The nature and evolution of Australia's intelligence and security framework is examined in this thesis where relevant to the study of NCND and Australia's approach to official secrecy.

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[16] *Criminal Code Act 1995* (Cth) (2025), sec. 90.4. This formulation was inserted into the Criminal Code in 2018 by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (2025).

[17] Ian Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (Canberra: Commonwealth Attorney-General's Department in association with the Australian Institute of Judicial Administration, 2002), 3.

[18] Attorney-General's Department, in Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia" (Commonwealth (Austl.): Australian Law Reform Commission, December 2009), 115.

[19] While there is no overarching authoritative definition, Australia's intelligence and security arrangements (or elements thereof) are often referred to as a "framework" in relevant literature. For example, Leuprecht and McNorton use "framework" to describe aspects of Australia's intelligence and security oversight, accountability mechanisms, division of work among agencies, governing legislation, and counterterrorism efforts. *Intelligence As Democratic Statecraft: Accountability and Governance of Civil-Intelligence Relations Across the Five Eyes Security Community - the United States, United Kingdom, Canada, Australia, and New Zealand* (Oxford: Oxford University Press, 2021), 142, 145, 151; In the context of the recent Richardson Review, to which this thesis has extensive reference, the term "legal framework" (and also "legal frameworks") is used more specifically to describe the legislative framework governing Australia's National Intelligence Community (NIC). Dennis Richardson, "Volume 1: Recommendations and Executive Summary; Foundations and Principles; Control, Coordination and Cooperation" (Comprehensive Review of the Legal Framework of the National Intelligence Community, 2019).

In addition to the above, this thesis makes two main scoping suppositions in order to isolate and interrogate historical sources relevant to this study. While generally well-supported, these suppositions are not claimed to be fact or substantively scrutinised in this thesis, and are recognised as appropriate subjects of analysis and criticism elsewhere, particularly in political, legal, ethical, and decolonisation scholarship. These suppositions are outlined here for context and transparency. The first is that during the studied period, Australia has operated continuously as a liberal democracy. Part of this assumption is that, in general, Australian governments have desired to maintain this status in both reality and perception (and will continue to do so in the future). This supposition will not be tested, as to do so would entirely change the parameters and results of this study. As such, it would not be logical to test this supposition as part of the research project. The second supposition is that it is outside the scope of this study to examine whether the intelligence and security activities of Australian governments have historically been 'warranted.' This research project does not analyse whether these activities (including the existence of agencies, their legislative powers, and their operations) are effective, ethically justified, conducted lawfully and with propriety, and appropriately adapted to contemporary security threats and opportunities. Conducting such a study academically would be an entirely separate research project. These issues have typically been examined through dedicated mechanisms, such as through the oversight institutions, and independently through reviews of the National Intelligence Community (NIC) and its governing legislation (including reports of the Australian Law Reform Commission [ALRC] and the recent Richardson Review, as discussed in the literature review below[20]). While there is potential for convergence of the analysis of NCND and the merit (or otherwise) of matters to which it has been applied, this thesis will distinguish between the two in its analysis.

Structure of thesis

The remainder of this Introduction provides an overview of the methods used in the research. The thesis then proceeds in nine chapters.

Chapter 1: Literature Review introduces the literature on which this thesis draws, including scholarship and primary source material. In so doing, it provides an overview of the key concepts invoked in this thesis, including the dilemma of national security secrecy in liberal democracy, followed by the 'logical' character of NCND. This draws on an analysis of the role of NCND in the US-led nuclear deterrence strategy of the Cold War, to which the 'strategic

[20] Richardson, "Volume 1"; Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia"; Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information" (Commonwealth (Austl.): Australian Law Reform Commission, May 2004).

ambiguity' afforded by NCND was critical. The use of NCND in the creation of strategic ambiguity carved out a distinct character and role for the principle among the US and its allies, including Australia. Chapter 1 establishes key literatures, definitions and concepts discussed throughout this thesis.

Chapter 2: Origins of Official Secrecy in Australia (1948–1955) is the first of seven chronological chapters examining the historical use of NCND by Australian governments. It explores the origins of official secrecy in Australia, establishing a 'baseline' from which its evolution is examined in subsequent chapters. Chapter 2 begins with an overview of early Commonwealth secrecy legislation, rooted in the inherited Westminster tradition of executive discretion; examines the development of Australia's nascent intelligence and security apparatus and its post-war consolidation (under international pressure); and concludes with the 1954–55 Royal Commission on Espionage and its aftermath. It demonstrates that, in the tumult surrounding the creation of ASIO, the Chifley Government established an early practice of declining publicly to 'either admit or deny' matters of national security. Chapter 2 finds that this early articulation of NCND in the Australian context would become the foundation of successive governments' approach to official secrecy.

Chapter 3: The Mid-Cold War and Turning Towards Openness (1955–1974) examines the professionalisation and apparent politicisation of Australia's intelligence and security apparatus under successive Coalition governments as the Cold War continued. These political tensions led to the 1972 election of the Whitlam Labor Government on a platform of 'open government,' which sought to establish a posture of openness by default through sweeping reforms to public law. The Whitlam Government's misgivings about the character of Australia's intelligence and security apparatus, developed under 23 years of Coalition Governments, ultimately led it to establish the First Hope Royal Commission, where this chapter concludes. Chapter 3 finds that the change of government not only saw changes in official secrecy policy due to policy differences between the major political parties, but reduced the information asymmetry between them, leading to new opportunities for bipartisanship.

Chapter 4: Growing Bipartisanship and the Hope Royal Commissions (1974–1984) examines how NCND evolved in the context of greater political consensus on, and increasingly structured scrutiny of, Australia's intelligence and security framework. The incoming Fraser Coalition Government's continuation of the Whitlam Labor Government's 'turn' towards openness was a significant development in the growing bipartisanship on official secrecy and national security. This raft of legislative reform included the freedom of information disclosure framework, which (apparently counter-intuitively) formalised the language and logic of NCND in statute. NCND and official secrecy were also formally scrutinised via the Hope Royal Commissions, comprehensive judicial reviews widely recognised as establishing the enduring principles of Australian intelligence and security framework. While the Royal Commissions supported the continuation of NCND in general, many recommendations advocated greater transparency and accountability of intelligence and security matters. In response, the Fraser Government reversed a long-held posture of NCND by publicly confirming the existence of the Australian Secret Intelligence Service (ASIS) and then-Defence Signals Directorate (DSD, a predecessor of the current Australian Signals Directorate, ASD). Chapter 4 finds that Australia emerged from this period with a stronger national policy agenda on official secrecy, including precedent both for independent review as a basis for policy change, and for considered and principled forms of disclosure as a complement to NCND, described in this thesis as 'avowal'.

Chapter 5: Evolution of Alliances (1984–1990) examines developments in Australia's international security alliances with the US and UK during the last years of the Cold War. This period saw renewed controversy over NCND-based nuclear deterrence strategy, which threatened the ANZUS alliance. While the Hawke Government indicated willingness to defend strongly the secrets of Australia and its allies where it deemed necessary, it also sought to advocate the Australian interest in increased transparency. This chapter examines how constructive engagement on the shared issue of secrecy led to the avowals of the Australian-US Joint Defence Facilities (JDFs), and preserved Australia's alliance relationships during and after the ANZUS crisis. Chapter 5 finds that, in stark contrast to the dynamics at the establishment of ASIO, having gained credibility through a matured and recently-scrutinised intelligence and security framework, Australia was positioned strongly to successfully broker compromises within is security alliances, including for greater transparency.

Chapter 6: Turn of the Millennium (1990–2005) examines how the Keating and Howard Governments approached official secrecy and the public discussion of national security matters at the turn of the millennium. The rapidly changing global environment saw an end to the Cold War and with it a waning public tolerance for secrecy, followed by a new era of terrorism, war, and concurrent re-tightening of security policies. For the incoming Keating Government, a series of unauthorised disclosures and growing media critique regarding ASIS triggered further independent review and avowals, carrying on the precedent established by Fraser and continued by Hawke. In the context of these avowals, the Keating Government expressed strong support for the continuation of NCND. The September 11 terror attacks of 2001 were then followed by rapid legislative reform under the Howard Government, further codifying Australia's security and intelligence framework and introducing new protections for national security information in court proceedings. Despite the ramp up of security measures, the subsequent Flood Inquiry then led to increasingly detailed public discussion and scrutiny of intelligence materials. Throughout these rapid changes in national security policy, however, Australian governments maintained an underlying commitment to NCND. Chapter 6 finds that Australian governments had come to see NCND as a valuable principle independent of its original Cold War security context, with an ongoing role to play in Australian liberal democratic governance.

Chapter 7: The Information Age (2005–2017) examines how the technological advances of the 'Information Age' precipitated a step-change in governments' ability to maintain information security. While the Gillard and Rudd Governments took active steps to reinvigorate the spirit of 'open government' to meet the new environment, the paradigm shift is most strongly evident through the mass unauthorised disclosures facilitated by the WikiLeaks online platform and former US intelligence official Edward Snowden. Subsequent disclosures by the Turnbull Government of Australia's cyber capability diverged from established precedents of avowal, signalling a lack of confidence in the continued suitability of historical approaches to official secrecy. Chapter 7 finds that technological advances facilitating the possibility and reality of mass disclosure challenged the fundamental logic of NCND, and saw Australian governments experiment with different approaches to the public discussion of national security matters.

Chapter 8: The Contemporary Security Environment (2017–2022) is the last of the chronological chapters on Australia's historical use of NCND. It examines how several recent reviews have grappled inconclusively with the appropriate 'balance' between liberal democratic and national security imperatives in the contemporary security environment. This chapter concludes with the *Collaery* proceedings, in the course of which the Morrison Government opted to subject NCND to judicial and public scrutiny, rather than either ending the proceedings or allowing open justice to prevail. This chapter also examines the incoming (and, at time of writing, current) Albanese Government's decision to simultaneously discontinue the prosecution and reaffirm its commitment to NCND. Chapter 8 finds that, having grown well beyond its early use by the Chifley Government, NCND remains an important tool of executive discretion.

Chapter 9: Discussion answers the research questions set out in this Introduction by reviewing and analysing the historical findings of the chronological chapters. On the first question, it finds that Australian governments' use of NCND and approach to official secrecy more broadly has consistently evolved, largely in a linear and well-articulated manner. From the Chifley Government's argument from first principles of the imperative to avoid either 'affirming or denying' national security matters, NCND became embedded and eventually legislated as official policy, spawned the complementary practice of avowal, and remains a tool of executive discretion. The scope of application also evolved, originally covering the broad sweep of information about Australia's nascent intelligence and security framework (including the very existence of certain agencies), and gradually narrowing as the framework matured to more specific categories of information such as operations and methods. On the second question, this thesis finds that commitment to NCND has historically been bipartisan, though its specific use and official secrecy policy more broadly has exhibited some partisanship. Where NCND was invoked in early cases to restrict information not only from the public but from the Parliamentary Opposition, its use over time became more structured and oriented towards moderating disclosure to the public, in parallel with increased bipartisanship on national security information sharing between political parties represented in Parliament. On the third question, this thesis finds that, rather than 'anathema' to liberal democratic values, NCND has played an integral part in *facilitating* Australian liberal democratic governance, including as an indication of the possibility of future transparency. Together with avowal, NCND has historically provided a consistent and principled structure for the discharge of executive discretion by (and between) successive governments, and played an important role in mediating the permanent tension between the imperatives of transparency and national security.

Methodology and Methods

This part outlines the methodology and methods used in this thesis, including research design and approach to research challenges. As explored above, there are many theoretical and methodological ways to approach the subject matter of this thesis, including politically, legally, philosophically, and historically. Three main factors informed an evaluation of possible methodology and methods. The first is the availability of source material. As observed by Richard J. Aldrich, Rory Cormac, and Michael S. Goodman, "[i]ntelligence studies are perennially dogged" by the secrecy surrounding the subject matter.[21] The study of NCND is no exception to this research challenge; available primary (and many secondary) sources tend to be historical, as explored in the literature review. Second, early research indicated that NCND policy had evolved and been used in distinct ways by Australian governments since the 1940s. Third, as part of the intended research impact is to support and inform improved public policymaking in Australia in relation to the use of NCND, a robust and practical evidence base is required to be persuasive (and useful) to the research audience.

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[21] Richard J. Aldrich, Rory Cormac, and Michael S. Goodman, *Spying on the World: The Declassified Documents of the Joint Intelligence Committee, 1936-2013* (Edinburgh University Press, 2014), 424, https://www.jstor.org/stable/10.3366/j.ctt1g09vm0.

Following consideration of a variety of methods in the context of these factors, this thesis proceeds in the historical method. Berg and Lune describe historical research as "attempts to systematically recapture the complex nuances, the people, meanings, events, and even ideas of the past that have influenced and shaped the present."[22] Consistent with Berg and Lune's description, this thesis uses a deductive approach and qualitative analysis to capture these nuances and answer the research questions set out above. The research design is primarily based on a chronological study of key historical developments relevant to NCND and official secrecy in Australia, from approximately 1948 to 2022. It draws on primary source material to identify and examine Australian governments' historical use of NCND and approaches to official secrecy policy, and applies secondary material to further interpret primary sources. Through analysing these historical findings both within their distinct contemporaneous time periods and comparatively across successive governments, this thesis establishes an understanding of the role of NCND, and determines the nature of and influences on the evolution of NCND over time.

Source collection

The primary source collection method used in this thesis is archival research. This research used the key historical developments identified through a review of secondary source literature to commence the research of primary sources. This source collection was initially primarily focussed on the holdings of the National Archives of Australia, which did indeed provide rich insight into elements of Australian official secrecy policy. However, it quickly became clear that, in particular relation to many of the early developments in Australia's approach to official secrecy, Australian records did not represent the full picture. While it is well-recognised in scholarship that Australia's early intelligence and security frameworks were heavily influenced by the expectations and policies of its key allies, particularly the UK, analysis tends not to extend to their influence over Australia's use of NCND, nor do Australian archival records fully illuminate this influence. Given the extraordinary authority of the UK in shaping early Australian intelligence and security and secrecy policy, this left a critical gap in scholarly understanding of how and why NCND has been used by Australian governments.

From the early phases of research, it was apparent that international archives were likely to hold primary material that will assist is this analysis. Archival research was broadened out to the national archives of key allies, the UK and US in particular. While online databases provided some material, most intelligence records are not available online or digitised. As such, international fieldwork was undertaken to facilitate physical viewing of this archival material at

[22] Bruce L. Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences*, Ninth edition (Boston: Pearson, 2016), 305.

the the US National Archives and Records Administration (NARA), Maryland, US; Library and Archives Canada (LAC), Ottawa, Canada; and the National Archives (TNA), London, United Kingdom.

International fieldwork was undertaken in the second year of study. This ensured enough preliminary research was completed to make the best use of the visit, while allowing the research to proceed broadly chronologically. Material collected from this fieldwork primarily informed the analysis and findings of the early chronological chapters.

Across archives accessed, initial source collection focussed on official material (as described in the literature review). As quickly became clear, official material relating to the subject matter of this thesis is an incomplete historical record, due to both continuing security restrictions on some classified information, and predictable gaps and inconsistencies in the records archivally retained. In the latter case, some official material was locatable through means other than dedicated archives, such as through Parliamentary records of tabled documents, or databases of ministerial speeches held by government agencies.

A further anticipated challenge of archival research was release periods. While generally rich the context of the chronologically early chapters (in the mid-twentieth century), the archival record steadily declined as the study approached the turn of the millennium. The general declassification period for the National Archives of Australia is generally twenty years, though in the case of intelligence-related records, discretion to declassify remains with the originating agency.[23] A lack of access to government deliberations ‘behind closed doors’ necessarily affected the kinds of analysis this study was able to achieve. This challenge was anticipated in both the scope and research design. Despite its focus on secrecy, from its inception this thesis has been primarily concerned with the ways in which Australian governments have in fact spoken publicly about national security matters. Many of the more recent developments in the history of official secrecy and NCND have played out very much in the public domain. As expected, an open-source approach to their study has proved more than fruitful.

Notwithstanding these challenges, the official material collected did provide a relatively comprehensive sense of how NCND was deployed in practice, and important insight into the deliberations of governments. Other primary material, such as media coverage and public commentary, provided evidence of the wider context and drivers of the evolution of official secrecy policy, including the contentions that NCND is anti-democratic and has been used coercively in alliance contexts.

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[23] *Archives Act 1983* (Cth) (2025), secs. 3, 31, 33; See also National Archives of Australia, “Access to Records under the Archives Act,” 2025, https://www.naa.gov.au/access-records-under-archives-act.

Analysis

Once primary source material was identified and collected, initial processing was undertaken. This primarily involved process tracing to identify key decision points, their drivers, and their consequences.[24] It also involved further research to identify and capture the nuance and contextual factors of different time periods. Following this phase of processing, an analysis phase was undertaken to identify overarching patterns that appeared to indicate the general forces that influenced government policy historically. The findings produced from this analysis form the substance of the historical chapters of this thesis.

Finally, this research applied secondary source material as outlined in the literature review to the initial historical findings. This assisted in a deeper analysis of the evolution of NCND and official secrecy over time, and the development of a conceptual understanding of the role of NCND in Australia's liberal democratic governance. This analysis appears throughout the historical chapters, but primarily forms the substance of Chapter 9 (Discussion).

Other methods considered

This section gives a brief overview of two additional methods which were considered but did not ultimately form part of the study. These were a study of the frequency and nature of governments' use of NCND as recorded in Hansard to support a structured discourse analysis and, separately, the conduct of interviews to supplement archival sources.

As part of the development of this thesis proposal, a pilot study was undertaken to assess the viability and value of a more structured discourse analysis of the use of NCND through government statements in Parliament. The pilot involved structured querying of the Parliament of Australia's Hansard search function with search terms relevant to the research, such as "neither confirm nor deny," "admit or deny," "affirm or refute," and permutations thereof. While the pilot produced some useful material, limitations of both the method and the dataset ruled out a larger structured study. Firstly, as the precise wording used to invoke the NCND principle has continually evolved, not all relevant material was discoverable through a structured querying approach; frequently, matters to which NCND has historically applied were discussed obliquely, meaning relevant material was not returned through structured querying. Further, early records are inconsistently transcribed and occasionally contained typographical errors, affecting search results.[25] Secondly, focussing on a discourse analysis Parliamentary

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[24] Berg and Lune, *Qualitative Research Methods for the Social Sciences*, 305.

[25] For example, in Arthur Calwell, "United States Hugs Atom Secrets" (House of Representatives Hansard: Commonwealth (Austl.), November 4, 1948), the (presumed) word "I" is rendered as "T", and "Communist" as "Co'mmunist"; Similarly, in Eric Harrison, "Motion of Censure" (House of Representatives Hansard: Commonwealth (Austl.), November 4, 1948), the (presumed) italicised words "my good" are rendered as "m7 g°°d". While such anomalies are usually readily apparent and thus have little effect on source analysis, they significantly reduce the

statements would not fully meet the research aim of scrutinising the role NCND has played in Australian liberal democratic governance (more broadly understood than the mere deliberations of parliament), much of which is demonstrated through archival documents containing advice to governments, deliberations, and relationships with allies. As such, while Hansard records remain a critical primary source material, the structured Hansard study concluded with the pilot. The material gathered from the pilot has instead valuably informed the broader historiographical approach of the research and has been used in combination with archival and other sources in the historical analysis.

Earlier iterations of the research design had included conducting semi-structured interviews to supplement the historical record. Ultimately, the interviews did not result in a usable dataset (for reasons outlined below), while the archival research produced sufficient material to sustain a historical analysis and meet the research aims of the study. As such, on balance, the interview data collection was discontinued. The intended target group for the interviews was key individuals involved in instances of NCND on their experience and deliberations, such as former Members of Parliament, political staff, public servants, journalists, and academics. Following the receipt of ethics approval, two rounds of interviews were sought. While two initial interviews were undertaken, the material from these interviews was not used in the analysis of this thesis. There were two main reasons for the discontinuation of the interview data collection. Firstly, while several of the individuals invited to take part in interviews were responsive and expressed interest in the research, the majority did not consent to be formally interviewed in either an attributed or confidential capacity. A number agreed to meet informally, preferring to speak ‘off the record’. Such informal discussions valuably informed the overall scope of the study though, naturally, were not treated as data collection, nor were they used in the analysis. Secondly, a number of individuals in the target group had (incidentally or otherwise) been involved in legal proceedings relevant to the subject matter of this thesis; this created additional complexities, including time and resourcing considerations, and (based on the experience with the unaffected group), carried no guarantee of producing usable data. In view of these developments, this data collection stream was suspended while the archival research progressed, and ultimately discontinued.

Conclusion

The role of NCND in Australia’s liberal democratic governance is more than a historical curiosity. It is a pressing contemporary question in both scholarship and policymaking, as the

reliability of structured database querying as a method of source identification. As such, this approach was discontinued as the primary research method.

recent *Collaery* prosecution demonstrates. However, there is currently no strong understanding of Australian governments' relationship with and use of NCND. This Introduction has outlined the approach taken in this thesis to researching and developing such an analysis.

This thesis finds that Australian governments' use of NCND and approach to official secrecy in relation to national security continually evolved over time. Broadly, this was influenced by two factors historically: the changing dynamic between security and liberal democratic imperatives, which triggered changes in NCND and official secrecy policy; and the ability of governments to maintain information security as informed by the information technology environment, which shaped such policy. It finds that NCND and its underlying 'logic' were first recognisably articulated by the Chifley Government, and became a general principle accepted by successive governments, before being formalised in legislation in 1982 in the context of freedom of information reforms. In parallel, governments gradually developed a complementary practice of avowal, which enabled official disclosure without compromising NCND. In general, cumulative historical 'turns' towards greater transparency, including avowals and increases in oversight and accountability frameworks, have reduced the circumstances in which Australian governments have used NCND.

This thesis finds that, though some related policy positions tended to be partisan (such as the ALP's recurrent 'open government' agenda), NCND both attracted consistent bipartisan support, and grew to operate as an important facilitator of bipartisanship on national security. This bipartisanship on the principle of NCND did not always extend to consistency in how it was invoked in practice, however. For example, where the Morrison Coalition Government sought to establish in Court the importance of maintaining NCND, the Albanese Labor Government opted to discontinue the associated prosecution, removing the need to invoke NCND.[26]

This thesis also finds that NCND has played a related, critical role in Australia in mediating the tension between the imperatives of national security secrecy and liberal democratic transparency. As this tension is conceptually 'permanent,' as described by the Richardson Review,[27] the need for its mediation is correspondingly permanent. NCND has historically 'bridged the gap' between the inheritance of concentrated executive discretion of the Westminster tradition and the growing expectations of transparency in a contemporary liberal democracy. The dynamic of tension between secrecy and transparency imperatives has been framed historically (and sometimes contemporarily) as a balance, including by the Hawke Government as

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[26] Mossop J, *R v Collaery* (No 7) [2020]; Dreyfus, "Transcript: Press Conference on Bernard Collaery."

[27] Richardson, "Volume 1," 122.

part of the *Defence Papers Case* (as explored in Chapter 5). As the business of government has expanded, however, the notion of 'balance' between secrecy and transparency as mutually exclusive, competing factors has grown more intricate. Together, NCND and avowal have comprised a principled basis on which Australian governments have navigated this changing dynamic.

Borrowing from the Berg and Lune description of the project of historical research, in seeking to capture and understand the nuance of historical events, this study provides an analysis of how we have arrived in the present day, where NCND is alive and well in Australia; not only explicitly in *Collaery* and the subsequent aftermath, but more subtly in the recent Parliamentary inquiries into press freedom (which unspooled similarly nebulous concepts such as the 'right to know'[28]). Prospectively, the information handling surrounding Australia's recent deepening of ties with the US and UK through the AUKUS agreement could prove also a pertinent case study. Further, these contemporary events are transpiring following the paradigm shift in the ability of governments globally to maintain information security, as acutely demonstrated by the WikiLeaks and Snowden disclosures. These mass unauthorised disclosure events have seen government globally under increasing pressure to respond to, rather than dismiss or indeed 'neither confirm nor deny', serious public allegations.[29]

Policy recommendations are outside the scope of this thesis. However, if NCND is to be invoked to curtail fundamental aspects of liberal democracy, such as open justice, then this analysis is urgently required. While this thesis may not be able to fully broker consensus on the conceptual boundaries of the prerogative of governments not to disclose, it provides an historically-informed evidence base for policymakers to consider whether, and if so, to what extent NCND should be prioritised in Australia's liberal democracy. In so doing, goes some way to shaping a shared understanding of these issues, and a providing a foundation for improved public policy on some of the most pressing challenges of contemporary liberal democratic governance.

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[28] See Senate Environment and Communications References Committee, "Report: Freedom of the Press" (Commonwealth (Austl.), May 2021), 7–8; and Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press" (Commonwealth (Austl.): Parliamentary Joint Committee on Intelligence and Security, 2020), 60–65.

[29] Robinson and Kaufman, "The CIA's Long and Dangerous History of Refusing to Answer Absurdly Obvious Questions"; Laura Jeffery, "Neither Confirm Nor Deny: WikiLeaks Evidence and the Vienna Convention on Diplomatic Relations in the Judicial Review of the Chagos Marine Protected Area," *Anthropology Today* 30, no. 3 (2014): 9–13, https://doi.org/10.1111/1467-8322.12109; Kevin, "Abbott's Spy Games."

Chapter 1: Literature Review

This chapter review provides an overview of the scholarship and commentary on which the research draws. This thesis uses the historical method to critically analyse the use by Australian governments of NCND, as the slippery thread throughout the story of official secrecy in Australia, and whether and how its use had evolved over time. To support this analysis, chapter proceeds in two parts.

The first part analyses the thematic literature on secrecy and NCND specifically, including some of the conceptual tensions at work in the use of secrecy in a liberal democracy. It contextualises NCND (and its 'logical' character) within this puzzle, as a basis for the analysis developed in this thesis of the role of NCND in Australia's liberal democratic governance. While a number of countries use NCND as part of their national security policy, this scholarship is primarily concerned with the US context, given the wide usage (and oft-claimed 'origin story') of NCND in the context of US-led Cold War nuclear deterrence strategy. This part introduces key concepts supporting the analysis throughout this thesis, and establishes the unique 'operation' of NCND as a policy.

The second part analyses the literature on official secrecy in Australia, including scholarship and commentary. As there is very limited scholarship on the history and usage of NCND in Australia, this part draws on a wide range of literature relating to Australia's intelligence and security history. While primary source material is discussed in detail in the substantive chapters of this thesis, an overview is provided in this part for completeness.

Part 1.1: Thematic literature

This part provides an overview of the international literature on secrecy in liberal democracy and NCND on which this thesis draws. Outside freedom of information jurisprudence, as explored below, the scholarly literature on NCND specifically is minimal, hence the inclusion of literature on the tension between transparency and secrecy (and related conceptual challenges of operating intelligence structures) within and between liberal democracies. While primarily international, this literature advances conceptual constructs and implications, which will be explored for their utility in examining the Australian context.

Section 1.1.1: Secrecy within liberal democracy

Before analysing how NCND operates, we must first contextualise it within the puzzle of secrecy within a liberal democracy. The apparent contradiction between the preservation of existence liberal democracies through security measures (which often require secrecy) on one hand and the preservation of the character of liberal democracies through the upholding of certain values (such as transparency and accountability) on the other vexed even the earliest proponents of modern liberal democracy. Immanuel Kant, John Stuart Mill and Jeremy Bentham, advocates of transparent government and the role of ‘publicity’ in informed public consent, all nevertheless held that transparency should not be absolute and considered there to be exceptions for legitimate government secrecy.[30] Scholars have argued that Mill and Bentham in particular advanced the case for secrecy on grounds that would today be recognisable as ‘national security’.[31]

Framed by Michael Colaresi as the ‘secrecy dilemma,’ this creates a fundamental tension for liberal democracies: how can the public have confidence in the integrity of executive government, when that same executive government “also has the power to selectively reveal and hide relevant information?”[32] Colaresi's 2014 book *Democracy Declassified: The Secrecy Dilemma in National Security* examines the inherent tension of official secrecy in democracies.[33] Colaresi offers a strong analysis of why secrecy both devalues, and is necessary for, democracy. Colaresi argues that the ‘transparency costs’ of making disclosures are not always justifiable. His analysis also draws out that secrecy around national security matters is ubiquitous in democracies, an unexceptional exception.

While secrecy in governments of any kind involves the risk of impropriety, the tension is especially acute in a system premised on public consent.[34] As succinctly observed by scholars such as Eva Horn (2011) and Dorota Mokrosinska (2023), when the public authorises political power, its “exclusion from knowledge about crucial activities and decisions of the government becomes hard to accept.”[35] The dominant approach to managing this tension in modern liberal democracies, more practical compromise than theoretical resolution, has been to

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[30] Immanuel Kant, *The Conflict of The Faculties*, trans. Mary J. Gregor (New York: Abaris, 1979), 55; John Stuart Mill, *Utilitarianism*, 1879th ed. (Waiheke Island: Floating Press, 2009), 41; John Stuart Mill, *Considerations on Representative Government* (Project Gutenberg, 2004), chap. X: Of the Mode of Voting, https://www.gutenberg.org/files/5669/5669-h/5669-h.htm; John Stuart Mill, *On Liberty* (Project Gutenberg, 2011), 102, https://www.gutenberg.org/files/34901/34901-h/34901-h.htm; Jeremy Bentham, *The Works of Jeremy Bentham*, ed. John Bowring, vol. 2 (Edinburgh: William Tait, 1843), 315.

[31] Michael P Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security* (Oxford University Press, 2014), 42.

[32] Colaresi, 1.

[33] Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security*.

[34] In the Australian context, this tension was recently considered by the Comprehensive Review of the Legal Framework of the National Intelligence Community, which accepted the view that the “legitimacy and sustainability of the NIC’s legislative framework depends on ongoing public consent”: Richardson, “Volume 1,” 222, 231.

[35] Eva Horn, “Logics of Political Secrecy,” *Theory, Culture & Society* 28, no. 7–8 (December 1, 2011): 105, https://doi.org/10.1177/0263276411424583; Dorota Mokrosinska, *State Secrecy and Democracy: A Philosophical Inquiry*, 1st ed. (London: Routledge, 2023), 1, https://doi.org/10.4324/9781003083733.

institute a system of 'checks and balances' across a number of 'branches' into which the business of representative government is separated. In the context of arguing for the ratification of the US Constitution, James Madison argued that such checks on executive power are essential, particularly in relation to the availability of information, arguing that "[k]nowledge will forever govern ignorance."[36] For Colaresi, in the context of national security, such measures should not be viewed as "a static trade-off" against security.[37] Rather, synthesising accountability measures with justifications for executive secrecy are the key to a resolution of the secrecy dilemma.

'Balance'

This raises a second sense in which language of 'balance' which is key to the analysis in this thesis. As raised in the Introduction, the relationship between imperatives of liberal democracy and national security (both variously described) has long been framed as a balance between binary, opposing factors.[38] Philosophy and political theory scholars such as Jeremy Waldron have observed how such framing, despite often being invoked with little specificity, nevertheless invites strong connotations of competition, trade-off, and mutual exclusivity: the assumption that an increase in one factor necessarily results in a decrease in the other.[39] The framing of 'balance' and its connotations have so pervaded commentary, scholarship, and jurisprudence internationally that Waldron begins his analysis of their operation by remarking that "Readers may think this all over-fussy. Surely everyone knows what we mean."[40] In his Australian, Canadian and New Zealand intelligence communities, Andrew Brunatti builds on this sentiment, observing that the 'conceptual simplicity' of balance "has become almost dogmatic."[41]

However, the "simple opposition of transparency and secrecy" has been increasingly challenged. Scholars including Horn, Mokrosinska, Waldron and Clare Birchall argue that this framing "falls short of a more complex and substantial understanding of the structure and the

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[36] Letter from J. Madison to W.T. Barry, 4 August 1822, in James Madison, *The Writings of James Madison*, ed. Gillard Hunt, vol. 9, 9 vols. (New York; London: G.P. Putnam's Sons, 1900).

[37] Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security*, 124, 24.

[38] Clare Birchall, "Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness," *Theory, Culture & Society* 28, no. 8 (2011): 8, https://doi.org/10.1177/0263276411427744; Horn, "Logics of Political Secrecy," 104; Waldron, "Security and Liberty," 192; Mokrosinska, *State Secrecy and Democracy*, 2–3.

[39] Waldron, "Security and Liberty," 194.

[40] Waldron, 194.

[41] Andrew Brunatti, "Managing Reputational Risk in National Intelligence," in *Intelligence and the Function of Government*, ed. Daniel Baldino and Rhys Crawley (Melbourne: Melbourne University Press, 2018), 159.

workings of political secrecy."[42] These challenges have come in various forms. They include scrutinising theoretical suppositions, from whether veneration of transparency and condemnation of secrecy is a requisite part of liberal democratic theory, to whether transparency and secrecy are in fact oppositional concepts in the first place (as further discussed in the next section).[43] They also include empirical studies, such as of whether transparency has a positive effect (and secrecy a negative effect) on liberal democratic governance and outcomes in practice.[44] These challenges to long-held suppositions and rhetoric are very much ongoing, and have not to date produced a notable alternative to the 'balance' framing (nor have they necessarily sought to do so).[45]

While this thesis is not focussed on theoretical analysis, some sensitivity to the theoretical complexity of 'balance' produces more nuanced historical analysis than would be possible otherwise. This thesis draws on this scholarship in two related ways. The first is to illuminate and interpret historical references to the 'balance' framing in primary source material. As the following chapters will examine, Australian public discourse historically has frequently evoked or appealed to the notion of balance in the discussion of official secrecy, including in government statements, jurisprudence, and policy analysis.[46] However, not unlike the trends seen in the scholarship, Australian public discourse has also increasingly recognised the complexity of the relationship between transparency and secrecy.[47] The second, related way in

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[42] Horn, "Logics of Political Secrecy," 104; Mokrosinska, *State Secrecy and Democracy*; Birchall, "Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness."

[43] See Birchall, "Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness," 12; See also Jacques Derrida and Maurizio Ferraris, *A Taste for the Secret*, trans. Giacomo Donis and David Webb (Cambridge: Polity Press, 2001).

[44] Jenny De Fine Licht, "The Janus Face of Transparency," in *Transparency and Secrecy in European Democracies: Contested Trade-Offs*, ed. Dorota Mokrosinska, 1st ed. (Abingdon, Oxon; New York, NY: Routledge, 2020), 17–35, https://doi.org/10.4324/9780429026003-3; See also Mark Fenster, "Seeing the State: Transparency as Metaphor," *Administrative Law Review* 62, no. 3 (2010): 888–89; Mark Fenster, "The Opacity of Transparency," *Iowa Law Review* 91, no. 3 (2006): 885–950.

[45] Mokrosinska, *State Secrecy and Democracy*, 1–5.

[46] Robert Hawke, "Transcript 6109: Derryn Hinch Program, 3AW" (Department of the Prime Minister and Cabinet, May 9, 1983); Peter Durack, "Second Readings: Australian Security Intelligence Organization Bill 1979, Telecommunications (Interception) Bill 1979, Telecommunications Amendment Bill 1979, Customs Amendment Bill (No. 2) 1979" (House of Representatives Hansard: Commonwealth (Austl.), March 8, 1979); Mason J, Commonwealth v John Fairfax & Sons Ltd ("Defence Papers Case"), No. [1980] HCA 44; (1980) 147 CLR 39 (High Court of Australia December 1, 1980), at 49-50; Alexander Downer, "Second Reading: Intelligence Services Bill 2001" (House of Representatives Hansard: Commonwealth (Austl.), June 27, 2001); Philip Flood, "Report of the Inquiry into Australian Intelligence Agencies" (Commonwealth (Austl.): Inquiry into Australian Intelligence Agencies, July 2004), 175; Robert Cornall and Rufus Black, "Report of the Independent Review of the Intelligence Community" (Commonwealth (Austl.): Independent Review of the Intelligence Community, 2011), 21; Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press."

[47] Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information," 10–11; Irwin Cotler, in Cornall and Black, "Report of the Independent Review of the Intelligence Community," 33; Rory Medcalf and Katherine Mansted, "Submission to the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," 2019, 2; Mark Rix, "Security Without

which the 'balance' scholarship used in this thesis is to inform the central analysis of the evolution of Australian governments' historical use of NCND, and the factors that shaped it. The increasing scholarly recognition of the complexity of the relationship between liberal democratic and national security imperatives is borne out in the historical findings of this thesis. For example, as particularly discussed in Chapter 4, some historical developments which produced an overall increase in government transparency simultaneously served to formalise secrecy policy and entrench NCND, which may seem paradoxical (or, alternatively, neutral) in an analysis solely based on balance. As such, as discussed in the Introduction, this thesis uses the term 'dynamic' rather than balance to describe the relationship between these imperatives.

Transparency and accountability

As the liberal democratic imperatives against which national security is most frequently 'balanced' (in the context of this thesis, at a minimum), transparency and accountability bear specific consideration. 'Twin principles' of liberal democracy, transparency and accountability are nevertheless recognised as having different connotations, and certainly different expressions in practice.[48] Where, in the context of governance, transparency broadly relates to the public availability of information about the activities of government, accountability relates to the ability of the public to sanction or reward governments or members thereof for their actions (primarily via elections).[49]

While information disclosure activities facilitating 'informed public consent' have long been considered a precondition for liberal democratic government (as explored above), such activities have relatively recently crystallised as the concept of 'transparency'. Writing in 2014, Carolyn Ball traces this use of the term in both public policy and scholarship to the 1990s. Ball identified the most comprehensive definition in the literature as that given by Finel and Lord (1999):

> Transparency comprises the legal, political, and institutional structures that make information about the internal characteristics of a government and society available to actors both inside and outside the domestic political system. Transparency is increased by any mechanism that leads to the public disclosure of information, whether a free

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Secrecy? Counter-Terrorism, ASIO and Access to Information," in *Spooked: The Truth about Intelligence in Australia*, ed. Daniel Baldino (Sydney: University of New South Wales Press, 2014), 240–63.

[48] Jonathan Fox, "The Uncertain Relationship between Transparency and Accountability," *Development in Practice* 17, no. 4–5 (August 1, 2007): 663–71, https://doi.org/10.1080/09614520701469955.

[49] Richard Bolto, "Accountability and Secrecy in the Australian Intelligence Community: The Parliamentary Joint Committee on Intelligence and Security," *International Review of Administrative Sciences* 85, no. 1 (March 1, 2019): 142–44, https://doi.org/10.1177/0020852316687646.

press, open government, hearings, or the existence of nongovernmental organizations with an incentive to release objective information about the government.[50]

Notably, this definition conceptualises transparency not only as the official disclosure of information by executive governments themselves, but as the overall character of a society. Further, it takes a markedly neutral position on the mechanisms 'leading to' public disclosure, and on disclosure itself, refraining from the introduction of constraining notions such as purpose, appropriateness, or ethical consideration. While transparency is not generally considered to include activities such as espionage, it may capture some forms of unauthorised disclosure, as the scope of this definition indicates. This thesis does include analysis of historical developments in Australian government policy on unauthorised disclosure (not all of which have involved sanction; the establishment of a public interest disclosure scheme, for example, effectively 'authorised' certain kinds of previously unauthorised disclosure). For the purposes of this thesis, however, 'transparency' is used in relation to the overall character of Australian government policy and practice. An analysis of the effect of such policy and practice on the character of society is outside the scope of this study.

Finel and Lord formulated their definition in the context of the information age, observing that the spread of information, "now possible on an unprecedented scale," has been accompanied by two trends; a "trend towards transparency" within both governments and industry, and the "spread of democracy" itself.[51] While more recent scholarship emphasises the importance of transparency as a mechanism for and symbol of good governance, public trust, and the overall 'standing' of a democracy,[52] Finel and Lord argue that transparency has both a 'positive' and a 'negative' logic. Through an examination of crisis case studies (and in dialogue with related democratic peace theory), Finel and Lord found that while transparency is linked with credibility, it can result in 'noise' and mixed messages which undermine effective communication and conflict resolution, and even unduly inflame tensions.[53]

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[50] Carolyn Ball, "What Is Transparency?," *Public Integrity* 11, no. 4 (2014): 298, https://doi.org/10.2753/PIN1099-9922110400.

[51] Bernard I. Finel and Kristin M. Lord, "The Surprising Logic of Transparency," *International Studies Quarterly* 43, no. 2 (June 1, 1999): 315–16, https://doi.org/10.1111/0020-8833.00122.

[52] Islam Pepaj and Murat Jashari, "The Role of the Principle of Transparency and Accountability in Public Administration," *Danubius Universitas. Acta. Administratio* 10, no. 1 (2018): 61; Marcial Bragadini Bóo, *The Rules of Democracy*, 1st ed. (Bristol University Press, 2022), https://doi.org/10.2307/j.ctv2nv8pj0.8; Geoffrey Bennington draws a link between such thinking and the mass disclosure context: "One might be forgiven for imagining, especially perhaps in the age of Wikileaks, that political secrets are bad and the truth should simply be uncovered." "Kant's Open Secret," *Theory, Culture & Society* 28, no. 7–8 (December 1, 2011): 27, https://doi.org/10.1177/0263276411423036.

[53] Finel and Lord, "The Surprising Logic of Transparency," 335–36; See also Licht, "The Janus Face of Transparency."

This is consistent with Ball's conclusion that the notion of transparency "contains the seeds of a paradox."[54] Even outside the context of national security or crisis, there are circumstances in which transparency may disadvantage liberal democratic governance, such as in international negotiations with nondemocratic nations. Further, there are circumstances where transparency is inappropriate and public expectations confer a duty for the protection of information, such as in relation to private health or financial information of individuals. Ultimately, Ball concludes that "believing in the value of transparency does not mean support for the activities of transparency in all situations."[55] The conclusion that non-universal transparency in practice does not inherently compromise and overall belief in the value of transparency is of great import to the analysis of this thesis.

Implicit in the Finel and Lord definition is that information disclosures need not be contemporaneous to be considered activities of transparency. While public hearings may technically disclose information in 'real time' to those present, all media coverage, for example, inherently involves some degree of delay. Relatedly, in his review of the structure of state secrets, David Pozen argues that "[i]f the public expressly grants someone the authority to keep certain secrets, and if the grantee faithfully applies that authority subject to post hoc review, it is fair to see this exchange as a victory for democracy, not simply as a concession to practical necessity."[56] Colaresi further develops this idea in the national security context, arguing that 'ex-post public' information disclosures, when the relevant information has ceased to be sensitive, operate as an important check on executive governments.[57] However, Colaresi frames such disclosure as operating as a measure of 'accountability' rather than for transparency solely.

'Accountability' has had a similarly long history as intrinsic to liberal democratic thought, and shorter consideration as a specific concept in contemporary scholarship on liberal democracy.[58] Accountability is implied by the notion of 'informed public consent,' which must necessarily involve means by which to express or withhold this consent. Further, Bentham advanced the case for the improvement of performance through observance (though in his writings on the penitentiary, rather than political, system), arguing that "the more strictly we are watched,

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[54] Ball, "What Is Transparency?," 298.

[55] Ball, 298.

[56] David E. Pozen, "Deep Secrecy," *Stanford Law Review* 62, no. 2 (January 2010): 287.

[57] Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security*, 125.

[58] See Mark Christensen and Kiyoshi Yamamoto, "Public Accountability and Democracy: An Accountability Stage in the Theatre of Democracy," *Financial Accountability & Management* 39, no. 2 (2023): 259–67, https://doi.org/10.1111/faam.12360.

the better we behave."[59] Contemporarily, in their 2023 survey, Christensen and Yamamoto trace the growth of scholarly attention towards this term from a "low base" in the 1970s into a "spotlight," offering a "buffet" of definitions and concepts.[60] Originally grounded in matters of finance and law, they observe the concept of accountability as contemporarily invoked to carry "most of the major burdens of democratic 'governance'."[61] Christensen and Yamamoto further note that scholarship on accountability (and transparency) has implicitly assumed that these concepts, at their heart, comprise "a mere making of a visibility where there existed a basic duality (good vs. bad; bare vs. clothed; exposed vs. hidden, etc.)"[62] Their counter-analysis of this assumption is based in the potential for 'performative' accountability. However, this assumption has a different import for this thesis; that the binary of 'disclosed' or 'undisclosed' (or, indeed, 'confirmed' or 'denied') is not necessarily applicable to policy and practice, particularly in relation to national security.

Related to accountability, one broad example of the rejection of the complication of a binary view of disclosure is the concept of oversight. In the context of national security, the purpose of oversight is generally recognised as the scrutiny and appropriate restraint of uses of executive power, usually involving some degree of independence.[63] While oversight mechanisms can certainly involve public disclosure, such as open hearings of Parliamentary committees, they can also operate partially out of public view. In their comparison of accountability across the 'Five Eyes' intelligence-sharing partners (US, UK, Canada, New Zealand and Australia), Leuprecht and McNorton observe that while differing greatly, all five countries have dedicated bodies with privileged access to classified information in the performance of their mandate to oversee or review intelligence and security activities.[64] In Australia, the Inspector-General of Intelligence and Security (IGIS) is required to conduct its inquiries in private, but must also provide a public annual report outlining certain details of its oversight activities.[65] Oversight of this kind offers a model of accountability without exhaustive public disclosure.

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59 Jeremy Bentham, *The Collected Works of Jeremy Bentham*, ed. Michael Quinn, vol. 1 (Oxford: Oxford University Press, 2001), 277.

60 Christensen and Yamamoto, "Public Accountability and Democracy," 259.

61 Christensen and Yamamoto, 259.

62 Christensen and Yamamoto, 260.

63 Shirin Sinnar, "Protecting Rights from Within? Inspectors General and National Security Oversight," *Stanford Law Review* 65, no. 5 (May 2013): 1027–86.

64 Leuprecht and McNorton, *Intelligence As Democratic Statecraft*, 185–89.

65 Leuprecht and McNorton, 149.

Executive discretion and the Westminster system

The ability to reveal or conceal information is derived from the power invested in executive government through liberal democratic process to exercise discretionary decision-making in certain circumstances. This thesis refers to the use of such power as 'executive discretion.' While this study does not involve legal analysis, it is relevant to note that the power of the executive in Australia has "significant content but ill-defined limits," the scope of which is effectively theoretical in the absence of an authoritative definition, as observed by Cameron Moore's 2017 monograph *Crown and Sword*.[66] Executive power is described, but not defined, in section 61 of the Australian Constitution, and Australian Courts have noted the intent of Australian governments to avoid defining it.[67] As later chapters will examine, executive discretion underpins the use of NCND.

The character of executive discretion in Australia is shaped by Australia's Westminster system of government. Contemporarily used to describe a number of Commonwealth democracies, the 'Westminster system' evolved in the UK as a system of representative democracy that nevertheless featured strong centralisation of discretion with executive government. A succinct description of the Westminster system was offered in 1979 by the Australian Senate Standing Committee on Constitutional and Legal Affairs, which observed its 'appeal of simplicity' in the context of considering new freedom of information legislation:

> the people elect a parliament, the majority in parliament choose a ministry, the ministers make decisions which are government decisions. The public service, apolitical and appointed on merit, then carries out those decisions. The line of responsibility is clear. The public servant is responsible to the minister, the minister to parliament, and parliament to the people. The public servant, in theory, has no independent power of [their] own… It is a system where lines of authority and responsibility are unambiguous and where the roles of the actors, and the relationship between them, are clear.[68]

Along with elements of liberal democracy, some 'conventions' of the Westminster system are implied in Australia's Constitution; for example, that the executive overlaps with the legislature, through the requirement at section 64 for Ministers to be (or become) Members of Parliament.[69] In addition to these codified requirements, a number of further conventions are broadly recognised as characteristic of the Westminster system, while generally unwritten in

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[66] Cameron Moore, *Crown and Sword* (Canberra: ANU Press, 2017), 7–9, https://doi.org/10.22459/CS.11.2017.

[67] Sir Alfred Deakin, quoted in Peter Gerangelos, "Section 61 of the Commonwealth Constitution and an 'Historical Constitutional Approach': An Excursus on Justice Gageler's Reasoning in the M68 Case," *University of Western Australia Law Review* 43, no. 2 (2018): 129.

[68] Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978" (Commonwealth (Austl.), November 6, 1979), 25.

[69] Parliamentary Education Office and Australian Government Solicitor, "Australia's Constitution with Overview and Notes by the Australian Government Solicitor" (Commonwealth (Austl.), 2010), vi.

black letter law. Two of these conventions are central to executive discretion: 'collective ministerial responsibility' (or 'Cabinet solidarity'), the doctrine that all ministers are "equally responsible for and bound by the decisions of the executive government;" and 'individual ministerial responsibility,' the doctrine that ministers are personally responsible for "the decisions made and carried out by the department[s]" they head.[70] While variable in practice, expectations that ministers resign (under certain circumstances) attach to both conventions, such as if they are unprepared or unable to maintain collective ministerial responsibility, or due to gross failures of their department.[71] These conventions are relevant to this thesis in two ways. First, collective ministerial responsibility is generally understood as premised on the secrecy of Cabinet, which facilitates effective decision making through full and frank debate.[72] Second, individual ministerial responsibility has become less straightforward in the modern era, when ministers cannot wield absolute control over (or even maintain full knowledge of) the activities of their departments, practically affecting the exercise of executive discretion. This has led scholars such as Dennis Grube and Cosmo Howard to question whether the Westminster system remains an effective model of government in the contemporary era.[73]

Grube and Howard further examine how, as a set of primarily unwritten conventions, the very nature of the Westminster system of government has eluded strict definition or explicit consensus.[74] This is borne out in the Australian context where, despite being the foundation of Australia's liberal democracy, the expression of the Westminster system of government has nonetheless evolved considerably since Federation. As remarked by Sir Geoffrey Yeend, in his capacity as then-Secretary of the Department of the Prime Minister and Cabinet, "the Westminster system is all things to all people – that depends on whom you are asking to define it."[75] Made in the context of whether the Westminster conventions were compatible with greater transparency, Yeend's observation indicates the extent to which key features of Australian liberal democratic governance remain essentially articles of philosophy. Contextualising NCND and official secrecy within Australia's Westminster system of government is critical to analysing its historical evolution and role in Australian liberal democratic governance. As demonstrated

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70 Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 35.

71 Senate Standing Committee on Constitutional and Legal Affairs, 35–36.

72 Senate Standing Committee on Constitutional and Legal Affairs, 37–38.

73 Dennis C. Grube and Cosmo Howard, "Is the Westminster System Broken Beyond Repair?," *Governance* 29, no. 4 (October 2016): 472, https://doi.org/10.1111/gove.12230.

74 Grube and Howard, 467–68.

75 Geoffrey Yeend, quoted in Transcript of Evidence, 15 (Department of the Prime Minister and Cabinet), in Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 34.

by the 1979 Senate Committee report (and further explored in the following chapters), these concepts, and Australian governments' self-understanding of them have, underpinned attitudes towards and policy on official secrecy historically. As the footing on which NCND is exercised, the concept of executive discretion particularly is key to this thesis.

Section 1.1.2: Intelligence and security frameworks

While general consensus exists in theory regarding the executive discretion to keep information secret on the ground of national security with certain 'safeguards' (as established above), the conduct of intelligence and security activities and establishment of safeguards present acute and ongoing challenges in practice. This thesis draws on a number of texts in this respect. Christian Leuprecht and Hayley McNorton's 2021 book *Intelligence as Democratic Statecraft: Accountability and Governance of Civil-Intelligence Relations Across the Security Community* localises the study of these challenges to Australia's own security alliance, the Five Eyes.[76] Leuprecht and McNorton offer a cogent analysis of the ongoing attempts by these liberal democracies to reconcile democracy and security in an "asymmetric struggle against unprincipled adversaries."[77] Their study is primarily comparative, and so provides a robust and up-to-date index of specific measures taken by each of the five countries to ensure and promote accountability of their intelligence and security frameworks. The development of the relationship of intelligence to a concept of 'democratic statecraft' is a valuable contribution to the increasing scholarly scrutiny (and revision) of the assumption that secrecy and transparency are competing factors.

On a similar theme, Peter Gill's 2016 book *Intelligence Governance and Democratisation: A Comparative Analysis of the Limits of Reform* focuses specifically on the conceptual challenges of governing the field of intelligence, drawing on the literatures of both intelligence studies and security sector reform.[78] While Gill takes the democratisation of formerly authoritarian regimes as his case studies, his analysis of the elements of intelligence governance in liberal democracies and evolving forms of democratic 'control' is nonetheless informative in the Australian context. Gill contrasts the typically ad hoc, scandal-based pace of review and reform of intelligence frameworks of 'older' democracies (in which he includes Australia) with the centralised and driving process of actively democratising countries. Gill's identification of these trends is useful in approaching the history of Australia's intelligence and security framework,

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[76] Leuprecht and McNorton, *Intelligence As Democratic Statecraft*.

[77] Leuprecht and McNorton, 4.

[78] Peter Gill, *Intelligence Governance and Democratisation: A Comparative Analysis of the Limits of Reform*, 1st Edition, Studies in Intelligence (London: Routledge, 2016), https://doi.org/10.4324/9781315728063.

and evolution of official secrecy and use of NCND. In addition to the structure of the overarching intelligence and security frameworks (and their oversight), further practical questions arise for judging the sensitivity of specific information, making decisions about its management, and publicly accounting for these activities. For the purposes of this thesis, a relevant concept guiding judgements about sensitivity is 'mosaic theory'.

As discussed in the second part of this chapter, the implications of mosaic theory are at the conceptual heart of the NCND principle. Mosaic theory holds that the value of information is not limited to its individual content, but can be multiplied through aggregation with other information.[79] Useful overviews are given in Stéphane Lefebvre's 2018 study of the justifications for official secrecy as publicly advanced by governments, and David E. Pozen's 2005 study of mosaic theory in relation to national security and US freedom of information law. Describing mosaic theory as a 'basic precept' in the intelligence and security context, Pozen observes that the analysis of multiple pieces of incomplete information to draw inferences generates advantages for government when used internally.[80] However, the reasoning of mosaic theory also implies "the potential for an adversary to deduce from independently innocuous facts a strategic vulnerability, exploitable for malevolent ends."[81] Critically, the value (and therefore sensitivity) of individual pieces of information is relative to all information available to the relevant analyst, including existing government information officially disclosed, other open source material, and any other information or intelligence gathered by the analyst.

This complicates the context in which governments must judge the sensitivity of information and exercise executive discretion over its management. Firstly, as Pozen notes, governments may not know the extent of the information accessible to adversaries in the latter categories, making the true sensitivity of individual pieces of information difficult to determine.[82] Secondly, and importantly for this thesis, given that much of the relevant information is not publicly available, such judgements are an inherently asymmetrical exercise in the context of domestic polities. Accountability mechanisms go some way to safeguarding the impartiality and propriety of these judgements. Nonetheless, the invocation of mosaic theory to justify secrecy has drawn criticism for leading to overclassification of material and inappropriate withholding of information by government, such as in the context of freedom of information requests

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[79] Stéphane Lefebvre, "Why Are State Secrets Protected from Disclosure? The Discourse of Secret Keepers," *The International Journal of Intelligence, Security, and Public Affairs* 20, no. 3 (September 2, 2018): 216–17, https://doi.org/10.1080/23800992.2018.1532184.

[80] David E. Pozen, "The Mosaic Theory, National Security, and the Freedom of Information Act," *The Yale Law Journal* 115, no. 3 (December 2005): 630.

[81] Pozen, 630.

[82] Pozen, 630.

or legal proceedings.[83] While some of these executive judgements are ultimately subject to external scrutiny (and even arbitration, such as in the extensive jurisprudence related to US freedom of information law, as further discussed below), many remain unchallenged and unexamined.[84] This demonstrates that, despite the strong emphasis on the separation of power in many contemporary liberal democracies,[85] the judgement of governments remains material in relation to national security secrecy.

Judgements about the sensitivity of information evidently change over time, as will be examined throughout this thesis in the Australian context. For example, liberal democratic governments now generally declare the existence of intelligence and security functions and agencies (many of which were not previously officially acknowledged, as discussed in the Introduction to this thesis). However, most governments continue to maintain secrecy over categories of information such as operational activities and capability, lest individual disclosures not only reveal specific matters but risk compromising the whole.[86] This reflects a basic contention at the heart of these functions. While this thesis does not have scope to elucidate the long history of scholarship globally on intelligence gathering, security operations, and espionage, it is generally accepted that they are activities which, at a fundamental level, tend only to be 'worth doing' in secret.[87] More than just undercutting their effectiveness, the disclosure of details of these activities "may not permit the security agencies to perform their mandate, secrecy being at the center of their very existence."[88] The underlying premise is that any strategic advantage generated through the activities would be lost by the direct or indirect disclosure of the activities

[83] Pozen, 630–33; See also Weston-Scheuber, "Hear No Evil, See No Evil, Speak No Evil". For a discussion of the accuracy of classification decisions in the Australian context, see Jake Blight, "Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995" (Independent National Security Legislation Monitor, June 27, 2024), particularly p. 55-59.

[84] Pozen, "The Mosaic Theory, National Security, and the Freedom of Information Act"; See also Wagner, "Controlling Discourse, Foreclosing Recourse"; Michael D. Becker, "Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check," *Administrative Law Review* 64, no. 3 (2012): 673–700; Danae J. Aitchison, "Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act," *UC Davis Law Review* 27, no. 1 (1993): 219–54.

[85] Tessa Boyd-Caine, *Protecting the Public? Executive Discretion and the Release of Mentally Disordered Offenders* (Oxford, UK: Willan Publishing, 2012), 2.

[86] See, for example, "Practitioners' Guide to the National Security Information (Criminal and Civil Proceedings) Act 2004" (Attorney-General's Department, June 2008), 10; See also House Permanent Select Committee On Intelligence, "(U) Review of the Unauthorized Disclosures of Former National Security Agency Contractor Edward Snowden" (US Congress, September 15, 2016), 22.

[87] Lefebvre, "Why Are State Secrets Protected from Disclosure?," 215.

[88] Lefebvre, 215.

to adversaries. Colaresi argues that this is at the heart of the dilemma, arguing that "if all information could be revealed to citizens, and thus potential enemies too, on demand, without public costs, then the dilemma would disappear."[89]

The effectiveness (and conversely, threat) of mosaic theory and intelligence gathering more broadly is closely interactive with advances in technology. In 1978, the US Court of Appeals in the District of Columbia observed that:

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitting into place to reveal with startling clarity how the unseen whole must operate.[90]

While technological advancement has continuously affected the practical ability of the executive to selectively reveal and hide information (and therefore limit the opportunity for mosaic analysis), the contemporary environment created exponential complexity for the management of information. As will be explored in Chapter 7, the 'information age' has constituted a step-change in the ability to disclose, disseminate, aggregate and analyse information, including for non-state actors. This results in what Colaresi describes as the "growing absolute scale of leaking,"[91] as most acutely on display through the WikiLeaks and Snowden disclosures. This potentially raises questions about the ongoing value of maintaining strategic ambiguity as the cornerstone of an information security approach, to be examined in Chapter 7.

Section 1.1.3: NCND and strategic ambiguity

This part examines the literature on NCND specifically, including its 'logical' character and relationship to 'strategic ambiguity.' It begins by examining how NCND became institutionalised through the primary international 'use case,' being the US-led nuclear deterrence strategy in the Cold War.[92] This use case provides significant insight into the importance placed by governments on unbroken application. The scholarship on NCND in this context assists to illuminate a key function of NCND: the generation of strategic ambiguity. An understanding of

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[89] Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security*, 4.

[90] *Halkin v. Helms*, No. 598 F.2d 1, 8 (D.C. Cir. 1978) (United States Court of Appeals, District of Columbia June 16, 1978).

[91] Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security*, 4.

[92] Stuart. McMillan, *Neither Confirm Nor Deny: The Nuclear Ships Dispute Between New Zealand and the United States* (Allen & Unwin, 1987); Gary Brown, "NCND Nevermore: Death of a Cover Story," *Bulletin of Concerned Asian Scholars* 20, no. 4 (December 1, 1988): 55–61, https://doi.org/10.1080/14672715.1988.10412582; White, "The Neither Confirm Nor Deny Policy: Oppressive, Obstructive, and Obsolete"; Alex Wellerstein, *Restricted Data: The History of Nuclear Secrecy in the United States* (University of Chicago Press, 2021).

this function and its value will assist in the analysis of how and why NCND has been and continues to be used by liberal democracies, particularly Australia.

The origins of NCND

Scholars have noted that minimal literature exists on NCND specifically.[93] As such, little has been comprehensively established about its origins. While this study does not have scope to investigate the earliest use of the phrase 'neither confirm nor deny' internationally, this form of words naturally does appear in the historical record prior to the studied period. It certainly appeared in news media as far back as 1911 when the Boston and Main Railroad company chose to neither confirm nor deny reporting about its construction plans to the *Boston Globe*.[94] Further, as will be explored in Chapter 2, some of the earliest uses of NCND in the national security context occur in Australia, dating back to at least the 1940s.[95] However, the typically-articulated 'origin' of NCND, and the use case which has been most richly analysed, is Cold War nuclear deterrence strategy.[96] A further imperative for the study of this 'use case' of NCND is the long historical entwinement of Australia's approach to national security (and secret-keeping in the name thereof) with those of its major security partners. As such, any historical study of Australian national security must address the approaches and influence of the US and UK in relation to this area of policy.

As formal policy in the context of Cold War strategy, NCND appears to have been devised and adopted in connection with the passage of US nuclear legislation in the 1950s, and operated to keep secret the nuclear armament status of nuclear assets.[97] Alex Wellerstein's 2021 book *Restricted Data: The History of Nuclear Secrecy in the United States* provides a comprehensive overview of the US' nuclear secrecy, from the early days of the Manhattan Project, to the anti-secrecy of the end of the Cold War and beyond.[98] Wellerstein notes that the specificity of the democratic context matters. The 'contradictions of secrecy' with which US

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[93] Oxford Pro Bono Publico, "Annexes to: To 'Neither Confirm Nor Deny': Assessing the Response and Its Impact on Access to Justice" (UK: JUSTICE, 2017), 10, https://justice.org.uk/neither-confirm-deny-ncnd-response/.

[94] "Manager Barr Silent: Will Neither Confirm Nor Deny Statement B&M RR Carshops Are to Be Built at Billerica," *The Boston Globe*, February 10, 1911.

[95] Lance Herbert Barnard, "Discussion of Matter of Public Importance: Resignation of Mr GC Hoffmann" (House of Representatives: Commonwealth (Austl.), March 18, 1969).

[96] Wagner, "Controlling Discourse, Foreclosing Recourse," 546.

[97] Michael Goldsmith, "Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy," Working Paper Series (Centre for Peace Studies, University of Auckland, 1993), 17; William M Arkin, Robert S Norris, and Joshua Handler, "Taking Stock: U. S. Nuclear Deployments at the End of the Cold War," Natural Resources Defense Council Nuclear Program, 1998, 4.

[98] Alex Wellerstein, *Restricted Data: The History of Nuclear Secrecy in the United States* (Chicago: University of Chicago Press, 2021).

policymakers and scientists and policymakers wrestled, Wellerstein argues, were less concerning for totalitarian nations where negotiation with the polity was unnecessary and state security took primacy.

This 'origin story' is notably low on detail across primary source material. However, versions have been put by a number of current and former US officials (including former US Secretary of Defense James Schlessinger[99]), and as such it approaches an official account. A summary of the policy contained in a 1987 US briefing pack offers a thorough description of the policy and its purpose, describing it as "an essential component of our policy of deterrence":

> The United States maintains a longstanding policy of neither confirming nor denying (NCND) the presence or absence of nuclear weapons at any general or specific location, including aboard any U.S. military station, ship, vehicle, or aircraft. This policy, which is common among the Western nuclear allies, has as its fundamental purpose the military security of nuclear weapons.
>
> By neither confirming nor denying the presence or absence of nuclear weapons, those who would threaten the weapons, including terrorists and saboteurs, are denied important information. Potential adversaries therefore find it more difficult to attack U.S. forces effectively. By denying a potential adversary accurate information on our military forces, we complicate his military planning and reduce his chance for a successful attack. The greater the uncertainty an aggressor faces, the greater the risks in a preemptive attack, and the more likely deterrence will be sustained.
>
> The Western policy of deterrence is based on a strategy of flexible response. By reducing a potential adversary's chances of differentiating between nuclear and non-nuclear units, we have greater flexibility in deploying all units and a greater chance of successfully employing them if the need should ever arise. .[100]

This articulation not only centres NCND within an overall approach to maintaining secrecy, but explicitly within substantive policy, being nuclear deterrence. This demonstrates a key contention of this thesis; that NCND and official secrecy policy more broadly are not always a function (or 'downstream') of substantive national security policy, but are interdependent with substantive policy, and act as substantive policy in their own right.

Most of scholarship on US and UK nuclear deterrence strategy is focussed on international relations developments rather than the study of NCND. However, a number of scholars specifically interrogated NCND in dedicated journal issues or working papers, particularly in the context of peace studies. In his 1995 survey of the US' use of NCND in foreign policy, 'Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy,' Michael Goldsmith

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[99] Hans M. Kristensen, "The Neither Confirm Nor Deny Policy: Nuclear Diplomacy at Work" (Washington DC, 2006), 17.

[100] Briefing pack from US Embassy Wellington, "Neither Conform [sic] Nor Deny Policy," 23 April 1987, quoted in Goldsmith, "Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy," 8.

argues that NCND reveals a "residual desire to maintain the moral basis" of alliances by "at least not openly lying" to the other participant, an important courtesy of diplomacy.[101] Goldsmith, along with Thorsten Borring Olesen (2011), Michael Pugh (1989), and Gary Brown (1988), also catalogues the murkier flipside of the deployment of NCND; its use by the US as a coercion tactic against nuclear-free allies.[102] NCND precipitated two major crises. These were the crisis between the US and Denmark in 1968, and the ANZUS crisis between 1985–1990.[103] In both circumstances, the US prioritised preserving the NCND policy rather than the relationships, even taking steps to downgrade the alliances rather than relinquish NCND. Goldsmith examines how the US also exerted pressure via statements on the common values underpinning the alliances, going so far as to say that those who enjoyed the protection of the nuclear umbrella needed to make concessions (in this case, accepting US NCND, contrary to their nuclear-free domestic policy, as this thesis will explore) to continue to enjoy it.[104] This phenomenon is further analysed by Robert Ayson in his 2018 article 'The Coercive Power of Shared Values,' which analyses groups of countries' public evocation of common values to apply reputational pressure on both adversaries and allies.[105] When called to explain the depth of its commitment to NCND and it was privileged over the alliances themselves, the US cited the criticality of the consistent application of NCND to its deterrence effect, appealing to the logical core argument. As explored above, while on its face this seems a legitimate (if severe) priority assessment, public critique of NCND was strongly suspicious of its deterrent effect by the time of the ANZUS crisis.[106] This added further weight to the view that the US was using NCND, at least in part, as a tool to pressure allies.

A related claim arising in parts of the literature is the suggestion that (at least) a secondary purpose of US NCND policy was the management of controversy over nuclear weapons both domestically and internationally. At a minimum, this has been noted as an apparent effect of the policy. Former Deputy Commander of the US Sixth Fleet, retired Rear Admiral Eugene Carroll retrospectively observed in May 1988 that:

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[101] Michael Goldsmith, "Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy," Working Paper Series (Centre for Peace Studies, University of Auckland, 1993). 15.

[102] Thorsten Borring Olesen, "Tango for Thule: The Dilemmas and Limits of the 'Neither Confirm Nor Deny' Doctrine in Danish-American Relations, 1957-1968," *Journal of Cold War Studies* 13, no. 2 (2011): 116–47; Pugh, *The ANZUS Crisis, Nuclear Visiting and Deterrence*; Brown, "NCND Nevermore."

[103] Olesen, "Tango for Thule: The Dilemmas and Limits of the 'Neither Confirm Nor Deny' Doctrine in Danish-American Relations, 1957-1968"; Pugh, *The ANZUS Crisis, Nuclear Visiting and Deterrence*.

[104] Goldsmith, "Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy," 17.

[105] Robert Ayson, "The Coercive Power of Shared Values," *Political Science* 70, no. 3 (September 2, 2018): 189–206, https://doi.org/10.1080/00323187.2019.1595065.

[106] Brown, "NCND Nevermore."

> In the late '50s and early '60s, when there was still a very radical socialist movement, even including participation with communist party factions, there were inherent difficulties for a conservative government if our warships arrived armed with nuclear weapons. A convenient formulation was concocted that satisfied the needs of the host government. The United States Navy just said that it never confirmed nor denied the presence of the weapons. It dehorned the radical movement, which no longer knew whether they were there or not.[107]

Carroll further commented at a public hearing in Sweden in September 1990 that the US' "closest friends and allies happily accepted this decision as a clever way to disarm the radical opposition."[108] While Carroll caveated that NCND was a tactical agreement of mutual interest to governments rather than "an insidious US plot" to deceive,[109] his remarks certainly leave open to question the possible use of NCND in the management of certain parts of public discourse.

This suggestion is taken up by scholars in the context of the ANZUS Crisis. Goldsmith, Pugh and Brown trace the growing public scepticism of the 'deterrent' effect of NCND in the context of these alliances, arguing that US government claims that NCND would help deter a Soviet nuclear attack were contested, and possibly even misleading. Brown advances the latter charge strongly in his 1988 article in the *Bulletin of Concerned Asian Scholars* 'NCND: Death of a Cover Story,' arguing that even on conservative assumptions about their capabilities, Soviet intelligence was likely able to determine the nuclear armament status of enemy warships by the mid-1980s, rendering NCND obsolete.[110] Brown's analysis concludes that the value of NCND was not in fooling adversaries, but in quelling international and international opposition on the controversial issue of nuclear armament.[111] While this thesis is not confined to nuclear deterrence policy, the logical and strategic issues raised in the analysis of NCND in what can be considered to be one of its earliest contexts can be considered in relation to its use regarding national security matters more broadly.

Jurisprudential literature and freedom of information

A closely related use case is in the context of access to official information, particularly under freedom of information law. There exists a mature and extensive body of jurisprudential literature on the use of NCND in this context and in litigation more broadly. Detailed legal analysis of the use and impact of NCND is outside the scope of this thesis. However, this thesis

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[107] Eugene Carroll, in Kristensen, "The Neither Confirm Nor Deny Policy: Nuclear Diplomacy at Work," 58.

[108] Kristensen, 69.

[109] Kristensen, 69.

[110] Brown, "NCND Nevermore," 55–61.

[111] Brown, 57.

refers to the jurisprudential literature to the extent that it illuminates the history of NCND, and reveals tensions in its logical application.

Scholars such as Michael Becker, A. Jay Wagner, and Danae J. Aitchison have scrutinised the US government's use of NCND in legal contexts.[112] Becker's 2012 article 'Piercing Glomar: Using the Freedom of Information Act and the official acknowledgement doctrine to keep government secrecy in check' provides a thorough overview of the use (and, he argues, overuse) of NCND in the US freedom of information context.[113] Of note for this thesis, Becker also analyses the US' 'official acknowledgement' doctrine, which litigants have used to compel the official release of information that has already found its way into the public domain, arguing that the use of NCND to conceal documentation that "undoubtedly exists" undermines public trust in government.[114] The UK government's use of NCND in relation to access to information has also drawn critique. A 2017 analysis produced by UK law reform and human rights organisation Justice scrutinised the use of NCND in the context of litigation in the UK and drew on approaches across the Five Eyes to make 23 recommendations for reform.[115] Similarly to Becker in the US freedom of information context, Justice argues NCND is overused by UK authorities in the context of litigation, hindering access to justice.[116]

In the legal scholarship, NCND frequently goes by another name: the 'Glomar Response'.[117] This moniker is drawn from the apparent genesis of NCND in the freedom of information context, being the use of the phrase by CIA lawyers in 1975 in response to a request relating to (then-classified) Project Azorian.[118] Project Azorian was an elaborate US operation to retrieve a sunken Soviet submarine in the hope of obtaining nuclear intelligence, which in-

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112 Becker, "Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check"; Wagner, "Controlling Discourse, Foreclosing Recourse"; Aitchison, "Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act."

113 Becker, "Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check."

114 Becker, 2.

115 "To 'Neither Confirm Nor Deny': Assessing the Response and Its Impact on Access to Justice" (UK: JUSTICE, 2017), https://justice.org.uk/neither-confirm-deny-ncnd-response/; Oxford Pro Bono Publico, "Annexes to: To 'Neither Confirm Nor Deny': Assessing the Response and Its Impact on Access to Justice."

116 "To 'Neither Confirm Nor Deny': Assessing the Response and Its Impact on Access to Justice," 41.

117 Bell, "Shhh! Don't Say Glomar Anymore"; Wagner, "Controlling Discourse, Foreclosing Recourse"; Becker, "Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check"; Nathan Freed Wessler, "'[We] Can Neither Confirm Nor Deny The Existence Or Nonexistence Of Records Responsive To Your Request': Reforming The Glomar Response Under FOIA," *NYU Law Review* 85 (October 2010); Aitchison, "Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act."

118 *Harriet Ann Phillippi, Appellant, v. Central Intelligence Agency and George H. Bush*, 546 F.2d 1009 (D.C. Cir. 1976) (U.S. Court of Appeals for the District of Columbia Circuit November 16, 1976).

volved the engagement of millionaire Howard Hughes to build a large ship featuring a retractable claw.[119] The ship was named the Hughes Global Marine Explorer, or 'Glomar Explorer.' This would go on to become the basis of the ubiquitous 'Glomar Response' nickname in legal scholarship. This link suggests functional credibility as an origin story, in US jurisprudence at a minimum.

Project Azorian was conceived when the US identified the location of the wreck of a Soviet submarine in the Pacific Ocean, which had sunk in March 1968.[120] The CIA considered that the submarine may contain materials of intelligence value. Furthermore, it appeared that the Soviet military had been unable to identify the location of the submarine, leaving the field open for a covert US operation. As the submarine was too far under the ocean for divers to access the vessel, a plan was devised to draw it up from the ocean bed using purpose-built heavy-lift equipment.[121] The reclusive Hughes, who had a convenient reputation as an eccentric, was contracted to build the ship and claw under the guise of a deep-sea mining project. Concluding in August 1974, the salvage operation retrieved only parts of the submarine, the wreck having broken apart during the lifting process.[122] Despite the "disappointing" recovery effort, the US viewed Project Azorian as a Cold War strategic success.[123] The major details of Project Azorian (incorrectly dubbed 'Project Jennifer' in the press[124]) had incredibly been kept secret while the operation was being conducted. However, a burglary of Hughes' offices involving the theft of documents linking the CIA to the Glomar Explorer brought the operation to the attention of the media, which began covering the story in February 1975.[125] Consequently, the CIA received a freedom of information request from journalist Harriet Ann Phillipi. The CIA response to Phillipi advising that the internal decision-maker had:

> …determined that, in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of your request can *neither be confirmed nor denied*. Therefore, he has determined that the fact of the existence or non-existence of any material or documents that may exist which would reveal any CIA connection or interest in the activities of the Glomar Explorer is duly classified Secret in accordance with criteria established by Executive Order 11652. Acknowledgement of the existence or non-existence of the information you request could reasonably be

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[119] Wagner, "Controlling Discourse, Foreclosing Recourse."

[120] Central Intelligence Agency, "Project Azorian: The Story of the Hughes Glomar Explorer," *Studies in Intelligence* Fall (1985): 1.

[121] Central Intelligence Agency, 43.

[122] "Project AZORIAN," Central Intelligence Agency, September 27, 2012, https://web.archive.org/web/20120927005022/https://www.cia.gov/about-cia/cia-museum/experience-the-collection/text-version/stories/project-azorian.html.

[123] "Project AZORIAN."

[124] David Robarge, "The Glomar Explorer in Film and Print," *Studies in Intelligence* 56, no. 1 (2012): 25.

[125] Central Intelligence Agency, "Project Azorian: The Story of the Hughes Glomar Explorer," 49.

> expected to result in the compromise of important intelligence operations and significant scientific and technological developments relating to the national security, and might also result in a disruption in foreign relations significantly affecting the national security.[126]

Consistent with the policy brief above, this response alludes to the objective of NCND as being to maintain strategic advantage; deterrence in the case of Cold War nuclear policy, or otherwise the protection of operations, methods, international security relationships, and other sensitive information. Nuclear deterrence was not only regularly cited by the US as the key aim of NCND in relation to its defence policy (a position repeated by Australia and other allied nations in the context of the Cold War), but couched as demanding strict, unbroken application of NCND; the 'logical core' argument.[127]

The 'logical core'

A key distinguishing feature of NCND is the apparently logical basis of the principle. This is the argument that NCND must be applied in all cases to effectively generate strategic ambiguity, lest one imprudent denial lead to the inference that other uses of NCND were confirmations (or vice versa).[128] This assertion is closely related to mosaic theory, as discussed above, being the use of individual pieces of information to extrapolate the whole. Both the US and UK argued, in the context of Cold War nuclear deterrence, that perseveration of this 'logical core' of NCND was of paramount importance and would be prioritised over cooperation with allies.[129]

The lengths to which nations would go to preserve NCND is demonstrated through the interaction of the US with friendly nuclear-free nations over the course of the Cold War. NCND played a notable role in this context in facilitating the building and maintenance of alliances between the US and such countries through constructive ambiguity. NCND assisted the US to broker cooperation across policy divides, a key foundation of the post-World War II renormalisation of international relations. In the context of US Cold War defence policy, the constructive ambiguity of NCND facilitated cooperation with several countries with nuclear-free policies, such as Japan, Denmark and New Zealand (for a period).[130] As examined above, scholars

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[126] *Harriet Ann Phillippi, Appellant, v. Central Intelligence Agency and George H. Bush*, 546 F.2d 1009 (D.C. Cir. 1976). Emphasis added.

[127] Kristensen, "The Neither Confirm Nor Deny Policy: Nuclear Diplomacy at Work"; Brown, "NCND Nevermore."

[128] Oxford Pro Bono Publico, "Annexes to: To 'Neither Confirm Nor Deny': Assessing the Response and Its Impact on Access to Justice," 10.

[129] Leslie H. Gelb, "U.S. Tries to Fight Allied Resistance to Nuclear Arms," *The New York Times*, February 14, 1985; Correspondence from Dart to Fisher, Foreign and Commonwealth Office, Subject: Ship Visits and NCND ([11] October 1989), in TNA: FCO 46/6753, "Neither Confirm Nor Deny (NCND) Policy: Visits to Australia by Nuclear-Capable Warships," 1989, 3, TNA: FCO 46/6753, The National Archives (UK).

[130] Goldsmith, "Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy," 17–18.

have characterised the 'soft edge' of this use of NCND as "maintain[ing] the moral basis" of such relationships, and the 'hard edge' as the application of pressure on friendly nations.[131]

While there was no Schrödinger-like implication that the use of NCND caused a given warship to be simultaneously both 'armed and not armed' with nuclear weapons in reality, NCND does conceptually go beyond mere platitudes. Goldsmith observes that, in arguing that NCND is compatible with nuclear-free policies, the US implicitly asserted an equivalence between ambiguity over whether nuclear weapons were present in an area, and that area being nuclear-free.[132] This has implications for the study of NCND. The US' assertions could be viewed as a mere practical flourish, rather than a sincere claim regarding the ontological force of NCND; of course, it was convenient for the US for the policies to be viewed as compatible. However, the use of NCND to traverse apparently impassable ground is further indication of the content and force of NCND as 'substantive' national security policy in its own right, rather than as merely derivative of substantive policy. This 'logical core' is what sets NCND apart from official secrecy.

It appears intuitive that the preservation of the logical core, and therefore the effectiveness of NCND, relies on the ability of governments to maintain information security. If this practical ability to reliably keep secrets were challenged, so too would be the effectiveness of NCND. Policy commentators internationally have argued this has occurred through the contemporary risk and reality of mass unauthorised disclosure.[133] At first glance, this seems to explode NCND's insisted-upon logical core, rendering NCND useless (if not absurd). Yet, liberal democracies have a history of maintaining NCND even where the information to which it applied had apparently been compromised. During the Cold War, a strong critique in the public commentary was that the deterrent effect of NCND became obsolete over the course of the hostilities. As examined above, this critique argued that the Soviet Union had almost certainly achieved capability to detect nuclear armaments (likely with the awareness of the US) at least by the mid-1980s, making the US' claims to ongoing operational necessity disingenuous.[134] Another undermining factor was the open-source reference compendium *Jane's Fighting Ships* (published regularly since 1898); in the 1980s the Australian Parliament openly discussed

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131 Goldsmith, 7, 15, 17–18; Olesen, "Tango for Thule: The Dilemmas and Limits of the 'Neither Confirm Nor Deny' Doctrine in Danish-American Relations, 1957-1968"; Pugh, *The ANZUS Crisis, Nuclear Visiting and Deterrence*; Brown, "NCND Nevermore."

132 Goldsmith, "Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy," 25.

133 Richard Norton-Taylor, "Why 'Neither Confirm Nor Deny' Has Become Untenable for British Spies," *The Guardian*, July 15, 2014, https://www.theguardian.com/commentisfree/2014/jul/15/neither-confirm-nor-deny-british-spies-edward-snowden-revelations; Kevin, "Abbott's Spy Games."

134 Brown, "NCND Nevermore."

whether the compendiums contained enough information about the nuclear capability of US warships to render NCND obsolete.[135]

Rather than being merely baffling, this thesis contends that this phenomenon indicates two related and important points. The first is that, far from being a recent development, even in the official originating context of the Cold War, there appeared to be a strong recognition of the distinction between the character of official, authorised disclosures, and unofficial, unauthorised disclosures. The second, implicit in the first, is that governments have seen value in maintaining NCND and its logical core nonetheless. Naturally, the ability of the executive to 'keep secrets' has never been absolute in practice.[136] As this thesis explores, governments' implicit calculation of the value of maintaining NCND's logical core is a clue towards NCND's important role in liberal democratic governance, over and above its apparent character as a secrecy policy only.

Part 1.2: Australian literature

There is limited material on the history of NCND itself in Australia in terms of both literature and primary source material. As such, this thesis primarily draws upon the broader literature on the history of Australian official secrecy policy and its intelligence and security framework, with which NCND is intertwined, to illuminate different parts of this story. While primary source material is principally adduced in later chapters of this thesis, this section begins with an overview of the primary source material as a map for the Australian context. This section concludes with an overview of the literature on the history of official secrecy in Australia. While this is largely tent-poled by historically-focussed monographs, a number of other bodies of literature touch on aspects, as explored below.

The main primary source material for this thesis concerns the secrecy policy and messaging of Australian governments. This comprises official material both contemporaneously unclassified (such as public statements, Parliamentary debate, independent reviews, and legislation) and subsequently declassified (such as correspondence, Cabinet submissions and decisions, and intelligence assessments); and non-governmental material such as media reports. Not all official material is interpreted in this thesis as an articulation of government policy. For example, independent reviews are evidence of the advice provided to government and

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[135] Josephine Vallentine, "Matter of Urgency: Bicentenary Celebrations, Naval Visits" (Senate: Commonwealth (Austl.), November 4, 1988).

[136] Scott Michaelsen and Scott Cutler Shershow, "Is Nothing Secret?," *Discourse* 27, no. 2 (2005): 124.

indicate the kinds of considerations at play in policymaking, but are not themselves government policy.

The first main category of official material drawn is government statements using the form of words or logic of NCND in relation to intelligence and security (as early as the 1940s by the Chifley Government[137]), as well as related government statements on official secrecy. In an example of the latter, in 1983 Prime Minister Hawke defended his Government's attempts to prevent the publication of classified material in a radio interview, appealing to the public to exercise "some degree of trust in the judgement of the Prime Minister and the Government" in relation to national security, referring to the need to 'balance' transparency and secrecy.[138] This statement would go on to become a key touchpoint of the official secrecy debate, while the material in question would become journalists Brian Toohey and William Pinwill's 1989 book *Oyster: The Story of the Australian Secret Intelligence Service*.[139]

The second main category of official material is evidence of instances where, despite the supposed 'iron logic' of applying NCND consistently, Australian governments discarded NCND in favour of official disclosure. Certain forms of considered and principled official disclosure are termed 'avowal' in this thesis. Due to their inherent nature as articulations of government policy, avowals offer a rich insight into evolving official secrecy policy. Key avowals include that of the Australian Secret Intelligence Service (ASIS) in Parliament by Prime Minister Malcolm Fraser in parliament in 1977,[140] and those relating to the Joint Defence Facilities (JDFs) in the 1980s both inside and outside Parliament by the Hawke Government.[141]

However, the vast majority of unclassified official material on Australia's intelligence and security framework takes the form of reports arising from independent scrutiny, either by external (sometimes judicial) reviews or those of oversight bodies, as outlined below. The establishment of these reviews and oversight bodies are in themselves part of Australia's maturing approach to official secrecy, while their terms of reference, associated exhibits and submissions, and findings provide valuable insight into the ecosystem of secrecy policymaking in

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[137] Barnard, "Discussion of Matter of Public Importance: Resignation of Mr GC Hoffmann" (House of Representatives: Commonwealth (Austl.), March 18, 1969).

[138] Hawke, "Transcript 6109."

[139] Brian Toohey and William Pinwill, *Oyster: The Story of the Australian Secret Intelligence Service* (Port Melbourne: William Heinemann, 1989).

[140] Fraser, "Ministerial Statement: Royal Commission on Intelligence and Security" (House of Representatives Hansard: Commonwealth (Austl.), October 25, 1977).

[141] Robert Hawke, "Ministerial Statement: Arms Control and Disarmament" (House of Representatives Hansard: Commonwealth (Austl.), June 6, 1984); Robert Hawke and William Hayden, "Transcript 6408: Press Conference, Parliament House" (Department of the Prime Minister and Cabinet, June 6, 1984); Robert Hawke, "Ministerial Statement: Joint Defence Facilities" (House of Representatives Hansard: Commonwealth (Austl.), November 22, 1988).

action. Australian governments have commissioned relatively frequent independent reviews of the intelligence and security framework.[142] The earliest significant review of Australia's intelligence and security framework was the 1954 Royal Commission on Espionage, established following the defection of Soviet officials Vladimir and Evdokia Petrov to determine the extent of Soviet infiltration of the Australian bureaucracy.[143] Almost fifty years later, in 2003, the *Inquiry into Australian Intelligence Agencies* (the Flood Inquiry) recommended that the intelligence agencies be externally reviewed every five to seven years, formalising the convention of regular reviews.[144]

Usefully, most of these reviews were surveyed by the relatively recent Comprehensive Review of the Legal Framework of the National Intelligence Community (Richardson Review), commissioned by the Turnbull Government in 2018.[145] A strong theme of this survey is the extent to which many foundational elements of Australian intelligence and security policy were shaped by Australia's alliances with the US and UK, with Australian policy either modelled on that of its allies or shaped as a direct result of pressure exerted by them.[146]

Nevertheless, the defining reviews of the Australian intelligence and security framework were the Hope Royal Commissions. Helmed by Justice Robert Marsden Hope, both the *Royal Commission on Intelligence and Security* (RCIS or the First Hope Royal Commission, 1974–77) and the *Royal Commission on Australia's Security and Intelligence Agencies* (RCASIA or the Second Hope Royal Commission, 1983–4) examined, and recommended changes to, government secrecy policy.[147] The First Hope Royal Commission found that the secrecy surrounding the existence ASIS was excessive and that it did not afford sufficient advantages. Hope's recommendation that the government avow ASIS was acquitted through Fraser's parliamentary declaration in 1977.[148] The Second Hope Royal Commission considered the policy of NCND specifically in the context of whether the government should respond to allegations of

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142 Leuprecht and McNorton, *Intelligence As Democratic Statecraft*, 156.

143 William Owen, Roslyn F.B. Philp, and George C. Ligertwood, "Report of the Royal Commission on Espionage" (Commonwealth (Austl.): Royal Commission on Espionage, August 22, 1955), NAA: A6235, 1, National Archives of Australia.

144 Flood, "Flood Report," 185.

145 Richardson, "Volume 1."

146 Richardson, 109–10.

147 Robert Marsden Hope, "Fifth Report: Australian Secret Intelligence Service, Vol. 1" (Commonwealth (Austl.): Royal Commission on Intelligence and Security, 1976); Robert Marsden Hope, "General Report" (Commonwealth (Austl.): Royal Commission on Australia's Security and Intelligence Agencies, December 1984), 7.

148 Fraser, "Ministerial Statement: Royal Commission on Intelligence and Security." (House of Representatives Hansard: Commonwealth (Austl.), October 25, 1977).

misconduct concerning ASIO. In this case, Hope found that the balance fell in the other direction, recommending that NCND be maintained except in the most exceptional circumstances where the policy itself would threaten national security.[149]

Other reviews and inquiries include the 1979 *Protective Security Review* (also led by Hope), the 1994 *Commission of Inquiry into the Australian Secret Intelligence Services* (the Samuels and Codd Inquiry),[150] the 2003 Flood Inquiry, the 2011 *Independent Review of the Intelligence Community* (Cornall and Black Review),[151] and the 2017 *Independent Review of the Australian Intelligence Community* (L'Estrange and Merchant Review).[152] While these reviews precipitated a number of important policy changes to Australia's intelligence and security framework (including the introduction of a legislative footing for ASIS and several structural changes to the agencies), they largely held to the principles established by the Hope Royal Commissions. Key among these are that Australia requires rigorous and independent intelligence capabilities; that intelligence functions and policy formulation functions be separated; and that there be a statutorily independent intelligence assessment agency (now known as the Office of National Intelligence).[153] Given these more recent reviews are broadly consistent with the Hope Royal Commissions, they will be examined in detail in the body of this thesis, rather than as part of the literature review.

In the context of law reform specifically, Australian governments have also commissioned several reviews by the ALRC which touch on government secrecy policy. In particular, 2004's *Keeping Secrets: The protection of classified and security sensitive information* and 2009's *Secrecy Laws and Open Government in Australia* both made recommendations to government secrecy policy.[154] Relevantly for this thesis, in a break with a key tenet of the polarised public debate on official secrecy (and conceptually critiquing the 1980s rhetoric of the Hawke Government), the ALRC argued that it is an oversimplification to characterise the issue of official secrecy in a liberal democracy as 'striking a balance' between transparency and secrecy.[155]

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[149] Hope, "General Report," 7.

[150] Gordon J Samuels and Michael H Codd, "Report on the Australian Secret Intelligence Service - Public Edition," Report, Commission of Inquiry into the Australian Secret Intelligence Service (Commonwealth of Australia, 1995).

[151] Cornall and Black, "Report of the Independent Review of the Intelligence Community."

[152] Michael L'Estrange and Stephen Merchant, "Report of the Independent Intelligence Review" (Commonwealth (Austl.), 2017).

[153] "Shaping the Intelligence Community," Office of National Intelligence, November 23, 2018.

[154] Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information"; Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia."

[155] Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information," 10–11.

Further to these external reviews, a vast body of output exists on the intelligence and security framework from Australia's oversight bodies. Contemporarily, Australia has a number of oversight bodies which perform different functions, including the office of the Inspector General of Intelligence and Security (IGIS), the Parliamentary Joint Committee on Intelligence and Security (PJCIS), the Independent National Security Legislation Monitor (INSLM) and the Australian Commission for Law Enforcement Integrity (ACLEI). While contemporarily the INSLM (established in 2010) is increasingly scrutinising Australia's secrecy legislation,[156] the IGIS and PJCIS are of primary historical importance to this study. Following the recommendation of the Second Hope Royal Commission, the IGIS was established in 1986 .[157] While Hope acknowledged that it would not entirely placate public curiosity about intelligence and security activities, it would engender public confidence in their integrity.[158] A legislated function of the IGIS is assisting to assure "the public that intelligence and security matters are open to scrutiny."[159] Accordingly, both the terms of its operation and its reporting provide valuable insight into the approach to scrutiny and transparency of the intelligence and security framework.

The PJCIS, on the other hand, was initially established as the Parliamentary Joint Committee on the Australian Security Intelligence Organisation (PJCASIO, a predecessor to the current PJCIS, following the widening of its remit in 2001 and again in 2005), contrary to the report of the Hope Royal Commission.[160] The PJCIS (and its earlier incarnations) has oversight of a variety of matters involving intelligence agencies, including relevant legislation, though is explicitly restricted from reviewing particular operations (except in very limited circumstances).[161] Beyond its reports, the ability of the PJCIS to hold public hearings and take submissions as part of its inquiries generated a rich body of material from different sectors. For example, the 2019 *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press* (PJCIS press freedom inquiry) was a crucible for public discussion on official secrecy. It drew extensive submissions from media organisations, many

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156 Recent reviews concerning secrecy (themselves falling outside the studied period, but nonetheless useful for historical analysis) include: Blight, "Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995", and; Grant Donaldson, "Report into the Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004" (Independent National Security Legislation Monitor, 2023), https://www.inslm.gov.au/publications/national-security-information-criminal-and-civil-proceedings-act-2004.

157 Richardson, "Volume 1," 98.

158 Hope, "General Report," 8.

159 *Inspector-General of Intelligence and Security Act 1986* (Cth) (2025), subs. 4(d).

160 Hope, "General Report," 25.

161 *Intelligence Services Act 2001* (Cth) (2025), para. 29(3)(c), 29(3)(k) and 29(4).

Australian academics, and government agencies,[162] and generated scholarly and ongoing policy debate.[163] Notably for this thesis, several submissions specifically engaged the issue of secrecy in a liberal democracy, including to argue that actively supporting transparency can reinforce Australia's international legitimacy and influence as a liberal democracy, thereby strengthening its national security [164] This echoed the ALRC's attempt to nuance the dichotomy between transparency and national security. While the PJCIS press freedom inquiry did not specifically review the operation of NCND in Australia, the material it generated nonetheless advances the theoretical landscape of official secrecy in Australia's liberal democracy.

This sprawling but fragmented historical record of secrecy policy in Australia is richly augmented by the scholarship, which largely takes the form of either biographies or focussed histories of specific agencies or bodies. Australia's secrecy policy since the start of the Cold War has been touched on in both security and media history scholarship, including by David Horner, Desmond Ball, John Blaxland, Clare Birgin, Rhys Crawley, David McKnight, John Fahey, Philip Deery, Frank Cain, Jenny Hocking, Peter Edwards, Lawrence Maher, and Pauline Sadler.[165] While the primary material evidences the role of elected politicians and institu-

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[162] Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," 3.

[163] Rebecca Ananian-Welsh and Joseph Orange, "The Confidentiality of Journalists' Sources in Police Investigations: Privacy, Privilege and the Freedom of Political Communication," *Australian Law Journal* 94, no. 10 (2020): 777–90; Jacinta Carroll, "Parliament's Joint Intelligence Committee the Right Body to Review Press Freedom," *The Strategist*, July 8, 2019, https://www.aspistrategist.org.au/parliaments-joint-intelligence-committee-the-right-body-to-review-press-freedom/.

[164] Medcalf and Mansted, "Submission to the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press."

[165] David Horner, *Defence Supremo: Sir Frederick Shedden and the Making of Australian Defence Policy* (St Leonards, N.S.W: Allen & Unwin, 2000); David Horner, *The Spy Catchers: The Official History of ASIO, Volume I (1949-1963)* (Sydney: Allen & Unwin, 2014); Desmond Ball and David Horner, *Breaking The Codes: Australia's KGB Network, 1944-1950* (St. Leonards, N.S.W: Allen & Unwin, 1998); Desmond Ball, *A Suitable Piece of Real Estate: American Installations in Australia* (Hale & Iremonger, 1980), https://library.anu.edu.au/record=b1203137; John Blaxland and Clare Birgin, *Revealing Secrets: An Unofficial History of Australian Signals Intelligence and the Advent of Cyber* (Sydney: NewSouth Publisher, 2023); John Blaxland, *The Protest Years: The Official History of ASIO, Volume II (1963-1975)* (Sydney: Allen & Unwin, 2015); John Blaxland and Rhys Crawley, *The Secret Cold War: The Official History of ASIO, Volume III (1975-1989)* (Allen & Unwin, 2016); David McKnight, *Australia's Spies and Their Secrets* (St Leonards, N.S.W: Allen & Unwin, 1994); John Fahey, *The Factory: The Official History of the Australian Signals Directorate, Vol 1 (1947 to 1972)* (Crows Nest, N.S.W: Allen & Unwin, 2023); Phillip Deery, *Spies and Sparrows* (Melbourne: Melbourne University Press, 2022); Frank Cain, *The Origins of Political Surveillance in Australia* (Australia: Angus & Robertson, 1983); Frank Cain, "Australian Intelligence Organisations and the Law: A Brief History," *UNSW Law Journal* 27, no. 2 (2004): 296–318; Frank Cain, *Terrorism & Intelligence in Australia: A History of ASIO and National Surveillance* (North Melbourne, VIC: Australian Scholarly Publishing, 2008); Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge, New York: Cambridge University Press, 1997); Jenny Hocking, *Gough Whitlam: A Moment in History (Volume I)* (Carlton, VIC: The Miegunyah Press, an imprint of Melbourne University Publishing Ltd., 2009); Jenny Hocking, *Gough Whitlam: His Time (Volume II)*, Updated Edition (Carlton, VIC: The Miegunyah Press, an imprint of Melbourne University Publishing Ltd., 2014); Peter Edwards, *Arthur Tange: Last of the Mandarins* (Crows Nest, N.S.W: Allen & Unwin, 2006); Peter Edwards, "The Intelligence Review: Our Hope for Years to Come," *The Strategist*, July 26, 2017; Peter Edwards, "'Serving Government as a Whole': Justice Hope and the Remit of Australia's Intelligence Agencies," *The Strategist*, June 26, 2019, https://www.aspistrategist.org.au/serving-government-as-a-whole-justice-hope-and-the-remit-of-australias-intelligence-agencies/; Peter Edwards, *Law, Politics and Intelligence: A Life of Robert Hope* (Sydney: University

tions in shaping policy, the scholarship usefully traces the influence of other key figures, including senior public servants and commissioners of inquiries. A strong argumentative thread in this scholarship in particular is the extent to which this handful of influential individuals significantly shaped Australian governments' approaches to secrecy.

Together, Horner and Ball's 1998 book *Breaking the Codes: Australia's KGB Network, 1944–1950* and Horner's 2000 biography *Defence Supremo: Sir Frederick Shedden and the Making of Australian Defence Policy* trace the influence Sir Frederick Shedden had on wartime and postwar policy. Characterised by Horner as "probably the greatest public servant of his time,"[166] Shedden emerged during this period as the "archetypal mandarin," wielding great personal power.[167] Notably for this thesis, Shedden pushed for the formation of what would become the Australian Security Intelligence Organisation (ASIO)[168] and lent his weight to UK proposals for an Australian D-Notice system. Adopted by the Menzies Government in 1952, the D-Notice system was aimed at achieving voluntary non-publication by the media of certain defence and national security matters. Maher (1997) and Sadler (2000) also note Shedden's influence and pressure from the US and UK in their studies of Australia's D-Notice system modelled on that of the UK, Maher describing Shedden as "unabashed apostle of the British defence establishment culture."[169] Australia's D-Notice system operated for a number of decades, though had fallen into disuse by the 1990s amid ongoing criticism from the media that it amounted to self-censorship.[170]

Edwards's 2006 biography *Arthur Tange: The Last of the Mandarins* also picks up the thread of influential individuals.[171] Edwards captures the nuance of Sir Arthur Tange's influence on secrecy policy as Secretary of the Departments of External Affairs (1954–1965) and Defence (1970–1979), noting that he worked to improve public transparency (including establishing the Public Information Office), but nonetheless felt keenly the weight of national security

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of New South Wales Press, 2020), http://ebookcentral.proquest.com/lib/anu/detail.action?docID=6166733; Laurence W Maher, "National Security and Mass Media Self Censorship: The Origins, Disclosure, Decline and Revival of the Australian D Notice System," *Australian Journal of Legal History* 3, no. 2 (1997): 171–204; Pauline Sadler, *National Security and the D-Notice System* (Ashgate/Dartmouth, 2001), https://ebookcentral-proquest-com.virtual.anu.edu.au/lib/anu/detail.action?docID=5257627.

166 Horner, *Defence Supremo*, 4.

167 Horner, 5, 268–69.

168 Horner, 274.

169 Maher, "National Security and Mass Media Self Censorship," 175.

170 Sadler, *National Security and the D-Notice System*, 68–74.

171 Edwards, *Arthur Tange*.

and imperative to maintain Australia's alliances.[172] Edwards positions Tange as clashing vehemently with those who did not share his approach to public disclosure, particularly Brian Toohey during his time as a Ministerial adviser.[173]

Robert Marsden Hope's enduring influence on Australia's intelligence and security policy has been extensively studied by historians and policy analysts, most notably Peter Edwards.[174] His comprehensive 2020 book *Law, Politics and Intelligence: A Life of Robert Hope* characterises Hope as a principled liberal, arguing that his war service inculcated his commitment to democracy,[175] which informs an analysis of the discussion of NCND and official secrecy more generally in the reports of the Hope Royal Commissions. Further, in an echo of Horner's analysis of how Shedden wielded personal power, Edwards argues that Hope's alacrity in navigating the boundary between the executive and judiciary drew respect across government,[176] ultimately positioning him as one of the most significant (and least likely) architects of the Australian intelligence and security framework.

Jenny Hocking's two-volume biography of Gough Whitlam (2008's *A Moment in History* and 2012's *His Time*) and 1997 *Lionel Murphy: A Political Biography*, together with heavily-anticipated 2020 book *The Palace Letters*,[177] provide ground-breaking insight into a period of intense upheaval for Australia's intelligence and security framework and official secrecy policy. Hocking charts Whitlam's trajectory from policy-minded Opposition agitator, to Labor Prime Minister displacing more than two decades of Coalition governments, to his sensational dismissal in 1975. Hocking's account demonstrates how the Whitlam Government suffered from the first from deep-rooted dysfunction, struggling to gain traction and trust with intransigent government agencies on its energetic social democracy reform agenda and matters of national security.[178]

In addition to the biographical scholarship, several key accounts of specific agencies and facilities (in particular, ASIO and the JDFs) further flesh out the story of official secrecy in

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[172] Edwards, 220–22.

[173] Edwards, 220–22.

[174] Edwards, "The Intelligence Review: Our Hope for Years to Come"; Edwards, "'Serving Government as a Whole': Justice Hope and the Remit of Australia's Intelligence Agencies."

[175] Edwards, *A Life of Robert Hope*, 38.

[176] Edwards, 59.

[177] Hocking, *Gough Whitlam*; Hocking, *Gough Whitlam: His Time (Volume II)*; Hocking, *Lionel Murphy*; Jenny Hocking, *The Palace Letters: The Queen, the Governor-General, and the Plot to Dismiss Gough Whitlam* (Melbourne, VIC; London: Scribe, 2020).

[178] Hocking, *Gough Whitlam: His Time (Volume II)*, 47–50, 65–70, 293–95.

Australia. In the three-volume series *The Official History of ASIO*, Horner, Blaxland and Crawley comprehensively examine the forces that established and shaped ASIO, with the immense benefit of access to ASIO's archives and interviews with officials.[179] Importantly for this thesis, in *Volume I: The Spy Catchers*, Horner examines the substantial pressure from the US and UK on the Chifley Government to improve the Australian security framework at the start of the Cold War, which ultimately led to ASIO's establishment.[180] Notably, Horner also presents evidence that ASIO was not established in secret, though the Chifley Government affirmed that it was "not the practice" to discuss its methods.[181]

In addition to providing further accounts of the Hope Royal Commissions and other historical developments as they pertained to ASIO, the *Official Histories* also scrutinise the historical and ongoing secrecy surrounding ASIO and some of its repercussions. For example, in *Volume III: The Secret Cold War*, Blaxland and Crawley examine how secrecy surrounding allegations of Soviet penetration of ASIO during the height of the Cold War continues to this day (including the findings of a 1994 investigation commissioned by the Keating Government), generating uncomplimentary speculation about the extent of the compromise.[182] Relevantly for this thesis (and a policy analysis of the priority that should be accorded to NCND), Blaxland and Crawley conclude that "secrecy for secrecy's sake can on occasion prove counter-productive."[183]

In addition to the *Official History,* David McKnight's *Australian Spies and Their Secrets* provides a further insightful account of the origins of ASIO amid the hunt for Soviet intelligence agents at the beginning of the Cold War.[184] McKnight also offers an analysis of political landscape during the *Royal Commission on Espionage*, strongly arguing that the inquiry "destroyed forever any hope of a bipartisan policy on security."[185] Phillip Deery's 2022 text *Spies and Sparrows* scrutinises particularly the human cost of ASIO's Cold War activities, arguing that ASIO crossed the boundaries of professionalism in its early countersubversion.[186]

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[179] Horner, *The Spy Catchers*; Blaxland, *The Protest Years*; Blaxland and Crawley, *The Secret Cold War*.

[180] Horner, *The Spy Catchers*, 76.

[181] Horner, 118.

[182] Blaxland and Crawley, *The Secret Cold War*, 421.

[183] Blaxland and Crawley, 421–22.

[184] David McKnight, *Australia's Spies and Their Secrets* (St Leonards: Allen & Unwin, 1994), https://library.anu.edu.au/record=b1886531.

[185] McKnight, 5.

[186] Deery, *Spies and Sparrows*.

Desmond Ball's explosive 1980 book *A Suitable Piece of Real Estate: American Installations in Australia* arguably elevated Australia's defence and intelligence ties with the US into the public consciousness, demonstrating the clumsiness of the official secrecy surrounding the JDFs and persuasively making the case for greater government transparency about the functions of the facilities.[187] The influence of Ball's scholarship is clear; just four years later, in response to mounting public pressure, the Hawke Government went on to avow the functions of the JDFs, re-drawing the contours of NCND in Australia.[188] Ball's work functions not only as a comprehensive account of the facilities, but as an indispensable case study of the weaknesses and repercussions of official secrecy.

While analysis of the evolution of official secrecy in Australia is largely to be found in historical monographs such as those explored above, a number of other bodies of literature also touch on this history. The work of national security law scholars such as Greg Carne and Dominique Dalla-Pozza offers a critical perspective on the nature and operation of Australia's intelligence and security frameworks as legislated, quite apart from statements of policy intent.[189] Carne's meticulous legal analysis, including on the operation of the PJCIS, establishment of the Office of National Intelligence (ONI), and empowerment of intelligence and security agencies in response to terrorism, provides a valuable comparator against which to examine these frameworks as articulated by governments.[190] Further, scholarship on the *Collaery* proceedings and other cases involving secrecy offences illuminates both the operation of such offences and reveals the varying approaches of governments historically to their prosecution.[191] Finally, a strong tradition of policy commentary in Australia functions as both primary

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187 Ball, *A Suitable Piece of Real Estate*.

188 Hawke, "Hawke, Ministerial Statement: Arms Control and Disarmament, Hansard (6 June 1984)."

189 Greg Carne, "Official Secrets and the Gibbs Report: A Charter for Reform or a Tug of the Legal Forelock?," *University of Tasmania Law Review* 12, no. 1 (1993): 11–25; Greg Carne, "Beyond Terrorism: Enlarging the National Security Footprint Through the Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011 (Cth)," *Flinders Law Journal* 13, no. 2 (2011): 177–239; Greg Carne, "Reviewing the Reviewer: The Role of the Parliamentary Joint Committee on Intelligence and Security - Constructing of Constricting Terrorism Law Review?," *Monash University Law Review* 43, no. 2 (2017): 334–85; Dominique Dalla-Pozza, "The Parliamentary Joint Committee on Intelligence and Security: A Point of Increasing Influence in Australian Counter-Terrorism Law Reform?," in *New Directions for Law in Australia: Essays in Contemporary Law Reform*, ed. Ron Levy et al., 1st ed. (ANU Press, 2017), 397–405, https://doi.org/10.22459/NDLA.09.2017.37; Dominique Dalla-Pozza and Greg Weeks, "A Statutory Shield of the Executive: To What Extent Does Legislation Help Administrative Action Evade Judicial Scrutiny?," in *Interpreting Executive Power* (The Federation Press, 2020).

190 Greg Carne, "Designer Intelligence or Legitimate Concern? Establishing an Office of National Intelligence and Comprehensively Reviewing the National Intelligence Community Legal Framework," *Unviersity of Western Australia Law Review* 46, no. 1 (2019): 144–60.

191 David Dixon, "Political Trials: From Clive Ponting To Bernard Collaery And Witness K," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, December 1, 2020), https://doi.org/10.2139/ssrn.3741039; Spencer Zifcak, "Human Rights: Why Bernard Collaery's Case Is One of the Gravest Threats to Freedom of Expression," *Law Society of NSW Journal*, no. 69 (March 19, 2021): 88–89, https://doi.org/10.3316/informit.296990947510902; Pender, "Open Justice, Closed Courts and the Constitution."

source material evidencing the public discourse on Australian official secrecy, and as secondary literature offering a useful lens to contextualise and analyse its evolution.[192] This thesis will make clear the capacity in which such commentary is used.

Conclusion

As this literature review has outlined, while NCND is threaded through the history of official secrecy in Australia, it appears only in the margins of the Australian literature on intelligence and security. The international literature is more advanced in the analysis of NCND and official secrecy broadly in liberal democracies. It provides useful concepts for an Australian analysis, including the use of NCND to create strategic ambiguity, and its apparently logical structure as a principle. This thesis draws on both in answering the research questions.

The analysis of NCND in this thesis engages with the conceptual challenges of secrecy in liberal democracy. While transparency of government activities is conceptually essential to the operation of liberal democracy, the maintenance of security nonetheless generally requires executive government to keep some of its activities secret. Reconciling these apparently contradictory imperatives has vexed even the most impassioned advocates of liberal democracy. The primary conceptual and practical approach to mitigating the paradox has been the establishment of transparency and accountability mechanisms, such as oversight and review bodies, which serve to scrutinise (and in some cases restrain) the exercise of executive discretion to conduct certain activities or maintain secrecy. While the evolution of these mechanisms has gradually reduced the range of circumstances under which the executive discretion to disclose is unfettered, there are nonetheless key areas in which it remains critical.

This is the acute challenge of the intelligence and security activities of government, for which secrecy is a precondition. Facing the unquantifiable risk that the disclosure of certain pieces of information may lead to the extrapolation of others, a number of liberal democracies, including Australia, have historically chosen to 'neither confirm nor deny' certain matters of national security. In the context of the Cold War, the US and UK's insistence upon unbroken

[192] For example, Kristy Bryden, "A Little Transparency, Please," *The Strategist*, August 7, 2013; Tobias Feakin, "Security vs Civil Liberties: Does the Balance Model Do Us Justice?," *The Strategist*, August 21, 2014, https://doi.org/10.1080/02684520500281502#.U_LQ6fmSyFU; Anthony Bergin, "Reader Response: Security vs Civil Liberties," *The Strategist*, August 25, 2014; Anthony Bergin and Kate Grayson, "Intelligence Oversight or out of Sight? Recommendations for Legislative Review," *The Strategist*, January 18, 2019, https://www.legislation.gov.au/Details/C2018C00357; Carroll, "Parliament's Joint Intelligence Committee the Right Body to Review Press Freedom"; Dennis C. Grube, "Spycatcher Scandal: Newly Released Documents from the Thatcher Era Reveal the Changing Nature of Government Secrecy," *The Conversation*, January 4, 2024, http://theconversation.com/spycatcher-scandal-newly-released-documents-from-the-thatcher-era-reveal-the-changing-nature-of-government-secrecy-220457.

application of NCND as part of nuclear deterrence strategy spanned the breadth of international engagement, both facilitating positive collaboration across policy divides in some cases, and precipitating the dissolution of alliances in others. The latter case demonstrates the depth of the US and UK's commitment to the 'logical core' of NCND, being that its effectiveness in protecting secrets relies upon its unwavering, iron-clad use. What, then, explains the clear historical evolution of Australian government's use of NCND? The historical study in the following chapters uses the framework of secrecy within liberal democracy to analyse and answer this question.

Chapter 2: Origins of Official Secrecy in Australia (1948–1955)

This chapter examines the origins of official secrecy surrounding Australia's early intelligence and security activities. In so doing, it asks what factors shaped the development of early secrecy policy and ultimately the adoption of NCND. This will establish a baseline from which to analyse the historical evolution of Australia's approach to keeping its own secrets. While Australia's early intelligence and security framework has been extensively examined both in scholarship and official reporting, this chapter focusses specifically on the developing policy and practice of 'official secrecy' which accompanied the establishment of this framework. This chapter finds that information handling practices regarding Australia's nascent intelligence and security activities were initially adopted under the strong influence of key security partners. It finds that that, while the Chifley Labor and Menzies Liberal-Country Party Coalition Governments took different approaches to official secrecy in responding to this pressure from allies, both established significant early precedent for elements of the evolution of official secrecy policy in Australia.

As are the next seven, this chapter is structured chronologically. It proceeds in three parts. The first part canvasses Australian approaches to official secrecy prior to 1948, including outlining early legislation giving effect to official secrecy policy (including the 1914 enactment of key secrecy offences, which would endure for almost five decades), and providing a brief overview Australian governments' approach to maintaining official secrecy during the world wars. The second part examines the evolution of official secrecy policy in the context of the changing security environment of the early Cold War, including the events preceding the establishment of ASIO. The third part examines the Menzies Government's 1952 adoption of the 'D-Notice' system, and the events of the 1954–55 Royal Commission on Espionage.

Part 2.1: Early secrecy legislation and official secrecy in wartime

The British Empire's legislative ecosystem was such that, in general, UK laws were taken to apply to Dominions in the absence of local laws. While the Australian Parliament did establish some secrecy offences in its first session in 1901, comprehensive provisions based on the *Official Secrets Act 1911* (UK) were enacted thirteen years later with the passage of the *Crimes Act 1914* (Cth) (*Crimes Act*). When the *Crimes Act* came into force, the UK suspended the application of the *Official Secrets Act 1911* (UK) to Australia.[193] Paradoxically, the passage of comprehensive provisions modelled on the UK legislation simultaneously endorsed the "intimate ties"[194] and political inheritance between the UK and Australia politically and militarily, and formally broke with UK secrecy legislation. The passage of this early legislation was therefore an important step in establishing a new 'national' security identity for Australia. Reflecting the information technology environment of the early century, the original *Crimes Act* provisions included "any sketch, plan, model, article, note, document, or information" in the description of secret information.[195] The *Crimes Act* provisions would endure (with amendments) until reforms in 1960, until their ultimate repeal and replacement with new offences in the Commonwealth Criminal Code in 2018.[196]

As will be discussed in later chapters, in addition to this legislation, several sections of the Constitution as established in 1901 later became part of the evolution of the legal contours of official secrecy. In addition to executive power (as explored in Chapter 1), the Constitution established several other mechanisms of liberal democracy, including that members of Parliament be chosen directly by the public (sections 7 and 24). These sections were later acknowledged by the High Court to contain an implied right to freedom of political communication, recognising that the informed exercise of democracy is premised on the availability of political information.[197] Echoing the deliberations of the proponents of liberal democracy examined in Chapter 1, the Court did not hold this to be absolute, however; rather, it found that valid laws appropriate to responsible and democratic government would not necessarily breach this implied right. These findings would go on to generate extensive and ongoing national debate on the limits of secrecy and, later, the public's 'right to know'.[198] The Constitution also enshrined

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[193] UK Statutory Rules and Orders, "Official Secrets (Commonwealth of Australia) Order in Council 1915," No 1199 § (1915).

[194] Maher, "National Security and Mass Media Self Censorship," 173–74.

[195] *Crimes Act 1914 (Cth)* [As Made] (1914), secs. 77, 79.

[196] Harry Gibbs, R Watson, and A Menzies, "Fifth Interim Report" (Commonwealth (Austl.): Review of Commonwealth Criminal Law, June 1991), 354; Sarah Kendall, "Australia's New Espionage Laws: Another Case of Hyper-Legislation and Over-Criminalisation," *University of Queensland Law Journal* 38, no. 1 (2019): 125–61.

[197] Mason CJ, *Australian Capital Television Pty Ltd & New South Wales v Commonwealth*, No. [1992] HCA 45; (1992) 177 CLR 106 (High Court of Australia September 30, 1992); Mason CJ, Nationwide News Pty Ltd v Wills, No. [1992] HCA 46; (1992) 177 CLR 1 (High Court of Australia September 30, 1992).

[198] See Tom Campbell and Stephen Crilly, "The Implied Freedom of Political Communication, Twenty Years On," *University of Queensland Law Journal* 30, no. 1 (2011): 59–78; Richard Jolly, "The Implied Freedom of Political Communication and Disclosure of Government Information," *Federal Law Review* 28, no. 1 (2000): 41–59; and Danielle Ireland-Piper and Jonathan Crowe, "Whistleblowing, National Security and the Constitutional Freedom of Political Communication," *Federal Law Review* 46, no. 3 (September 1, 2018): 341–65, https://doi.org/10.1177/0067205X1804600301 particularly p. 353-356.

broadcasting and telecommunications powers, which became relevant to official secrecy policy in wartime.[199]

Early intelligence functions were established by the Barton Government shortly after federation. Early intelligence collection focussed on regional trade and politics.[200] Military intelligence activities included the development of early capability to support signals intelligence collection, which would become a critical element of Australia's national security policy and partnerships.[201] The changed security environment of World War I saw rapid shifts in Australia's approach to official secrecy precipitated the establishment of civilian intelligence and security functions and an expanding collection focus, which included border security and espionage.[202] Despite increasing development of domestic capability, Australia did not yet have an independent intelligence policy, and remained guided by British Empire interests.[203] World War I also saw the creation of the first Commonwealth police force, established in 1917 by Prime Minister Billy Hughes under the *War Precautions Act 1914–1918* (Cth) (*War Precautions Act*) following dissent over military conscription and decommissioned in 1919. At the end of the war, the remaining fragments of the wartime intelligence and investigations functions were consolidated into an Investigations Branch under the Attorney-General, which focussed on the activities of left-wing groups perceived by government as possible threats to national security.[204]

Following the UK's lead, the Fisher and Hughes Governments adopted a legislative approach to information management over the course of World War I. New powers were established under the *War Precautions Act* to prevent "the spread of reports likely to cause disaffection or alarm" and secure "the safety of any means of communication." The *War Precautions Act* also enabled the regulation of activities that could "jeopardize the success of the operations of any of His Majesty's forces," such as espionage and other communications with adversaries.[205] This was an early demonstration of Australian governments' use of legislation to recalibrate official secrecy policy in response to the changing security environment.

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[199] Rhonda Jolly, "Media Ownership and Regulation: A Chronology, Part One - From Print to Radio Days and Television Nights," Report (Parliamentary Library (Australia), February 1, 2016), 2, Australia.

[200] Richardson, "Volume 1," 105.

[201] John Fahey, *Australia's First Spies: The Remarkable Story of Australia's Intelligence Operations 1901-45* (Sydney: Allen & Unwin, 2018), 1–15.

[202] Richardson, "Volume 1," 106.

[203] Richardson, 104.

[204] Andrew Moore, *The Right Road? A History of Right-Wing Politics in Australia* (Oxford University Press, 1995), 27; Horner, *The Spy Catchers*, 17.

[205] *War Precautions Act 1914-1918 (Cth)* (1914), sec. 4.

Government engagement with media was a critical part of the response to the new security threats in this period. For many nations, this included both censorship and collaboration in an effort to suppress both pacifist and pro-Germany propaganda. More contemporarily, journalists observed that government-imposed and self-censorship of newspapers was not viewed as inherently negative, but rather had "support because the war had general support."[206] Nonetheless, in response to criticism that wartime measures were being misused for political reasons rather than security, the Hughes Government established an advisory board on which media editors were represented in 1918 to advise government censors.[207] Information management was not exclusively focussed on nondisclosure, however. War correspondents (and later, historians) were officially commissioned to record and report the events of the war,[208] which played a significant role in the development of Australian national identity, such as through the work of Charles Bean.[209] In addition to public reporting, government and media also collaborated out of public view. The journalist Keith Murdoch, who narrowly lost the post of official war correspondent to Bean, was commissioned by his friend Prime Minister Fisher to confidentially deliver a pragmatic report on the war effort. Having evaded British censors as private correspondence, Murdoch's fervent September 1915 Gallipoli Letter was disseminated through the British and Australian establishment and is now recognised for its role in helping bring an end to the Dardanelles campaign in Gallipoli.[210] This approach to media engagement during the war demonstrated the value and distinct complementary roles of both public and classified reporting.

Australia's nascent approach to official secrecy and national security underwent further changes during World War II. Wartime information security measures were again imposed. The new Department of Information was established by the Menzies Government to manage information and censorship, and an average of eight censorship notices issued daily to Australian radio stations and newspapers between 1940 and 1945.[211] Some restrictions issued to media were aimed at the protection of temporarily sensitive information. In December 1941,

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[206] Daniel Schorr, "On National Security, Five Ways to Respond to Restraints," *Nieman Reports; Spring* 52, no. 1 (1998): 42–45.

[207] Jolly, "Media Ownership and Regulation," 9; Editors, "A Muzzled Press," *The Australian Worker*, March 22, 1917.

[208] John R Stephens, "Circuits of Memory: The War Memory Boom in Western Australia," *Societies* 2, no. 3 (2012): 86, https://doi.org/10.3390/soc2030084.

[209] Aline Le Guen, "Pulling Down the ANZAC," *Institute of Public Affairs Review* 67, no. 3 (December 24, 2020): 6–9, https://doi.org/10.3316/ielapa.546192416907348.

[210] "The Gallipoli Letter: 100 Years Later - National Library of Australia" (National Library of Australia, October 14, 2015).

[211] Kay Saunders, "'An Instrument of Strategy': Propaganda, Public Policy and the Media in Australia During the Second World War," *War & Society* 15, no. 2 (1997): 75–90, https://doi.org/10.1179/072924797791201201.

the government ordered the closure of four radio stations for breaching a temporary ban on reporting the presumed loss of an Australian naval vessel.[212] Prime Minister Curtin later publicly confirmed that the HMAS *Sydney* had sunk following a battle with enemy forces,[213] and provided a rationale for both the temporary ban and the timing of the official confirmation:

> The Prime Minister added that although the action took place some days ago, an announcement to the public had not been made earlier for three reasons. For strategical reasons, including the safety of other ships, it was thought desirable not to publish the information earlier than now. There was also the remote, yet not impossible, eventuality of the Sydney still being afloat, and also a hope that a version could be obtained from one of her personnel. Time was taken in the desirable direction of informing the next of kin.[214]

The Curtin Government's handling of the public discussion of HMAS *Sydney* was an early demonstration of a number of elements of evolving Australian official secrecy policy. The use of targeted measures specific to the sensitivity of the information, and the public articulation of the justification for the protection of information when possible, demonstrated an approach that would both mitigate threats and uphold the imperative for transparency. This apparent pursuit of 'balance' would go on to characterise the evolution of official secrecy policy in Australia, as will be discussed in the following chapters.

Relevantly, World War II also saw rapid changes in Australia's key security partnerships. At the outbreak of World War II, notwithstanding the affirmation of Australia (and other nations) as autonomous Dominions in the interwar period through the 1926 Balfour Declaration,[215] Australia's security and defence interests were still intimately tied to the UK. This was evidenced by the phrasing of Menzies' 3 September 1939 announcement of Australia's entry into the war: "Great Britain has declared war… [and] as a result, Australia is also at war."[216] This would evolve starkly over the course of the war. By the end of World War II, Australia had pivoted strongly to the US as a result of Japan entering the war. In a statement as significant as Menzies', Curtin announced on 26 December 1941 that "Without any inhibitions of any kind, I make it quite clear that Australia looks to America, free of any pangs as to our traditional links or kinship with the United Kingdom."[217] This keenly-felt international alignment of Australia's

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[212] Jolly, "Media Ownership and Regulation," 21.

[213] Editors, "Ban on Radio Stations," *Sydney Morning Herald*, December 2, 1941.

[214] Editors, "H.M.A.S. SYDNEY Missing," *The Border Watch*, December 2, 1941.

[215] Peter C. Oliver, "'Dominion Status': History, Framework and Context," *International Journal of Constitutional Law* 17, no. 4 (October 4, 2019): 1173–91, though implementation was delayed in Australia and New Zealand (see p. 1190-1191 for an overview).

[216] "Prime Minister Robert G. Menzies: Wartime Broadcast" (Australian War Memorial, September 3, 1939), https://www.awm.gov.au/articles/encyclopedia/prime_ministers/menzies.

[217] John Curtin, "The Task Ahead," *The Herald*, December 27, 1941.

security interests would strongly inform the evolution of its domestic intelligence and security framework, and arguably become a lever of duress from key allies.

Part 2.2: International pressure and domestic politics

While the conclusion of World War II eased immediate wartime pressures, the early days of the Cold War sharpened anxieties about the threat of espionage and foreign interference. The activities of the Communist Party of Australia (CPA), founded in 1920 and increasingly suspected of being aligned with Soviet efforts to establish global communism, were perceived as a significant security threat.[218] Misgivings were further fuelled by the 1945 defection of Soviet official Igor Gouzenko in Canada, which revealed the operation of Soviet espionage networks in Canada and prompted the Chifley Government review the adequacy of secrecy legislation in Australia.[219] It was in the context of these concerns, and the ensuing developments in Australia's intelligence and security framework, that would later give rise to the Chifley Government's first use of the logic of NCND in 1948.[220]

Concern about Australia's information security was also growing internationally. As early as March 1946, both the UK and US were focussed on the security deficiencies in Australia and its contributions to allied security more broadly.[221] At the 1946 British Commonwealth Signal Intelligence Conference in London, officials noted that Australia's contribution of intercept operators was the lowest proportionally in the Commonwealth, and that its offer of personnel was five times smaller than that of Canada.[222] While in May 1946 Australia and the UK had begun a highly sensitive collaboration on long-range missile testing hosted in Australia,[223] by August 1946, counterespionage MI5 officer Courtenay Young (who in 1949 went on to become the first MI5 Security Liaison Officer with ASIO[224]) reported back to MI5 that there is "no

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[218] Frank Cain, "Venona in Australia and Its Long-Term Ramifications," *Journal of Contemporary History* 35, no. 2 (2000): 232; Maher, "National Security and Mass Media Self Censorship," 176.

[219] Maher, "National Security and Mass Media Self Censorship," 176.

[220] Barnard, "Discussion of Matter of Public Importance: Resignation of Mr GC Hoffmann," (18 March 1969).

[221] Correspondence between Young and White (August 1946), TNA: KV 4/454, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," August 1946, 83–85, The National Archives, UK.

[222] Minute by the Chiefs of Staff at Meeting, Signed GC Oldham, Commander, Joint Secretary - Agendum No.10/46: Recommendations of British Commonwealth Signal Intelligence Conference Held in London February/March 1946 (4 July 1946), TNA: KV 4/454, 71.

[223] Cain, "Venona in Australia and Its Long-Term Ramifications," 234.

[224] Horner, *The Spy Catchers*, 91.

security whatsoever in Australia on anything."[225] In December, fellow MI5 officer, A.J. Kellar, reported that "very little, if indeed anything at all, can go from us to the Australians" on the basis of security concerns. Kellar, however, raised the question of whether Australia should be informed of their own vulnerabilities, asking "Are we on Young's recommendation to be precluded from telling the Australians about a possible Russian agent in their own country?"[226]

By 1947, the Director General of MI5, Sir Percy Sillitoe, wrote of the (pre-ASIO) Commonwealth Investigation Service (CIS) that it was in a "rather bad state, and for that reason somewhat ineffective," and that attempts had been made to "impress on the Australians, in a tactful way, the importance that we attach to security work, particularly in view of the various research projects which are now being undertaken in Australia."[227] Young's reports back to the UK further described CIS as "untrained in security and inclined to be flat-footed," and its officers as liable to 'blow' investigations "owing to ham-handed methods."[228] The UK had begun to fear the likelihood not only of Australian leakages themselves, but that leakages "might seriously affect future exchanges between ourselves and United States of America."[229]

It was not long before these very fears came to fruition. As extensively examined in David Horner's *The Spy Catchers* (the first of three volumes comprising the official history of ASIO), from April 1947 cryptanalysts as part of the VENONA operation began to obtain evidence of espionage by Soviet intelligence operatives in Canberra.[230] VENONA was a top-secret US-UK signals intelligence operation, the existence of which was guarded even more closely than the allied intelligence programs of World War II.[231] VENONA saw the decryption of thousands of Soviet messages, which uncovered extensive espionage activity in Australia, the UK, Canada and the US.[232]

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225 Correspondence between Young and White (24 August and 6 September 1946), TNA: KV 4/454, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 83–85.

226 Note by Kellar (13 December 1946) in B Division Instruction: Correspondence with Australia, signed DG White (January 1947), TNA: KV 4/454, 34.

227 Correspondence from Sillitoe to Stephenson, Dominions Office (7 March 1947), TNA: KV 4/454, 26, 32.

228 Correspondence from Young (19 December 1946) Note by Kellar (13 December 1946) in B Division Instruction: Correspondence with Australia, signed DG White (January 1947), TNA: KV 4/454, 33–34.

229 Note by Security Service: General Security Situation in Australia, signed Furnival Jones (30 May 1947), TNA: KV 4/455, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 1948, 22–24, 26, 32, The National Archives (UK).

230 Horner, *The Spy Catchers*, 55; See also Ball and Horner, *Breaking the Codes*, particularly chapters 11-14.

231 Horner, *The Spy Catchers*, 55.

232 Horner, 55; Richardson, "Volume 1," 110.

Critically, however, the US and UK did not reveal the details of this intelligence to Australia contemporaneously, for fear of revealing the VENONA operation. While Sillitoe had informed Chifley in February 1948 of MI5's of discovery of information leakage from the Australian establishment to the Soviets (likely in 1946), he had deliberately obfuscated the source of the intelligence and scale of the compromise.[233] A subsequent investigation undertaken by the Chifley Government did not identify any ongoing espionage activity, leaving the government with a misinformed impression of security.[234] This invidious state of affairs caused internal consternation for MI5, which feared that the Chifley Government (none the wiser about the revelations of VENONA) would give the UK Prime Minister, Clement Attlee, assurances about security in Australia that would then be difficult for MI5 to "contradict," and that it would be forced to "watch our secrets being poured into a leaky barrel."[235] Future MI5 Director General Roger Hollis even went so far as to describe Attlee as having "let down" Sillitoe by failing to take a firm line with Chifley.[236]

This deadlock did not persist for long however. As also explored by Horner, the US took strident action on the VENONA revelations by restricting the intelligence made available to Australia. While Australia had deepened its intelligence engagement with the US over the course of World War II, the UK (and the British Empire more broadly) remained the primary hinge of the relationship, and the restriction of information to Australia was effected through this relationship. The US had voiced its concerns to the UK with increasing force, culminating in a 'blunt' ultimatum from the US Chief of Naval Intelligence that "unless [MI5 is] prepared to give a written undertaking that American reports containing classified information on guided weapons will be positively excluded from Australian personnel…no further reports will be made available."[237] The US advised that UK noncompliance with the ultimatum would mean that MI5 would be asked to return any reports in its possession, and that the subject matter of the embargo may be extended beyond guided weapons.[238] The US also pointedly made clear that in

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233 Horner, *The Spy Catchers*, 58, 68.

234 Cain, "Venona in Australia and Its Long-Term Ramifications," 233.

235 Correspondence between Hollis and Sillitoe (1 and 8 September 1948), TNA: KV 4/456, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 1948, 125–28, The National Archives (UK).

236 Correspondence between Hollis and Sillitoe (1 and 8 September 1948), TNA: KV 4/456, 125–28.

237 Report from Hollis to Director General (5 January 1949), TNA: KV 4/457 - Part 1, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 1948, 4, The National Archives, UK.

238 Report from Hollis to Director General (5 January 1949), TNA: KV 4/457 - Part 1, 4.

its view the ‘Australian problem’ was “much broader in scope than implied” by UK representations to the US, and went to the “whole question of security in the Australian government.”[239] However, internal MI5 reports in October 1948 also stressed that “the United States authorities have firmly refused to allow us to mention to the Australians that the United States were the discoverers of the existence of a spy-network in Australia,” and feared the “embarrassment” of Australia receiving the impression that the UK was responsible for the embargo.[240]

Without the crucial VENONA puzzle piece that Soviet espionage remained ongoing in Australia, the US embargo initially did little to convince the Chifley Government of the imperative for strengthened secrecy. As explored by Christopher Andrew in *Defend the Realm: The Authorized History of MI5* (2009), , the UK Government was caught in the middle, as MI5 had feared. After a particularly unproductive meeting, Hollis acknowledged internally that Chifley and his colleagues could well begin to regard the MI5 representatives as either “fools…[or] knaves” based on their unexplained persistence.[241] In a letter to Attlee on 4 October 1948, Chifley wrote that since the 1946 incidents, “[t]here is not the slightest indication that there is any leakage to any foreign agent about what may be called security matter,” and wrote of the 1946 incidents that “There has not been a country, and least of all the Great Powers, which has not had a similar experience of this nature.”[242] Chifley further argued that if Australia were to continue cooperating with the US and Britain that “either the embargo be lifted as soon as possible or that we should be informed of the reasons why this cannot be done.”[243]

In an internal instruction on 6 October 1948, future MI5 Director General, Martin Furnival Jones, noted that it was of particular importance that MI5 officers “not mention the fact that we know of a Russian espionage network operating there.”[244] At a ministerial level however, in his response on 29 October 1948, Attlee ultimately contradicted Chifley’s claim about security

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239 Report from Hollis to Director General (5 January 1949), TNA: KV 4/457 - Part 1, 4.

240 Correspondence from Sillitoe to Helsby (14 October 1948), TNA: KV 4/456, “Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5’s Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information,” 67–68.

241 Christopher M. Andrew, *Defend the Realm: The Authorized History of MI5* (New York: Alfred A. Knopf, 2009), 368–71.

242 Correspondence from Chifley to Attlee (4 October 1948), TNA: KV 4/456, “Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5’s Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information,” 70–72.

243 Correspondence from Chifley to Attlee (4 October 1948), TNA: KV 4/456, 70–72.

244 Internal instruction from Furnival Jones (6 October 1948), TNA: KV 4/456, 97.

leakages, advising that "There is definite evidence of the existence of an espionage organisation in your country at the present time."[245] Attlee expressed a desire to support Australian efforts to end the embargo, but wrote that the UK would not entertain any approaches to the US until an Australian security service with counter-espionage functions was established. On this point, and Chifley's comparison of Australia's historical leakages with those of other countries, an intervening MI5 report noted that "The difference at present is that the other countries either possessed counter-espionage services or made arrangements to set them up."[246] While the Chifley Government ultimately established ASIO the following year as a direct result of this international pressure, reports to Sillitoe noted that Chifley maintained the personal view that "security is mostly boloney."[247]

'Affirm or deny'

Ultimately, in pursuit of an end to the information embargo, Chifley had agreed with the UK on 12 July 1948 to the creation of a new Australian counter-espionage organisation.[248] MI5 seconded liaison officers to Australia to assist the disbanding CIS in the creation of the new agency. The agency was subsequently established via Executive Directive in 1949, and commenced operations in the Attorney-General's Department under the inaugural Director-General Geoffrey Reed, a Justice of the Supreme Court of South Australia, who chose the name ASIO.[249] The Directive (replaced with a similarly-worded Charter by the Menzies Government in 1950[250]) instructed Reed to ensure that the new agency was "kept absolutely free from any political bias or influence," and maintain the "well-established convention whereby Ministers do not concern themselves with the detailed information which may be obtained" by ASIO.[251] It also authorised Reed to determine the methods and working conditions required to "ensure

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245 Correspondence from Attlee to Chifley (29 October 1948), TNA: KV 4/456, 35–37.

246 Correspondence between Sillitoe and Helsby (14 October 1948), TNA: KV 4/456, 67–68.

247 Chifley, cited in Telegram from Canberra to Director General (4 February 1949), TNA: KV 4/457 - Part 1, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 43.

248 Cain, "Venona in Australia and Its Long-Term Ramifications," 234–35.

249 Progress Report prepared by Reed (18 August 1949), TNA: KV 4/459 - Part 1, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 1949, 22, The National Archives, UK.

250 Charter of the Australian Security Intelligence Organization (6 July 1950), in Attorney-General's Department, "ASIO Appointment of Colonel C.C.F. Spry as Director-General of Security: ASIO Charter, 1950," 1950, 8, NAA: M1509, 37, National Archives of Australia.

251 Ben Chifley, "Prime Minister's Memorandum to the Director General of Security, Being a Directive for the Establishment and Maintenance of a Security Service" (Australian Security Intelligence Organisation, March 16, 1949), Accessed via web archive: https://web.archive.org/web/20071005025937/http://www.asio.gov.au/About/TimeLine/Content/Directive.aspx.

efficiency and secrecy."[252] Relevant to the developing concept of 'national security,' the Directive specifically limited ASIO's activities to "defence of the Commonwealth from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organizations, whether directed from within or without the country, which may be judged to be subversive of the security of the Commonwealth," and excluded any role in criminal law enforcement.[253]

Hansard indicates that the logic of NCND was first used by the Chifley Government in 1948 in the context of the establishment of ASIO.[254] In parallel with the consternation building between its allies, domestic concerns over Australia's information security came to a head in the Australian Parliament on 4 November 1948, when the Opposition moved to censure the Chifley Government in relation to the information embargo in the House of Representatives. The Motion of Censure (the motion) concerned the "allegations that the United States Government has refused or is reluctant to make available secret information,"[255] explicitly accusing the Prime Minister of refusing to 'affirm or deny' conversations had with the UK Cabinet about the US embargo. The debate which ensued carved out several important arguments antecedent to the adoption of NCND in relation to national security matters.

The Opposition challenged the Government to 'admit or deny' the allegations, along with the authenticity of apparently official documents and a litany of media stories reporting on them (including the *Sydney Morning Herald*, Sydney *Sun*, the *Courier-Mail,* Melbourne *Sun News Pictorial*, Adelaide *Advertiser*, and London *Daily Graphic*[256]). The Opposition argued that the Australian public "should be informed of the state of defences in Australia,"[257] and accused the Chifley Government of a "remarkable reluctance to answer the simple question." [258] In what

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252 Chifley.

253 Chifley.

254 Barnard, "Discussion of Matter of Public Importance: Resignation of Mr GC Hoffmann" (House of Representatives Hansard: Commonwealth (Austl.), March 18, 1969).

255 Motion of Censure (4 November 1948), TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 1948, 44–48, The National Archives, UK.

256 TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information."

257 Harrison, "Motion of Censure" (House of Representatives Hansard: Commonwealth (Austl.), November 4, 1948); see also TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 59–67.

258 Arthur Fadden, "Motion of Censure" (House of Representatives Hansard: Commonwealth (Austl.), November 4, 1948); see also TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5

can be read as an early articulation of a policy position on appropriate exceptions to NCND, Opposition member and former Prime Minister, Sir Arthur Fadden, contended that:

> Surely the statement that the United States of America was refusing to provide Australia with information was sufficiently grave to warrant and clear-cut statement from the head of the Government, either denying or affirming the truth of the published report.[259]

In response, the Chifley Government extended one of the first articulations of the underpinning 'logic' of NCND. The Minister for Defence, John Dedman, argued that:

> I do not believe that a Minister should be put in the position of having either to deny or to affirm the truth of any allegation that may be made in regard to confidential matters.
>
> If he were placed in this position it could quite easily happen that the Opposition might obtain information relating to some highly secret matter, such as secret defence work, mention it in this House, and then say to the Minister concerned, 'I challenge the Minister to deny or to affirm that such and such is the case'.
>
> Immediately the Minister would be placed in the position that if he denied the statement his denial would indicate to a possible enemy that secret defence scientific work of a certain kind was not being carried on in this country.
>
> On the other hand, if he affirmed the statement, his affirmation would indicate to an enemy that that particular kind of defence work was being undertaken in Australia.[260]

The Minister for Defence concluded that the logic of NCND persisted even in the context of Parliament, and therefore the threat of censure:

> No Minister should be put in the position of having to deny or to affirm the truth of any allegation or statement made by the Opposition merely because it was made in this House.[261]

In arguing that Ministers were not only under no obligation to 'affirm or deny' allegations, but should not even be put in a position of having to do so, Dedman foreshadowed the use of

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and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 59–67.

[259] Fadden, "Motion of Censure"; see also TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 69–73.

[260] John Dedman, "United States Hugs Atom Secrets" (House of Representatives Hansard: Commonwealth (Austl.), November 4, 1948); see also TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 69–73.

[261] Dedman, "United States Hugs Atom Secrets"; see also TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 69–73.

NCND as formal policy. Further, Dedman's statement argued that the executive should not be forced by the Opposition to reveal information, effectively asserting the primacy of executive discretion over the ability of the Opposition and Parliament more broadly to compel disclosure. This demonstrates that this early use of NCND not only occurred in the general context of a lack of bipartisan information sharing on national security, but that it was indeed aimed at actively restricting information from the Opposition.

The Opposition and Government were further divided on the expectations of the Australian public in regard to official secrecy. While the Opposition argued that it is the duty of every Member of Parliament to protect community interests by making the "fullest use of any information that comes to him from any quarter, if he considers that it will be of service to the public,"[262] the Government contended that the public expected their representatives, whether in Opposition or Government, "to assist the elected government of the country to preserve governmental secrets."[263] While the motion ultimately failed, the domestic turmoil did not go unnoticed internationally. An MI5 report circulated 6 October 1948 had condemned the irresponsibility of the Australian media and politicians in being "prepared to make use of secret information in the hope of embarrassing their political opponents, and without serious consideration of the harm which they may be doing to their country and to the Commonwealth."[264] These concerns contributed to the UK's other avenue of pressure on the Chifley Government, discussed below.

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262 William Hughes, "United States Hugs Atom Secrets" (House of Representatives Hansard: Commonwealth (Austl.), November 4, 1948); see also TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 76.

263 Calwell, "United States Hugs Atom Secrets"; see also TNA: KV 4/457 - Part 2, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information."

264 MI5 Report (6 October 1948), TNA: KV 4/456, "Intelligence Organisation in Australia: The Relationship between MI5 and the Security Authorities in Australia, in Particular MI5's Contribution to the Establishment of Australian Security Intelligence Organisation (ASIO), Stemming from Concerns about Australian Security Arrangements in the Light of VENONA Information," 98.

Part 2.3: Media cooperation and external scrutiny

Section 2.3.1: Operation of the D-Notice system

In parallel with its concerns about Australia's intelligence and security apparatus, the UK had been pressing the Chifley Government on the adequacy of its approach to media engagement, advocating for greater cooperation as early as January 1947.[265] The UK had operated a system of direct media engagement, known as the 'Defence Notice' (D-Notice) system, since 1912. Premised on good faith, the system involved the agreement and issue of D-Notices outlining subject matter of security sensitivity, on which the media would then voluntarily refrain from reporting.[266] The system was not based in statute, but complemented existing official secrecy legislation, which dealt with espionage, other unauthorised disclosure, and "the receipt and publication of official secrets."[267]

While parts of the Australian establishment were initially resistant to the UK's proposal of an Australian D-Notice system, preferring the assurance of wartime censorship to the level of openness required to secure willing cooperation, the information embargo and deteriorating domestic confidence prompted the Chifley Government to reconsider.[268] It began privately approaching key media outlets with requests to refrain from reporting on security matters, including in the context of media conjecture about the establishment of ASIO, with mixed results. Following the defeat of the Chifley Government in the December 1949 election, Shedden advocated within the incoming Menzies Coalition Government for a D-Notice system modelled on that operating in the UK. The proposal steadily gained momentum, and the system commenced operations in 1952.[269] The inaugural meeting of the Defence, Press and Broadcasting Committee, the membership of which comprised both government and media representatives, took place on 14 July 1952. The Committee agreed to eight D-Notices, regarding "UK atomic tests in Australia, aspects of naval shipbuilding, official ciphering, the number and deployment of Centurion tanks, troop movements in the Korean War, weapons and equipment information not officially released, aspects of air defence, and certain aerial photographs."[270]

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[265] Maher, "National Security and Mass Media Self Censorship," 177.

[266] Pauline Sadler, "The D-Notice System," *Australian Press Council News*, May 2000, 16.

[267] Maher, "National Security and Mass Media Self Censorship," 173.

[268] Maher, 177, 185–86.

[269] Sadler, "The D-Notice System," 16.

[270] Sadler, 16.

As was the UK model, the Australian D-Notice system was premised on voluntary co-operation, and did not have a basis in legislation or impose penalties for nonparticipation.[271] It initially operated in secrecy and involved robust engagement, including pushback from media representatives on proposed D-Notices which covered already-published material, or which were viewed as insufficiently security-related.[272] This would continue until *Nation* magazine published an article reporting on the existence of the Committee and details of its operation in July 1967, precipitating critique of the system as censorship.[273] The Holt Government sought to clarify the function of the Committee under questioning in Parliament in November 1967, advising:

> The Committee's function is not to recommend, but in fact to issue D Notices to press, radio and television. A D Notice is a confidential request in the interests of national security not to make public specific matters referred to in the notice. The system is a voluntary one and non-compliance carries no penalties. A request for a D Notice originates with a Government department and is referred to the committee, which can either approve, refuse or suggest amendment. When it approves that committee's secretary issues the notice on a confidential basis to editors and managers. If it does not approve, the notice does not issue.[274]

Despite Holt's attempt to clarify the collaborative elements of Australia's D-Notice system, it would continue to attract critique and gradually fall out of use towards the end of the Cold War. The Committee reduced the number of D-Notices to four in 1974 and met for the last time in 1982.[275] Though technically still operating after the end of the Cold War, the D-Notice system was no longer widely-known amongst the media.[276] Three of the four remaining D-Notices related to the intelligence agencies and the defence force; the fourth related to the whereabouts of Vladimir and Evdokia Petrov, discussed in the next section.[277]

Section 2.3.2: Maturation and Royal Commission on Espionage

The rapid development of Australia's intelligence and security framework and approach to media engagement went some way to rebuilding the confidence of its security partners. Seized of the worsening Cold War environment, the Menzies Government deepened international cooperation, formalising Australia primary security partnership with the US in 1951

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[271] Sadler, 1.

[272] Maher, "National Security and Mass Media Self Censorship," 196.

[273] Editors, "Govt to Censor Press?," *Tribune*, July 26, 1967.

[274] Harold Holt, "Answers to Questions Upon Notice: Defence Press and Broadcasting Committee" (House of Representatives Hansard: Commonwealth (Austl.), November 8, 1967).

[275] "Fact Sheet 49: D Notices" (National Archives of Australia, September 27, 2011).

[276] Samuels and Codd, "Report on the Australian Secret Intelligence Service," 114–15.

[277] "Fact Sheet 49: D Notices."

through the Australia, New Zealand, and US Security Treaty (ANZUS).[278] While still closely intertwined with the UK and the Commonwealth, Australia's growing relationship with the US saw it engage with a markedly different system of liberal democratic governance, not only inculcated with but premised on high levels of contestability, accountability and transparency.[279] In a further separation from the UK, three years after the establishment of ASIO as a domestic security agency, in May 1952 the Menzies Government established the Australian Secret Intelligence Service (ASIS). While also closely modelled on its UK counterpart, the creation of a foreign intelligence service in ASIS was strong and forward-looking gesture towards Australia's independent intelligence interests.[280]

Though highly classified even within executive government (as examined in Chapter 3[281]), Australia's international security relationships were further expanded in 1953 through formalising intelligence cooperation as part of the UKUSA agreement,[282] originally a wartime UK-US signals intelligence agreement that was also joined by Canada and New Zealand. The UKUSA agreement became the basis of ongoing 'Five Eyes' intelligence cooperation.[283] The Defence Signals Bureau (DSB, a predecessor of ASD), was the fulcrum of this cooperation. As examined in Chapter 3, 4 and 6, while ASIO was publicly acknowledged from its beginnings and was given a statutory basis in legislation in 1956, the existence of ASIS and DSB was subject to NCND until 1977, and the agencies operated on Executive Directive until their establishment in legislation via the enactment of the *Intelligence Services Act 2001* (Cth) (*IS Act*).[284]

In strengthening its international position, Australia had also deepened its security responsibilities as a key player in the maintenance of global stability and deterrence of conflict. In line with these increased responsibilities, the Menzies Government was intent on eradicating

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278 "Security Treaty Between Australia, New Zealand, and the United States of America" (Australian Treaty Series, 1952).

279 As discussed in Chapter 1, "checks and balances" were a fundamental consideration in the development of the US Constitution. Indeed, Bernard Siegan describes constitutional limitations on power (particularly the separation of the judiciary) as 'predicated on the highest moral principles.' "Separation of Powers and Other Divisions of Authority under the Constitution," *Suffolk University Law Review* 23, no. 1 (1989): 5; For the landmark study of the shifting dynamics between Australia and its "great and powerful friends," see Coral Bell, *Dependent Ally: A Study of Australia's Relations with the United States and the United Kingdom since the Fall of Singapore* (Canberra: Australian National University, 1984), https://hdl.handle.net/2027/ien.35556017471814?urlappend=%3Bseq=5.

280 Richardson, "Volume 1," 110.

281 Pugh, *The ANZUS Crisis, Nuclear Visiting and Deterrence*, 46.

282 Blaxland and Birgin, *Revealing Secrets*, 243.

283 NAA: A11401, S112, "Appendix J - Principles of UKUSA Collaboration with Commonwealth Countries Other than UK," 1956, NAA: A11401, S112, National Archives of Australia; Fahey, *The Factory*, 280.

284 "Australian Security Intelligence Organization Act 1956 (Cth) [As Made]" (1956); "Ministerial Statement: Royal Commission on Intelligence and Security"; "Intelligence Services Act 2001 (Cth) [As Made]" (2001).

the "dangerous nest of traitors" in the Australian bureaucracy.[285] The newly-formed ASIO accordingly focussed on the threat of espionage. In 1951, now under the leadership of new Director-General Charles Spry,[286] ASIO commenced surveillance of Soviet Embassy official Vladimir Petrov, and was ultimately successful in inducing him to defect to Australia in 1954 along with his spouse, Evdokia Petrov, in exchange for political asylum.[287] The Petrovs supplied extensive material naming over 60 Australians purportedly connected with Soviet espionage, apparently confirming the Department of External Affairs as the site of the compromise.[288] From the perspective of the US and UK, this intelligence independently confirmed "what VENONA had revealed for years, without compromising the VENONA capability" even to the Australian government.[289]

Following the watershed defection, on 13 April 1954 the Menzies Government announced the Royal Commission on Espionage to investigate the extent of the espionage networks in light of the Petrovs' claims. Three Commissioners, Judges of the Supreme Courts of New South Wales, Queensland, and South Australia respectively, conducted sweeping inquiries over ten months, and presented their final report to Parliament on 14 September 1955. It found the material supplied by the Petrovs to be genuine, and concluded that the Soviet espionage networks had operated in Australia between 1943 and the 1954 Petrov defection.[290] It also found that Soviet intelligence operatives had attempted to pose as, and cultivate relationships with, Australian journalists. The Commissioners concluded that, while operatives had attempted to penetrate the Parliament, no Australian Parliamentarians had supplied information either knowingly or unknowingly.[291] In an implicit comment on the tension between national security and liberal democratic imperatives, the Commissioners ultimately did not consider any prosecutions to be warranted as a result of its findings. This view was partially based on the likelihood of harm associated with the unauthorised disclosures, which was concluded to be only indirect or possible prejudice "to the security or defence of Australia."[292] However, the Commissioners' inclination against prosecutions was also based on the fact that there was "no evidence legally admissible in a court of law" to warrant the prosecution of the existing

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285 Richard Casey, "Adjournment: Import Restrictions - Tractor - Drugs - Security - Dr John Burton - Broadcasting - Communism" (House of Representatives Hansard: Commonwealth (Austl.), May 27, 1952).

286 Attorney-General's Department, "ASIO Appointment of Colonel C.C.F. Spry as Director-General of Security."

287 Owen, Philp, and Ligertwood, "Report of the Royal Commission on Espionage," 3.

288 Harvey Barnett, "Legislation-based National Security Services: Australia," *Intelligence and National Security* 9, no. 2 (April 1, 1994): 287–89, https://doi.org/10.1080/02684529408432250.

289 Richardson, "Volume 1," 111.

290 Owen, Philp, and Ligertwood, "Report of the Royal Commission on Espionage," 295–96.

291 Owen, Philp, and Ligertwood, 192–93.

292 Owen, Philp, and Ligertwood, 293.

secrecy offences, and that the existing offences (as modelled on the UK Official Secrets Act) included references to 'an enemy' which would be challenging for a court to determine in a complex security environment.[293] These latter considerations raised broader questions regarding the ongoing fitness of the offences in their existing form. Additionally, the Commissioners commended ASIO and affirming its role as "essential to the security and defence of Australia."[294] These findings implicitly affirmed related key points: both that secrecy offences should be framed appropriately for the contemporaneous security environment, as a key element of the overall approach to official secrecy; and that the approach to maintaining official secrecy should not only be mediated through criminal law , but also include security activities (even where they did not result in prosecutions).

The Royal Commission published the vast majority of its findings in its public report, including in relation to the names, methods, and activities of Soviet intelligence operatives, and the names and activities of implicated Australians.[295] It had also carried out its activities in public to the extent possible, "[d]espite the difficulties necessarily involved" in doing so.[296] This was in contrast with the one previous Royal Commission regarding espionage, undertaken in Canada after the 1946 Gouzenko defection, which had conducted its activities in secret.[297] The Commissioners also made concerted efforts to alleviate the impression that individuals being named by or called before the Royal Commission inherently indicated actual or reputational compromise, noting that:

> This misconception was one of the difficulties which we felt in connection with our decision to take oral evidence in public. It is possible that we could have carried out our task more effectively in private; but on the whole we considered that the disadvantages of an open hearing were outweighed by the advantages. The tradition of the common law in this regard is a sound one.[298]

By exception, however, the Commissioners did hear evidence in secret as "the national interest demanded it." The Commissioners particularly refrained from publishing the majority of the evidence of senior servants 'of the Crown' relating to matters within their agencies, including the Director-General of Security, a Deputy Secretary of the Department of Defence, and the former Permanent Head of the Department of External Affairs. Significantly for this thesis, the Commissioners noted that "Whether this evidence should be published in the future

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[293] Owen, Philp, and Ligertwood, 292–93, 301.

[294] Owen, Philp, and Ligertwood, 298.

[295] Owen, Philp, and Ligertwood, 294–301.

[296] Owen, Philp, and Ligertwood, 8.

[297] Owen, Philp, and Ligertwood, 7.

[298] Owen, Philp, and Ligertwood, 9–10.

is a matter for which, in our view, should be determined by the Crown on principle applicable to the disclosure or nondisclosure of matters of State."[299] The approach of the Commissioners contributed to the precedent for independent public inquiry to the extent possible, while recognising the executive as the proper authority to determine whether disclosure of official material was appropriate.

Conclusion

Australian national security policy, including official secrecy, was no blank slate at federation. Early official secrecy was strongly characterised by UK legal and cultural inheritance, including through the application of the UK law, which was displaced by Australian in 1914 when legislation took over national secret-keeping. Australian governments' information management measures in wartime drilled these still-nascent instincts about the interaction between security secrecy and liberal democratic imperatives. In the early days of the Cold War, the influence of both the UK and subsequently the US, primarily wielded through restricting the flow of information, precipitated the consolidation of Australia's intelligence functions and a new era of media cooperation through the D-Notice system. It was in this context that Australia would adopt the logic of NCND in relation to certain matters of national security. The Royal Commission on Espionage then contributed to the precedent for independent review and public process where possible, including publication of certain details of intelligence activities, while also deferring to executive discretion on the disclosure of official material. These themes would become characteristic of the evolution of official secrecy policy in Australia.

This chapter has outlined the origins of official secrecy policy in Australia, the adoption of NCND, and the factors that shaped their early expressions. It finds that the events of Australia's early security history demonstrate that official secrecy policy was not merely a by-product of carving out a 'national' security approach for Australia, but a significant and deeply embedded vector by which Australia would both assert distinct nationhood from key allies, and later experience significant duress within these alliances. These findings establish a baseline to analyse how official secrecy policy would develop over the rest of the twentieth century, and are important antecedents to the evolution of NCND.

[299] Owen, Philp, and Ligertwood, 7–9.

Chapter 3: The Mid-Cold War and Turning Towards Openness (1955–1974)

This chapter examines how, following the rapid expansion of the intelligence and security framework in the early 1950s, Australia's still-nascent official secrecy policy was tested and further refined in the early Cold War. This period also laid the groundwork for the approaching era of 'open government.' This chapter explores how a political partisanship over national security (and the roles and activities of national security agencies) culminated in two major domestic crises and precipitated a sustained historical 'turn' towards transparency and major legislative reform. It finds that as the imperatives and public mandate for wartime secrecy waned, Australian governments from either side of politics became more responsive to domestic demand for more transparency and accountability in relation to national security matters.

This chapter proceeds in two parts. The first part analyses the professionalisation of ASIO post-Royal Commission into Espionage, increasing public concerns over political partisanship, and the growing protest activity relating to the Vietnam War. The second part examines Labor's return to power under Whitlam, and the beginnings of a policy pivot to 'open government.' This chapter concludes that that pressure on Australian governments prompted them to pursue somewhat divergent, ad hoc policy positions on secrecy and NCND throughout the 1960s to the mid-1970s. This early unstructured approach would precipitate a significant period of structured policy reform, paving the way for increasing bipartisanship on national security, to be discussed in the next chapter.

Part 3.1: Expansion and politicisation

Section 3.1.1: Statutory footing for ASIO

Following the upheaval of the watershed espionage revelations of the late 1940s and early 1950s and resulting Royal Commission into Espionage, the Menzies Coalition Government took steps to consolidate Australia's new national security framework. Significantly, these included establishing ASIO in statute with the passage of the *Australian Security Intelligence Organization Act 1956* (Cth) (*ASIO Act 1956*), which was otherwise narrowly framed to provide authority for ASIO's existence and operation, limiting ASIO's functions as related to security.[300]

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[300] Richardson, "Volume 1," 122; George Brandis, "National Security and the Law - Reflections of a Former Australian Attorney-General," *Australian Law Journal* 95, no. 10 (2021): 829.

‘Security’ was defined as “the protection of the Commonwealth and the Territories of the Commonwealth from acts of espionage, sabotage or subversion, whether directed from, or intended to be committed, within the Commonwealth or not.”[301] This was largely similar to the formulation in Chifley’s 1949 Directive, though used the word ‘protection’ (instead of ‘defence’) of the Commonwealth, and included ‘subversion’ as a third distinct category of act, rather than a descriptor of acts of espionage or sabotage, incrementally widening ASIO’s remit. During the Parliamentary debate, Prime Minister Menzies noted that the legislation did no more than was necessary to define ASIO’s functions “in terms which, though broad, are sufficient to exclude activities in which such a service should not be engaged, and to secure the proper rights of officers and employees of the service as officers of the Commonwealth.”[302]

In introducing the legislation to Parliament, Menzies emphasized that the purpose of the legislation was to extend employment rights to ASIO staff, citing the controversy surrounding ASIO generated during the Royal Commission on Espionage as warranting increased employment protections.[303] However, the new legislation explicitly carved ASIO staff out of the *Public Service Act 1922* (Cth), instead centralising the majority of employment powers with the Director-General.[304] Menzies also explicitly compared the government’s legislative approach with that of its key security partners, indicating an enduring alertness to remaining in step with their security frameworks:

> No statutory basis has been provided for the security services of the United Kingdom, but in the United States legislative authority has been given by Congress for both the internal and the external security services… it is necessary for the protection, and therefore also for the efficiency, of the security service to take a similar step in Australia, and to give the service statutory authority and protection.[305]

Despite the increased transparency of publicly enshrining ASIO’s functions in legislation, the *ASIO Act 1956* did not replicate the explicit safeguards contained in Chifley’s original 1949 Directive and Menzies’ 1956 Charter. While the Directive and Charter specified that the

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301 *Australian Security Intelligence Organization Act 1956* (Cth) [As made], sec. 2.

302 Robert Menzies, “Second Reading: Australian Security Intelligence Organization Bill 1956” (House of Representatives Hansard: Commonwealth (Austl.), October 24, 1956).

303 Robert Menzies, “Second Reading: Australian Security Intelligence Organization Bill 1956” (House of Representatives Hansard: Commonwealth (Austl.), October 24, 1956).

304 *Australian Security Intelligence Organization Act 1956* (Cth) [As made], sec. 9.

305 Menzies, “Second Reading: Australian Security Intelligence Organization Bill 1956" (House of Representatives Hansard: Commonwealth (Austl.), October 24, 1956).

Attorney-General would be "responsible for [ASIO] to Parliament," and that ASIO be "kept absolutely free from any political bias,"[306] the new legislation made no explicit mention of Ministerial accountability, or the imperative that ASIO's activities remain apolitical. In his speech to Parliament, Menzies did advise that the Attorney-General would administer the new legislation, but took care to leave ambiguous the limits of ministerial control in relation to ASIO:

> The bill makes no attempt to specify the manner in which, or the degree to which, ministerial authority should be exercised in relation to the service. It is clearly impossible, and in any event undesirable, for a Minister to exercise in this field the same degree of supervision and authority that he exercises in his own department. The proper course, in the Government's view, is to make the Director-General responsible for the due control of his service, and to allow the measure of authority of the responsible Minister to be worked out, as in the past, by convention and in the light of the circumstances of the time.[307]

The Labor Opposition, led by Dr Herbert Evatt, sought various amendments as part of Parliament's consideration of the legislation, including for enhanced ministerial responsibility and oversight by Parliament, and a framework for appeal rights for individuals against adverse security findings by ASIO.[308] The amendments were unsuccessful. Further, the *ASIO Act 1956* did not enshrine any requirements to inform the Opposition on matters of national security. While in practice Opposition leaders were sporadically briefed, the lack of requirement meant that successive Labor Oppositions were limited in their access to national security information until the election of the Whitlam Government in 1972.[309]

Section 3.1.2: Concerns about politicisation

Despite ASIO's actual and perceived success in handling the defection of the Petrovs, its increased public profile and incrementally widened remit raised questions about it evolving role. The lack of bipartisan briefing on matters of national security coincided with the increasing scale of ASIO operations as the Cold War wore on. In line with ASIO's new legislation, the targets of these operations included trade unions suspected of subversion and, ultimately, the domestic protest movement against the Vietnam War, which was declared a priority by the

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[306] Chifley, "Prime Minister's Memorandum to the Director General of Security, Being a Directive for the Establishment and Maintenance of a Security Service"; Charter of the Australian Security Intelligence Organization (6 July 1950), in Attorney-General's Department, "ASIO Appointment of Colonel C.C.F. Spry as Director-General of Security," 8.

[307] Menzies, "Second Reading: Australian Security Intelligence Organization Bill 1956" (House of Representatives Hansard: Commonwealth (Austl.), October 24, 1956).

[308] Richardson, "Volume 1," 112; Blaxland, *The Protest Years*, 318.

[309] As Blaxland observed, in 1964 the Director-General of Security, Charles Spry, had been "eager to establish a relationship" with Labor leader Arthur Calwell, and conducted meetings with the approval of Menzies; however, the Government's willingness to engage with the Opposition on national security waned as Whitlam rose to the Labor leadership. *The Protest Years*, 63–64, 317, 321–22.

CPA in 1965.[310] As the security service expanded, so too did concerns about the politicisation of its activities.[311]

The increasing polarisation around the Vietnam War signalled a turning point in the relationship between government and the media. Far from the cooperation of and shared support for involvement in the still-recent world wars, the media "found themselves no longer on the same side" as government, and started to lose confidence in official statements about the war and, in the US, began terming regular government press briefings the "five o'clock follies."[312] The journalist Daniel Schorr described how the relationship breakdown led to greater scrutiny: "Out of the painful perception that their government could lie to them, and perhaps to itself, came a breed of watchdog journalists" who were "disillusioned with government and dubious about right and wrong."[313] In the early 1970s, the Pentagon Papers and Watergate scandals in the US substantiated widespread concern about executive impropriety.

The activities of ASIO during the Vietnam War are well-established in the literature, in particular through the second volume of its official history, *The Protest Years*, by John Blaxland. While Australia's involvement in the war initially had popular support in 1965, it also sparked growing dissent, particularly in relation to compulsory national service, which had been introduced in 1964. With its attention fixed by the CPA's support for the anti-war movement, ASIO began closely monitoring protest activity.[314] As the movement gained momentum in the late 1960s, public speculation increased regarding ASIO's covert presence at protests and attempts to recruit informants, fuelled by reported comments from left-wing Labor Parliamentarian Dr Jim Cairns at a University of Tasmania rally about ASIO's use of informants.[315] By the time Australia withdrew troops from Vietnam in December 1971, many diverging issue-based groups were emerging beyond the anti-war movement. As Blaxland observed, ASIO had begun to view much of the broader issue-based activism collectively as a "communist-influenced 'revolutionary protest movement.'"[316]

Members of the Labor Opposition also became increasingly concerned being targets of security surveillance themselves. In 1967, the Opposition used Parliamentary question time

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310 Blaxland, 161.

311 Richardson, "Volume 1," 122–23.

312 Schorr, "On National Security, Five Ways to Respond to Restraints," 42–45.

313 Schorr, 42–45.

314 Blaxland, *The Protest Years*, 162–63.

315 Blaxland, 168, 170, 172–73.

316 Blaxland, 183–84.

to seek assurances from the Gorton Coalition Government that their telephone communications were not being intercepted. Rather than providing such assurances, Attorney-General Sir Nigel Bowen invoked "the practice that has been adopted since as far back as the days of Mr Chifley and Sir Robert Menzies," responding that the government would:

> neither affirm nor deny an assertion that any particular interception was involved. Once there is a breach of that rule then it will be impossible to stop it at that point. This must be quite clear to honourable members. I propose to adhere to that rule.[317]

While Bowen appealed to the bipartisan nature of the NCND stance in his response, it was nonetheless the case that NCND was being used to restrict information from the Opposition, and in a highly politicised context. Following intensified allegations by members of the Opposition of surveillance by ASIO in 1968, Bowen again referred to the well-established nature of NCND, describing it as "a sound practice" the reasons for which were "obvious"; on this occasion, however, Bowen chose to depart from NCND to address the issue.[318] Bowen explicitly articulated the reasons for the departure, citing the seriousness of the allegations and the "degree of publicity" they had received in the media, which he described as having "created disquiet in the minds of very many Australians."[319] Bowen was also clear in his intention to avoid setting a precedent for departing from NCND:

> On the other hand, I want to make it clear that in departing from the established practice I do so in the special circumstances of the present case and not to create a precedent. Indeed, having dealt with these allegations, I propose that in the future the ordinary rule should be strictly adhered to.[320]

Bowen's statements indicate an early attempt to navigate the tension between national security and liberal democratic imperatives. NCND offered a principled, structured precedent for avoiding disclosure by maintaining ambiguity rather than resorting to deception. However, as Bowen's 1968 statement demonstrated, more flexibility was needed to facilitate the occasional departure from NCND, responsive to liberal democratic imperatives, without giving the impression that NCND had been abandoned altogether. Future Australian governments would build on the elements of Bowen's approach to develop the complementary practice of avowal to achieve this (as examined in Chapter 4). Contemporaneously, however, Bowen's statements

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317 Nigel Bowen, "Questions: Tapping of Telephones" (House of Representatives: Commonwealth (Austl.), August 24, 1967).

318 Nigel Bowen, "Questions: Australian Security Intelligence Organisation" (House of Representatives Hansard: Commonwealth (Austl.), June 4, 1968).

319 Bowen.

320 Bowen.

did little to quell the intensifying politicisation of national security. It was in this environment that discord about the extent of official secrecy would ultimately foment into major policy reform.

Part 3.2: Turning towards openness

In 1972, after 23 years of Coalition governments, the Labor Party won electoral victory under Gough Whitlam. Whitlam would serve as Prime Minister from 5 December 1972 until his 11 November 1975 dismissal by the Governor-General . Having agitated extensively for reforms in Opposition, Whitlam came to power with a large policy agenda, focussing on social reforms and increased government transparency.[321] Notwithstanding its short time in office, the Whitlam Government was very legislatively active, introducing and enacting a record number of bills, despite having more bills rejected in the Senate than in the combined 71 years of the Parliament at that time.[322] This turn towards transparency both saw unprecedented ministerial scrutiny of ASIO and the extension of Opposition briefing on national security to include matters relating to ASIS, reducing the information asymmetry between the major political parties. It also sowed the seeds of major structural policy reforms, heralding what would become known as the 'open government' era.

These developments significantly shifted the approach to official secrecy and public discussion of national security matters in both the short and long term. While in office, the Whitlam Government's abrupt and radical break with long-held attitudes about and expectations of official secrecy caused consternation at the highest levels both within the Australian bureaucracy and internationally, and was perceived by some as a disregard for security.[323] However, Whitlam's vision of greater transparency ultimately proved enduringly influential, and would be cumulatively implemented by subsequent governments over the following decades (explored below and in Chapter 4). As will be examined, Australian governments adapted their approach to, but did not discard, NCND in the context of this turn towards transparency.[324] This demonstrated that the use of NCND and, by implication, its perceived value as a policy, was independent of any one approach to official secrecy more broadly.

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[321] "First Whitlam Ministry Decisions and Other Administrative Actions: Press Statements," December 1972, NAA: A5931, CL48, National Archives of Australia.

[322] "Australia's Prime Ministers: Gough Whitlam," National Archives of Australia, n.d., https://www.naa.gov.au/explore-collection/australias-prime-ministers/gough-whitlam.

[323] Hocking, *Gough Whitlam: His Time (Volume II)*, 293–95.

[324] As will be discussed in Chapters 4 and 5, the use of NCND greatly evolved under the Fraser Coalition and Hawke Labor Governments. See Malcolm Fraser, "Ministerial Statement: Joint Defence Space Research Facility" (House of Representatives Hansard: Commonwealth (Austl.), October 19, 1977); "Ministerial Statement: Royal Commission on Intelligence and Security"; Hawke, "Hawke, Ministerial Statement: Arms Control and Disarmament, Hansard (6 June 1984)"; Hawke, "Ministerial Statement: Joint Defence Facilities."

Section 3.2.1: The beginnings of 'open government'

The legislation characterising the 'open government' era opened up the institutions and activities of government to the Australian public, including through new appeal procedures, complaints mechanisms, and independent review. While this legislation was enacted steadily over many years, much of it ultimately well after the 1975 dismissal, many of the reforms originated in the pivot towards transparency that gained momentum under Whitlam. John McMillan AO, Emeritus Professor of Australian public law and inaugural Australian Information Commissioner, identifies Whitlam's commitment to greater transparency measures as the "first assurance of change" to a culture of official secrecy that had become a "parody" by the 1970s.[325]

Though the open government reforms were primarily administrative rather than specifically concerned with Australia's intelligence and security agencies, they had wide-ranging implications for these agencies and official secrecy policy more broadly. This reflected a growing public demand for increased oversight and supervision of public administration, in connection with the concern that "ministers do not actually know all about, or effectively control, the whole of the complex machinery of the modern state."[326] Professors Creyke and McMillian observed that, domestically,

> The dramatic post-war expansion of Australian government had created new pressures that demanded a fresh response. The growth of discretionary power had also altered the balance between citizen and government in a way that threatened the ideals of accountability and administrative justice. Innovation was required.[327]

Momentum for administrative reforms was also generated by the Commonwealth Administrative Review Committee, led by Sir John Kerr (the Kerr Committee), which had been established by the Gorton Government and reported in 1971.[328] Reforms recommended by the Kerr Committee included the creation of a general administrative review tribunal to conduct external review of government decisions.[329]

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325 John McMillan, "Twenty Years of Open Government - What Have We Learnt?" (Inaugural Professorial Address, Australian National University, March 4, 2004), 1.

326 Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 26.

327 John McMillan and Robin Creyke (1998), cited in Melissa Perry, "The Administrative Review Council Report on Judicial Review: Renaissance of the ADJR Act?" (2013 Public Law Weekend Administrative Law Conference, Australian National University: Federal Court of Australia, 2013).

328 Senate Legal and Constitutional Affairs Committee, "Report of the Inquiry into the Performance and Integrity of Australia's Administrative Review System" (Commonwealth (Austl.), March 2022), Australia.

329 Melbourne Law School, "Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Performance and Integrity of Australia's Administrative Review System" (Commonwealth (Austl.), November 24, 2021).

‘Open government’ was a key plank in the Labor Party’s 1972 election platform. On the campaign trail, Whitlam claimed that a culture of ‘excessive secrecy’ in government was “directly related to the fact that the Liberals have been in power too long: they have a lot to hide.”[330] Whitlam committed a Labor government to building into the “administration of the affairs of this nation machinery that will prevent any government, Labor or Liberal, from ever again cloaking your affairs under excessive and needless secrecy.”[331] Specific commitments included the establishment of a Commonwealth Ombudsman “to act as guardian of the people.”[332] They also included the introduction of a freedom of information Act (similar to that recently introduced in the US) to mandate the publication “of certain kinds of information and establish the general principle that everything must be released unless it falls within certain clearly defined exemptions.”[333]

Following the 1975 dismissal, many of the open government reforms were continued by the incoming Fraser Coalition Government, as further examined in Chapter 4. These included the 1982 passage of freedom of information legislation under Fraser, fulfilling Whitlam’s vision of a decade prior. Justice Melissa Perry of the Federal Court described this policy continuity between successive governments as an “almost unrecognisable degree of bipartisanship.”[334]

Section 3.2.2: New approach to intelligence and security

Whitlam conceded after winning government that “a number of prejudices had developed concerning ASIO” due to the prolonged lack of briefing during Labor’s time in Opposition.[335] The lack of bipartisanship extended to Australia’s foreign intelligence service. Whitlam had not been officially informed of the existence of ASIS until becoming Prime Minister, despite having been Opposition Leader since 1967 (and hearing of its existence from unofficial and foreign sources).[336] By contrast, the new Coalition Opposition was naturally aware of the existence of ASIS, having established the service in 1952 while in government under Menzies.

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[330] Gough Whitlam, “It’s Time for Leadership: Policy Speech for the Australian Labor Party Delivered at the Blacktown Civic Centre,” November 13, 1972, 29.

[331] Whitlam, 5.

[332] Whitlam, 29.

[333] Whitlam, 29.

[334] Perry, “Renaissance of the ADJR Act?”

[335] Blaxland, *The Protest Years*, 321.

[336] Samuels and Codd, “Report on the Australian Secret Intelligence Service,” 38; This was also noted in the reports of the First Hope Royal Commission, which found that “Whatever the reasons for that situation it should not be reverted to,” and urged the institutionalisation of bipartisan information sharing arrangements: Robert Marsden Hope, “Third Report: Intelligence Co-Ordination Machinery” (Canberra: Royal Commission on Intelligence and Security, 1976), NAA: A8908, 3A, National Archives of Australia, 48-49, paras. 87-88.

This shared knowledge created a new dynamic between government and Opposition and, with it, new opportunities for bipartisanship. With ASIS still out of the public eye, the Whitlam Government established the practice of authorising briefing the Leader of the Opposition on intelligence and security. This bipartisan practice reduced the need to apply NCND to ASIS in respect of confidential engagement with the Parliamentary Opposition. The practice would be continued by successive governments, enshrined in the ASIS Directive, and supported by the First Hope Royal Commission (which also recommended public acknowledgement of the existence of ASIS, as examined in Chapter 4).[337]

However, distrust of the domestic security service and its “alleged conspiracies against Labor” persisted.[338] Tensions with ASIO erupted again in early 1973 resulting in what became known as the ‘Murphy raids.’ These events would contribute to Whitlam’s 1974 election commitment to review Australia’s intelligence and security framework. This conviction was further hardened with the leaking of the ‘Cairns dossier,’ a document apparently prepared by ASIO regarding then-Treasurer and Deputy Prime Minister, Dr Jim Cairns. This period saw significant evolution in the way Australian governments engaged publicly on national security matters.

The Murphy Raids

As incoming Attorney-General, Lionel Murphy assumed ministerial responsibility for ASIO. Murphy had indicated support for ASIO’s existence while in Opposition, voting against its abolition at a 1971 Labor Party conference.[339] Upon taking office, however, both Murphy and Whitlam expressed concern about the robustness of ASIO’s approach to right-wing extremism, and scepticism regarding its emphasis on communism (ASIO’s historical focus) and the level of genuine domestic threat it posed.[340] Further controversy arose between Whitlam and the then-Director-General of Security, Peter Barbour, over Whitlam’s reluctance to require ministerial staff to undergo security checks. While Whitlam ultimately allowed security checking of staff on the condition of the introduction of an appeals system, the issue had already drawn concern from US and UK intelligence officials regarding the handling of shared intelligence.[341]

The Whitlam Government’s concerns were further heightened during preparations for the March 1973 visit of the Yugoslavian Prime Minister, which revealed a lack of coordination

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[337] Samuels and Codd, “Report on the Australian Secret Intelligence Service,” 38.

[338] Gaetano Joe Ilardi, “The Whitlam Government’s 1973 Clash With Australian Intelligence,” *International Journal of Intelligence and CounterIntelligence* 14, no. 1 (January 1, 2001): 64, https://doi.org/10.1080/08850600150501335.

[339] Blaxland, *The Protest Years*, 320.

[340] Blaxland, 321, 324.

[341] Blaxland, 322.

between ASIO and Commonwealth and State law enforcement agencies, and deepened the impression that ASIO was not across right-wing extremism had already taken hold in the Whitlam Government.[342] On 1 March 1973, Murphy made a statement to Parliament affirming the operation of right-wing Croatian terrorist organisations in Australia, evidence of which he alleged had been suppressed by the previous Gorton Government.[343] Murphy also requested that ASIO provide greater detail on the threat of Croation terrorism, though after two weeks had yet to receive further briefing.[344] Already distrustful of ASIO's political leanings, Murphy was now encouraged in his view of ASIO as conspiratorial and that it was withholding information from the new government.[345]

On 15 and 16 March respectively, Murphy, a number of his staff, and officers of the Commonwealth Police Force made unscheduled visits to the Canberra Regional Office and Melbourne Headquarters of ASIO. Among the documents viewed and taken by Murphy in the Canberra office was a copy of ASIO's notes from a meeting between ASIO, the CPF, and the Attorney-General's Department on 2 March 1973, the day after Murphy's promise in Parliament to make a statement on Croatian terrorism that painted 'a different picture' to that communicated by the Gorton Government. Apparently in connection with this remark, the notes indicated agreement among agencies that evidence on Croatian extremism was substantially unchanged since the change of government, and therefore that Murphy's promised statement should "not be at variance" with a previous 1972 advisory.[346] The notes were subsequently interpreted by Murphy as part of an effort to present edited advice in order to compel the Whitlam Government to remain consistent with the Gorton Government's position on Croatian extremism.[347] This galvanised Murphy's visit to the Melbourne headquarters, intent on preserving ASIO's information.[348]

In Melbourne, 27 members of the CPF arrived early in the morning and, without producing a warrant, sealed up ASIO file containers and directed ASIO staff to a conference room where they were "effectively detained by police" before being addressed by Murphy.[349] In his subsequent remarks, interpreted by ASIO staff as 'confusing' and replicated by Blaxland in *The*

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[342] Ilardi, "The Whitlam Government's 1973 Clash With Australian Intelligence," 68.

[343] Lionel Murphy, "Questions: Croatian Terrorists" (Senate Hansard: Commonwealth (Austl.), March 1, 1973).

[344] Ilardi, "The Whitlam Government's 1973 Clash With Australian Intelligence," 69.

[345] Richardson, "Volume 1," 113–14.

[346] Ilardi, "The Whitlam Government's 1973 Clash With Australian Intelligence," 70–71.

[347] Blaxland, *The Protest Years*, 329.

[348] Ilardi, "The Whitlam Government's 1973 Clash With Australian Intelligence," 71.

[349] Blaxland, *The Protest Years*, 336.

Protest Years, Murphy specifically referred to the pivot towards ‘open government’ while affirming the continued national need for a security service:

> It is our policy to bring open government to Australia. ASIO will of course remain as our own security service, as there is a need for us to maintain our own security. It must adhere strictly to its charter, hence the policies of the new government. The organisation will be brought under strict administerial [*sic*] control. This is part of the democratic process. ASIO is part of that, as is the Attorney-General subject to direction from above. Ministerial control is as it should be.[350]

While Murphy’s statement explicitly connected the ‘raids’ with the Whitlam Government’s agenda for transparency, Murphy had taken these actions without consulting the Prime Minister or the Cabinet. Barbour immediately appealed to Whitlam, meeting him on 17 March 1973 and describing the ‘raids’ as “unprecedented, extraordinary, and gravely damaging to ASIO and the national security interest.”[351] However, Whitlam defended Murphy’s actions both in private and in Parliament.[352] Murphy himself later stated in Parliament that he viewed his actions as appropriate in the context of his ministerial responsibilities under the *ASIO Act*.[353]

Public statements

The occurrence and details of the ‘raids’ were quickly reported in the media, which largely reported the events as evidence of the new Government’s lack of confidence in ASIO and Barbour.[354] The day after the raids, the Opposition Leader, Bill Snedden, was quoted in the media as commenting that the damage to “the standing of ASIO in the eyes of all other world intelligence services” was immeasurable.[355] The former Attorney-General under the Gorton Government, Ivor Greenwood, was scathing about the raids. Greenwood issued a statement on 22 March 1973 accusing Whitlam and Murphy of allowing “a mounting campaign… to blacken the name” of the Director-General of Security and ASIO.[356] Greenwood further accused the pair of creating a “hate of and fear in the Croatian community by talking about assassins, terror and deportation… without facts, evidence or proof being shown,” and sheltering “behind unacknowledged press comments, vague and accusatory generalisation.”[357] Other members of the Opposition implied that the raids had been “staged by the Government to

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[350] Lionel Murphy (1973), quoted in Blaxland, 333–34.

[351] Richardson, “Volume 1,” 113–14.

[352] Ilardi, “The Whitlam Government’s 1973 Clash With Australian Intelligence,” 80.

[353] Richardson, “Volume 1,” 113–14.

[354] *Sydney Morning Herald* (18 March 1973), *Canberra Times* (19 March 1973), *Labor ’73* (30 March 1973), in Ilardi, “The Whitlam Government’s 1973 Clash With Australian Intelligence,” 73, 75–76.

[355] Ilardi, 73.

[356] Ivor Greenwood, “Statement by Senator the Hon Ivor J Greenwood, QC” (Australian Parliament House, March 22, 1973).

[357] Greenwood.

discredit and dismantle ASIO."[358] Among information leaked to the media was an all-staff message from Barbour following the 'raids', the source of which was identified as an ASIO officer who had passed the document to the Leader of the Country Party. The leak of this document triggered a fresh round of turmoil and antipathy between the Whitlam Government and ASIO.[359]

Following the immediate fallout, Barbour had began to advocate for the repair of ASIO's public standing. As observed by Blaxland in *The Protest Years,* Barbour argued "that it was in the public interest to make it clear that ASIO had not withheld information from Murphy."[360] On Barbour's suggestion, Murphy made a demonstration of the Whitlam Government's support for ASIO, publicly disavowing any intention to restructure or abolish ASIO or replace Barbour as Director-General, and confirming that ASIO had not withheld information.[361] However, Murphy also sought to substantiate his earlier claim from 1 March 1973 regarding Croatian terrorist groups in Australia. Addressing the Senate on 27 March, Murphy spoke again of the existence of the groups, tabling documents from ASIO and the CPF regarding their alleged activities and naming many Croatian Australians.[362]

This did little to quell the public turmoil surrounding the 'raids,' however. Pressed in Parliament, Whitlam expressly declined to confirm or deny the accuracy of leaked internal documents relating to Croatian terrorist activity, which appeared to contradict the Government's public position.[363] In May, a Senate Select Committee on the Civil Rights of Migrants was established to inquire into any infringements of the civil rights of Croatian migrants, and the circumstances of the March 'raids'. The Director-General of Security publicly appeared before the Committee, an unprecedented development which drew yet more media attention.[364] Barbour's statement in evidence had been drafted by the Department of the Prime Minister and Cabinet and approved by Murphy, who directed Barbour to keep his evidence minimal and decline to provide any ASIO documents or disclose details of official conversations.[365] While avoiding criticism of the government, Barbour did allude to the risk of the media coverage

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358 *Sydney Morning Herald* (23 March 1973), in Ilardi, "The Whitlam Government's 1973 Clash With Australian Intelligence," 73.

359 Ilardi, 81; Blaxland, *The Protest Years*, 346.

360 Blaxland, *The Protest Years*, 340.

361 Blaxland, 340.

362 Blaxland, 341.

363 Gough Whitlam, "Questions: Australian Security Intelligence Organisation Document - Allegation of Conspiracy" (House of Representatives Hansard: Commonwealth (Austl.), April 4, 1973).

364 Blaxland, *The Protest Years*, 346.

365 Blaxland, 345–46.

of Murphy's actions jeopardizing ASIO's relationships with its sources domestically and internationally.[366]

Section 3.2.3: 1974 election and further controversy

In December 1972, early in Whitlam's first term, Barbour had suggested to Whitlam that the government could consider arranging for the independent review of ASIO's activities. Whitlam had initially declined.[367] By May 1974, however, the government was in an invidious position on national security, having failed to adequately substantiate its public critique of ASIO. Rather than effectively re-asserting Ministerial responsibility and institutional political neutrality in line with liberal democratic imperatives, Whitlam's first term of government had seen greater polarisation of security issues and waning confidence in the relationship between the executive and Australia's intelligence and security framework. Unable to set a functional precedent for effective ongoing accountability, and facing ongoing public derision, the Whitlam Government found itself at an impasse.[368] This reflected the increasingly dire straits of the Government's legislative reform agenda more broadly, which was being obstructed by the repeated rejection of key legislation in the hostile Senate.[369] In 1974, Whitlam requested a double-dissolution election. In a campaign speech on 29 April 1974, Whitlam announced that if returned to office, the government would establish a sweeping independent inquiry: "The Government will appoint a judicial inquiry into the structure of the Australian security services."[370] Between winning a second term and establishing such an inquiry, however, the Whitlam Government became entangled in another security crisis.

The June 1974 unauthorised disclosure and publication of 'the Cairns Dossier', a document on, further contributed to increased concern surrounding the security and politicisation of the intelligence agencies. As examined above, then-Treasurer and Deputy Prime Minister, Dr Jim Cairns, had played a role in the moratorium demonstrations against the Vietnam War in the previous decades, during which time he had come to the attention of ASIO. By the time of the disclosure, however, Cairns was broadly viewed as a moderate in the Labor Party. The document had "fallen into the hands" of *The Bulletin*, which on 22 June 1974 published an

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366 Ilardi, "The Whitlam Government's 1973 Clash With Australian Intelligence," 74–75.

367 Blaxland, *The Protest Years*, 322.

368 Ilardi, "The Whitlam Government's 1973 Clash With Australian Intelligence," 81.

369 Hocking, *Gough Whitlam: His Time (Volume II)*, 146–48.

370 Gough Whitlam, "1974 Election Speech Delivered at Blacktown, NSW" (Museum of Australian Democracy at Old Parliament House, April 29, 1974).

article entitled ‘Cairns: ASIO’s Startling Dossier.’ Extensively quoting the document, *The Bulletin* alleged that it was a 12-page report produced in 1971, noting:

> Written from ASIO’s traditional right-wing standpoint, the paper at one point accuses Cairns of working for the destruction of the parliamentary system. It says that his political campaigning was leading to ‘anarchy and in due course left-wing fascism.’ In the light of Cairns’ performance in office, the paper seems to be a severe overreaction to the days of the moratorium.[371]

It also quoted the document as articulating the view that “The democratic parliamentary system of government is the only known means of combating fascism,” and accused Cairns of wishing to destroy the system.[372] The revelation of the dossier also conflicted with ASIO’s earlier advice to the Whitlam Government that it did not maintain files on parliamentarians.[373] On 21 August 1974, shortly after the revelation of the Cairns dossier, Whitlam announced the appointment of Justice Robert Marsden Hope to lead the inquiry (as examined in Chapter 4).

Days before the dismissal, the Whitlam Government found itself embroiled in further security controversy. On 2 November 1975, Whitlam made public comments adverting to the previous government’s involvement with the CIA officers, who were associated with the Pine Gap facility. Concerned that Whitlam may expose its officers in Australia, the CIA appealed to ASIO’s acting Director-General on 10 November, expressing the belief that “its relations and operations with Australia were in grave doubt, and a concern that the Labor government had changed its stand on maintaining security secrecy.”[374]

The inquiry remained ongoing at the time of Whitlam’s 1975 dismissal, preventing the Whitlam Government from undertaking large-scale national security reform for the remainder of its term. However, its establishment of an independent review in such dire politicised circumstances set a key precedent. Echoing Chifley’s directions to the inaugural Director-General of Security, critical to the operation of Australia’s intelligence and security framework was ensuring not only that it in fact remained apolitical, but that was also protected from the impression of politicisation. To restore both fact and impression, a mechanism was needed in which both public and Parliament could have confidence. As examined in the next chapter, independent inquiry would become an enduring feature of successive governments’ national security

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371 “Cairns: ASIO’s Startling Dossier,” *The Bulletin*, June 22, 1974, Vol. 096 No. 4911 edition, https://nla.gov.au/nla.obj-1336599038.

372 “Cairns: ASIO’s Startling Dossier,” *The Bulletin*, June 22, 1974.

373 Lionel Murphy, “Questions: Australian Security Intelligence Organisation” (Senate Hansard: Commonwealth (Austl.), April 3, 1973); Richardson, “Volume 1,” 114.

374 Ilardi, “The Whitlam Government’s 1973 Clash With Australian Intelligence,” 82; Paul Kelly, *The Dismissal: The Dramatic Fall of Gough Whitlam* (Australia: Angus & Robertson, 1983), 28.

policy, including to further broaden the way in which the executive engaged publicly on national security matters.

Conclusion

Australian official secrecy policy was stretched, scrutinised, and increasingly reformed during the events of the middle of the Cold War. The convergence of the rapid expansion of Australia's intelligence and security framework with 23 years of successive Coalition governments produced a pronounced information asymmetry between not only government and the public, but between government and Parliamentary Opposition. As had the Chifley Labor Government, successive Coalition governments used NCND to restrict the disclosure of information about national security to the Opposition. This asymmetry was accompanied by widely-held concerns about excessive secrecy and the politicisation of intelligence and security. Growing public expectations of transparency were expressed in 1972 via the election of the Whitlam Labor Government on a platform of 'open government,' which promised to reframe the relationship between government and citizen and entrench a posture of default openness. Notably, after being officially informed of the existence of ASIS upon becoming Prime Minister, Whitlam commenced the enduring practice of authorising that the Leader of the Opposition be briefed on intelligence and security, reducing the restrictions on national security information between the major political parties. While the Whitlam Government was dismissed before accomplishing much of its planned open government agenda, the Fraser Coalition Government continued many of the reforms in a significant demonstration of bipartisanship, as explored in the next chapter.

This chapter finds that the change of government produced changes in official secrecy policy not only due to differences in policy positions, but because it reduced the information asymmetry between political parties. This, in turn, reduced the need to continue restricting certain information from the Parliamentary Opposition. While the Whitlam Government only held office for three years, it nonetheless had a significant influence on Australian official secrecy policy and created opportunities for increasing bipartisanship on national security. Further, Whitlam's actions in his last days as Prime Minister left a legacy which would continue to reverberate through official secrecy policy and NCND for decades to come, notably through the First Hope Royal Commission.

Chapter 4: Growing bipartisanship and the Hope Royal Commissions (1974–1984)

This chapter analyses the growing bipartisanship on national security from 1974-1984. This period saw a continuation of the 'open government' policy agenda through two changes in government, and first major exercises in structured scrutiny of Australia's security and intelligence framework, the Hope Royal Commissions. Having won office in November 1975 in the wake of Whitlam's dismissal, the incoming Fraser Coalition Government chose to continue with many of Labor's 'open government' reforms. This marked a significant development in the growing bipartisanship between the two major political parties on information disclosure. Key among these reforms was the *Freedom of Information Act 1982* (Cth) (*FOI Act*) which, in facilitating its primary purpose of greater public access to information, also enshrined the logic and language of NCND in legislation.

The evolution of official secrecy policy was also greatly influenced in this period by the Hope Royal Commissions. The Hope Royal Commissions specifically considered the logic and appropriateness of NCND and made recommendations regarding its continued usage by Australian governments. Though established by the Whitlam Labor Government in 1974, the Royal Commission on Intelligence and Security (RCIS, or the First Hope Royal Commission) ultimately reported to the Fraser Coalition Government in 1977. In 1983, Hawke Government established the Royal Commission into Australia's Security and Intelligence Agencies (RCASIA, or the Second Hope Royal Commission), which reported in 1984. Both were led by Justice Robert Marsden Hope AC CMG QC, a Judge of the New South Wales Court of Appeal. The Hope Royal Commissions left a significant legacy for the evolution of official secrecy policy and NCND. Firstly, they created a precedent for independent review of the framework (which would become a semi-regularised practice, formalised in 2004[375]) and, with it, a robust basis for policy change, including modifications of NCND. Secondly, they established many of the foundational principles of Australia's intelligence and security framework which continue to endure today. Thirdly, the Hope Royal Commissions made a number of specific findings pertaining to official secrecy policy and NCND, which would shape successive governments' approach in the subsequent decades.

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[375] Flood, "Flood Report," 63, 185.

This chapter proceeds in three parts. The first part examines the continuity of Whitlam's 'open government' agenda by Fraser, and the establishment of many of the disclosure frameworks and oversight institutions that remain in place today. The second part examines the First Hope Royal Commission, and in particular Hope's analysis of the case for greater public disclosure, and Fraser's subsequent avowal of ASIS. The second part also examines the circumstances surrounding the Protective Security Review, and its implications for official secrecy policy. The third part examines the Second Hope Royal Commission, the establishment of 'avowal' as a considered and principled practice of disclosure, and strengthening of oversight and accountability mechanisms. This chapter finds that Australia came out of this period with a matured national policy agenda on official secrecy. This included a stronger basis and scope for NCND policy, and well as the establishment of 'avowal' as a complementary practice of considered and principled disclosure.

Part 4.1: 'Open government' continued

In its last year in office, the Whitlam Government enacted the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*), a world-first step in merits review,[376] and established the Australian Law Reform Commission (ALRC) as an enduring mechanism by which to assist in the work of reform. In the years following the dismissal, the Fraser Government enacted the *Ombudsman Act 1976* (Cth), *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), and the *FOI Act*. These were supplemented by the introduction of the *Privacy Act 1988* (Cth) by the Hawke Government the following decade.

Section 4.1.1: A new relationship between government and citizen

This created new dynamics of accountability and increased direct contact between Australians and the institutions of government. The Administrative Review Council, established under the AAT in 1975 as an independent advisory body, observed in its first annual report that the open government reforms would "inevitably produce changes in the citizen's relationship with government and in the workings of the machinery of government."[377] They contributed to a greater level of access for the public to Australia's institutions, including both to information

[376] Melbourne Law School, "Submission to the Inquiry into the Performance and Integrity of Australia's Administrative Review System."

[377] Gerard Brennan (1977), cited in Michael Kirby, "Whitlam as Law Reformer," *Federal Law Review* 10, no. 1 (March 1979): 74, https://doi.org/10.1177/0067205X7901000103.

itself through freedom of information requests, and to expanded justice outcomes via the creation of the AAT (in which a special division would later be created to hear appeals relating to ASIO security assessment on citizens[378]). The creation of the AAT ensured that the institutions of government were accountable directly to individual citizens as well as to government more broadly.[379] Alongside the AAT, the Office of the Commonwealth Ombudsman also created a new avenue for oversight and public complaints. In the context of the *FOI Act*, the Senate Standing Committee on Constitutional and Legal Affairs observed that greater transparency would not only improve direct accountability to the public, but was also in the interests of executive government, as a means of "ensuring greater accountability of public servants to their ministers."[380] While many of these legislative reforms had exemptions to modify their application to security and intelligence agencies, they "altered the cultural context in which the intelligence, security and law enforcement agencies operated."[381] They shifted the default posture to one of transparency, conferring rights on the public and putting the onus "upon the government to justify secrecy to some body other than itself."[382]

'Open government' reforms generated public debate regarding their appropriateness in the Westminster system of government. Many of the reforms were drawn from other models of liberal democracy, including the Scandinavian system of independent public inspectors in the case of the Ombudsman, or US legislation in the case of the *FOI Act*, and suggested to be irrelevant to Australia.[383] The decentralisation to statutory bodies of executive discretion to make information disclosure and administrative decisions appeared to undermine the conventions of individual and collective ministerial responsibility. The freedom of information concept, in particular, was argued to be irreconcilable with workings of the Westminster system, which were viewed as "an almost total impediment" to its goals.[384] The Senate Standing Committee

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378 The AAT was replaced by the Administrative Review Tribunal (ART) in 2024. The provisions governing intelligence and security appeals to the ART are contained within Part 6 of the "Administrative Review Tribunal Act 2024 (Cth)" (2025); See also Part IV, Division 4 of the "Australian Security Intelligence Organisation Act 1979 (Cth)" (2025).

379 Richardson, "Volume 1," 126–27.

380 Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 26.

381 Richardson, "Volume 1," 126–27.

382 Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 26.

383 Submission no. 108, 1 (Premier of Queensland), in Senate Standing Committee on Constitutional and Legal Affairs, 34.

384 Senate Standing Committee on Constitutional and Legal Affairs, 25; Daniel Stewart, "Assessing Access to Information in Australia: The Impact of Freedom of Information Laws on the Scrutiny and Operation of the Commonwealth Government," in *New Accountabilities, New Challenges*, ed. Penelope Marshall, Evert A. Lindquist, and John Wanna (ANU Press, 2015), 101.

on Constitutional and Legal Affairs, though questioning the extent to which the conventions of the Westminster system of government were expressed in contemporary Australia, nonetheless considered that greater transparency would improve the convention of individual ministerial responsibility, arguing that "It is in the interests of ministers themselves to expose the advice of their officials to wider scrutiny."[385] Ultimately, it concluded that "[g]reater exposure of government agencies to scrutiny can be expected in the longer term to result in a reduction in the level of suspicion and distrust surrounding relations between some government and non-government agencies."[386]

Implications for NCND

'Open government' legislation had two main implications for NCND and official secrecy policy more broadly. Firstly, while these legislative changes were broadly transparency-focussed, they nevertheless further embedded both national security secrecy and the logic and practice of NCND itself. This was particularly apparent in the context of the *FOI Act*, which enshrined NCND in law alongside national security exceptions to the new disclosure obligations. Secondly, they introduced complexity into the concepts of 'authorised' or 'unauthorised' disclosure, and the interaction of these concepts with executive discretion to disclose. These are discussed in turn below.

In establishing new structures of transparency, the posture of 'openness' by default simultaneously further entrenched and formalised NCND as policy. As explored in the Literature Review of this thesis, a key development in the institutionalisation of NCND in the US was its use in the formulation of a response to a freedom of information request relating to the Hughes Glomar Explorer mission. This laid the precedent for the extensive and well-studied use of NCND as part of freedom of information jurisprudence in the US.[387] In Australia, the passage of the *FOI Act* was a powerful recalibration of the default handling of official information. Like the legislation establishing the AAT and Ombudsman, the *FOI Act* created avenues for individual citizens to seek information directly from government. The development and Parliamentary consideration of the Bill considered not only the specific effects of the reforms but the overall 'shifting of the dial' in information handling to one of a more open posture:

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[385] Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 26.

[386] Senate Standing Committee on Constitutional and Legal Affairs, 26.

[387] Becker, "Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check"; Wagner, "Controlling Discourse, Foreclosing Recourse"; Aitchison, "Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act"; Pozen, "The Mosaic Theory, National Security, and the Freedom of Information Act."

> [W]hen government is more open to public scrutiny, it in fact becomes more accountable. As a result there is a greater need for it to be seen to be efficient and competent. The accountability of the government to the electorate, and indeed to each individual elector, is the corner-stone of democracy, and unless people are provided with sufficient information accountability disappears.[388]

As passed in 1982, the *FOI Act* self-described its object as to:

> …extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by…creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities.[389]

Nevertheless, the new legislation provided for caveats to this new posture of openness in respect of intelligence and security matters. Firstly, ASIS, ASIO and the then-Office of National Assessments (ONA, a predecessor of the current Office of National Intelligence, ONI) were specifically exempt from the operation of the *FOI Act*, while a limited exemption applied to the Department of Defence in relation to the activities of DSD and the then-Joint Intelligence Organisation (JIO, a predecessor of the current Defence Intelligence Organisation, DIO).[390] Secondly, Part IV of the *FOI Act* as passed contained fifteen categories of document exempt to the requirement for the executive to release information.[391] Several of these categories were relevant to intelligence and security activities, including one specifying documents "affecting national security defence, international relations and relations with States," and others relating to law enforcement, public safety, and Cabinet.[392]

Thirdly, the *FOI Act* also created an exemption for documents to which non-disclosure provisions in other legislation applied, primarily being secrecy provisions.[393] The Senate Standing Committee on Constitutional and Legal Affairs, which reported on the legislation while be-

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388 Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 21–22.

389 *Freedom of Information Act 1982* (Cth) [As made] (1982), sec. 3(1).

390 Dennis Richardson, "Volume 4: Accountability and Transparency; Annexes" (Comprehensive Review of the Legal Framework of the National Intelligence Community, December 2019), 33.

391 *Freedom of Information Act 1982* (Cth) [As made], pt. IV.

392 *Freedom of Information Act 1982* (Cth) [As made], pt. IV.

393 *Freedom of Information Act 1982* (Cth) [As made], sec. 38.

fore Parliament, identified there as being more than 290 secrecy provisions across Commonwealth legislation.[394] The Committee commented in its report that the philosophy of open government was “diametrically” contradictory to that of broad secrecy provisions.[395] It recognised particular criticism of the ‘catch-all’ Crimes Act offences as “reinforcing the present system of discretionary secrecy,” describing the penalty for section 70 as “draconian” but noting that it had only been prosecuted once in Australia, unsuccessfully (as compared with 30 prosecutions of the equivalent offence in the UK).[396] The Committee recommended that secrecy provisions be either individually specified in the new legislation as exemptions from disclosure obligations, or repealed. The Fraser Government had already commenced an internal review to identify secrecy provisions for inclusion.[397] However, the requirement to specify individual provisions creating exemptions was ultimately omitted from the *FOI Act* as made, which instead created an exemption for “Documents to which secrecy provisions of enactments apply.”[398] This went some way to connect open government and official secrecy, if not satisfactorily reconciling their underlying ‘philosophies’ in the eyes of the Committee.

Most significantly for NCND, however, section 25 of the *FOI Act* specifically made provision for cases where indicating the existence of a document would itself be sensitive, as in the US Glomar case. Closely following the US formulation enacted in 1966,[399] this section empowered the executive to in certain cases ‘neither confirm nor deny’ the existence of documents which, were they to exist, would be exempt. The provision read as follows (replicated at length):

> **Information as to existence of certain documents**
>
> 25. (1) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency,

[394] Senate Standing Committee on Constitutional and Legal Affairs, “Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978,” 233; A 2023 review conducted by the Attorney-General’s Department identified 875 secrecy offences across primary and subordinate Commonwealth legislation, “taking into account the general secrecy offences, specific secrecy offences and non-disclosure duties given criminal liability by section 122.4 of the Criminal Code Act 1995 (Criminal Code).” Attorney-General’s Department, “Review of Secrecy *Provisions*: Final Report,” November 2023, 4.

[395] Senate Standing Committee on Constitutional and Legal Affairs, “Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978,” 236.

[396] Senate Standing Committee on Constitutional and Legal Affairs, 238.

[397] Lindsay Curtis, in Transcript of Evidence, 139 (Attorney-General’s Department), Senate Standing Committee on Constitutional and Legal Affairs, 234.

[398] *Freedom of Information Act 1982* (Cth) [As made], sec. 38. A schedule was later added, as envisioned by the Committee, though secrecy provisions were not required to be specified in the schedule to operate as exemptions. “Freedom of Information Act 1982 (Cth)” (2025), sec. 38.

[399] Freedom of Information Act (US), 5 U.S.C. § 522 (1966).

> would cause the last-mentioned document to be an exempt document by virtue of section 33 or sub-section 37 (1).
>
> (2) Where a request relates to a document that is, or if it existed would be, of a kind referred to in sub-section (1), the agency or Minister dealing with the request may give notice in writing to the applicant that the agency or the Minister, as the case may be, *neither confirms nor denies* the existence, as a document of the agency or an official document of the Minister, of such a document but that, assuming the existence of such a document, it would be an exempt document under section 33 or sub-section 37 (1) and, where such a notice is given—
>
> > (a) section 26 applies as if the decision to give such a notice were a decision referred to in that section; and
> >
> > (b) the decision shall, for the purposes of Part VI, be deemed to be a decision refusing to grant access to the document in accordance with the request for the reason that the document would, if it existed, be an exempt document under section 33 or sub-section 37 (1), as the case may be.[400]

With the inclusion of this wording in the *FOI Act*, the Fraser Government formalised NCND as legislated policy in relation to national security matters, in the context of the primarily transparency-focussed reforms. While it is outside the scope of this thesis to specifically analyse the jurisprudence of the *FOI Act*, as an articulation of government policy this was a significant step in the evolution of NCND and Australian official secrecy policy. Notably, section 25 remains in the *FOI Act* at the time of writing in a very similar form.[401]

The second major effect of the 'open government' reforms on NCND and official secrecy broadly was to introduce complexity into the concept of 'authorisation' in respect of disclosure. The posture of default openness appeared to implicitly reject the traditionally sweeping executive discretion of the Westminster system of government regarding information disclosure. While legislation such as the *FOI Act* specifically authorised officials within the executive to disclose official information under certain circumstances (and in that literal sense, it could be seen to provide clarity on the question of authorisation), this authorisation was triggered by requests from outside executive government, such as from a media outlet. Further, the executive was not merely authorised to disclose information, but obliged to do so.[402]

The rejection of discretion was not total, however. As explored above, the inclusion of caveats recognised the continued imperative for secrecy in respect of certain matters, including national security. While government maintained some discretion within the scope of these caveats, they nevertheless existed within a structure by which both the public and executive

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[400] *Freedom of Information Act 1982* (Cth) [As made], sec. 25. Emphasis added.

[401] *Freedom of Information Act 1982* (Cth).

[402] Sec. 11 created for the public a "legally enforceable right to obtain access" to official documents (subject to certain exemptions). *Freedom of Information Act 1982* (Cth) [As made].

government were bound, and which was subject to independent review. This refined both the basis on and the context in which Australian governments would use NCND.

Part 4.2: First Hope Royal Commission

As discussed in the previous chapter, the secretiveness of the 23 years of Coalition governments and following tumultuous security developments during the Whitlam Government, had entrenched widespread concern about security of official information and the political independence of the security and intelligence framework.[403] More broadly, successive governments were also grappling with the reality of operating an increasingly sophisticated security apparatus in line with a waning mandate for security measures and increased expectations of transparency.

Announced by Whitlam on 21 August 1974, the First Hope Royal Commission undertook a comprehensive inquiry into Australia's national security agencies, including their history, functions and administrative structures.[404] Conferred considerable powers of inquiry under the *Royal Commissions Act 1902*, the First Hope Royal Commission was robustly equipped to access classified information in the course of scrutinising the operations of Australia's intelligence agencies. Between March 1976 and April 1977, the First Hope Royal Commission delivered eight reports to the Governor General. While parts of the reports were publicly tabled in Parliament in October 1977, many remained classified until their release as archival records in 2008.[405] These included two procedural reports; a general report containing abridged findings and recommendations; a report on security vetting and the establishment of the Security Appeals Tribunal; and four specific reports on the activities of ASIO, ASIS, and DSD. While the reports considered that the intelligence officers discharged their duties with a high degree of professionalism and had produced a number of "diamonds" of critical importance to Australia, they were also critical of the Australian security and intelligence community as a whole, finding in particular that it was "fragmented, poorly co-ordinated and organized", and that "agencies lack proper guidance direction and control. They do not have good or close relations with the system of government they should serve."[406]

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[403] McKnight, *Australia's Spies and Their Secrets*, 1994.

[404] Richardson, "Volume 1," 114.

[405] Parliamentary Joint Committee on Intelligence and Security, "Advisory Report on the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020" (Commonwealth (Austl.), February 2022), Australia.

[406] Robert Marsden Hope, "Third Report: Abridged Findings and Recommendations" (Commonwealth (Austl.): Royal Commission on Intelligence and Security, December 1, 1976), 4, para. 6 (struck through in archival copy and annotated as para. 42). Where possible, paragraph numbers are given in addition to page numbers for archival sources where page numbers are not original to the document or are inconsistently displayed.

The First Hope Royal Commission advocated many foundational principles for the Australian security and intelligence community, which would form the basis for the structure and operations of the community for years to come.[407] These included the imperative for independent security and intelligence agencies (and the need for their operations to be protected by a level of secrecy), the separation between intelligence assessment and policy development, the criticality of robust accountability arrangements and, importantly, the case for greater public disclosure, including of the existence of ASIS.

Section 4.2.1: The case for avowal

Consistent with the Royal Commission's terms of reference, the reports took on the issue of official secrecy in relation to the operation of intelligence agencies. Previously, successive governments declined to confirm or deny the very existence of an Australian foreign intelligence service, though it was somewhat of an 'open secret.'[408] In regards signals intelligence, while Australia's involvement in the cryptographic efforts of the Five Eyes was well-established by the time of the First Hope Royal Commission, its signals intelligence function had taken many bureaucratic forms since the world wars and had not been publicly acknowledged.[409]

Hope noted that although operational secrecy is fundamental to the operation of the agencies' functions, "they have suffered from unnecessary secretiveness,"[410] and made the case for greater public disclosure. The Royal Commission examined the argument for avowal of ASIS in a classified report, finding that secrecy concerning its existence did not afford operational advantages such as operational cover, mitigation of illegality of activities (an official anxiety the Royal Commission declared unfounded), or elimination of the risk of embarrassment with other countries.[411] Hope's Fifth Report, delivered in 1976, considered the secrecy surrounding ASIS and the policy of successive governments to neither confirm nor deny its existence:

> Subsequent governments have adhered to this policy, and the existence of ASIS never really became a subject for public speculation until 1972. In spite of the publicity then

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[407] L'Estrange and Merchant, "Report of the Independent Intelligence Review," 6.

[408] Hope, "Fifth Report, Vol. 1", 15, para. 4.

[409] Malcolm Fraser, "Ministerial Statement: Royal Commission on Intelligence and Security" (House of Representatives Hansard: Commonwealth (Austl.), October 25, 1977); Blaxland and Birgin, *Revealing Secrets*, 271.

[410] Hope, "Third Report: Abridged Findings and Recommendations," 5, para. 10 (struck through in archival copy and annotated as para. 46).

[411] Hope, "Fifth Report, Vol. 1", 153, para. 301.

> and since, governments have kept the policy of not commenting publicly and have neither confirmed nor denied ASIS' existence.[412]

The Fifth Report considered the argument that, were the existence of an Australian foreign intelligence service operating overseas revealed, this would embarrass the Australian Government internationally and jeopardise bilateral relationships. However, Hope found that:

> There is no evidence that in the years since ASIS was established, any such embarrassment has been caused to the Australian Government. The extensive press, radio and television publicity in Australia…does not appear to have caused concern to the governments of countries with which Australia has relations.[413]

Further, Hope found that both in Australia and internationally "the existence of ASIS is no longer a secret... Should the 'fig-leaf' be retained?"[414] Ultimately, Hope concluded that continued secrecy was of no value: "I find, therefore, that, from the viewpoints both of internal and external policy, there is nothing to be gained from continuing the pretence that ASIS is a 'secret' secret service… It is not desirable because continued secrecy is at best an 'emperor's clothes' situation."[415] The acceptance of this reasoning by Fraser created a new basis on which to consider avowal, or the reversal of NCND. However, Hope still recommended NCND be maintained over the operations of ASIS, considering them a "matter which I would expect to be mitigated when ASIS has been established by statute, without prejudice to the 'no comment' stance which has been traditional."[416]

Critical for Hope was the introduction of a legislative basis for ASIS, to which he saw avowal as a precursor. In his view, a legislative basis could "well enhance" the security of ASIS. Hope considered that avowing its existence would then allow the case to be made publicly for its activities to be subject to information security measures such as the D-Notice system and *Crimes Act* secrecy offences: "If the service can be admitted to exist, disclosures about its activities will be more easily seen to fall within the ambit of the *Crimes Act* and D-notices. Evidence can hardly be given to a court about a non-existent organization."[417] Hope also considered that a legislative basis would acquit the right of the Director and members of ASIS to "a legitimate and established place as Australian civil servants."[418] Hope pointed to ASIO as an

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[412] Hope, "Fifth Report, Vol. 1," 15, para. 4.

[413] Hope, "Fifth Report, Vol. 1," 28, para. 36.

[414] Hope, "Fifth Report, Vol. 1," 151, para. 294.

[415] Hope, "Fifth Report, Vol. 1," 153, para. 300-301.

[416] Hope, "Fifth Report, Vol. 1," 212, para. 439.

[417] Hope, "Fifth Report, Vol. 1," 155, para. 307.

[418] Hope, "Fifth Report, Vol. 1," 153-154, para. 301.

illustration of an intelligence agency maintaining operational secrecy while being established by statute, through the *ASIO Act 1956*.

Having considered the issue of secrecy from both sides, Hope recommended that the Government "find an early opportunity to acknowledge publicly the existence of the Australian Secret Intelligence Service,"[419] and ultimately to establish the service in legislation.

Section 4.2.2: Information management within the executive

As examined in Chapter 3, Prime Minister Whitlam had encountered criticism over suggestions that the Government would prevent the security vetting of ministerial advisers by ASIO.[420] Together with the Whitlam Government's more assertive approach to publicly discussing national security matters, this had raised domestic and international concerns about the robustness of information security and the overall approach to official secrecy.[421] While the Whitlam Government ultimately allowed vetting of staff, the issue of security vetting had been folded into the terms of reference for the First Hope Royal Commission, which included examining procedures for the review of adverse security reports furnished by ASIO.[422]

Security checking was carried out by ASIO for Commonwealth employees and, in a limited manner, for immigration cases. For Commonwealth employees, the security checking process constituted the initial step in the internal information management and protection system, wherein employees undertook to comply with handling requirements in relation to the information entrusted to them in their role. At its acute end, this information management system culminated in criminal offences for individuals who did not comply with these requirements. To formalise the handling of official information, Australia had adopted as a matter of policy an information classification system, which was set out in the Protective Security Handbook (first issued in 1948 as a reference guide for government entities).[423] This information classification system was broadly aligned with those of Australia's close allies, including the US which established a system via Executive Order,[424] and the UK where the Cabinet Office issued whole-

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[419] Hope, "Fifth Report, Vol. 1," 154, para. 302.

[420] Gough Whitlam, "Questions Without Notice: Security Checks of Ministerial Staff" (House of Representatives Hansard: Commonwealth (Austl.), October 7, 1975); Richard Hall, *The Secret State: Australia's Spy Industry* (Stanmore, NSW: Cassell Australia, 1978), 62.

[421] Blaxland, *The Protest Years*, 322; Whitlam, "Whitlam, Questions Without Notice: Security Checks of Ministerial Staff, Hansard (7 October 1975)."

[422] John Kerr and Gough Whitlam (1974), "Letters Patent, Appendix 1-A," in Robert Marsden Hope, "First Report: Procedural Matters" (Commonwealth (Austl.): Royal Commission on Intelligence and Security, 1976), 15.

[423] "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 - Appendix 3 - Protective Security Handbook" (Commonwealth (Austl.), June 1978).

[424] Richard Nixon, "Executive Order 11652: Classification and Declassification of National Security Information and Material" (United States Government, March 8, 1972).

of-government policy on the use of security classifications.[425] As the business and information of government grew, such structures were increasingly important to ensure the protection of information and promulgation of executive discretion. Nevertheless, they entailed the incremental decentralisation of this discretion, through delegating the authority to classify and make decisions about the internal disclosure of information to individual public servants.

Consistent with his broader findings, Hope had found that the security checking function undertaken by ASIO had to align with its legislative mandate, and therefore relate directly to security rather than to all varieties of confidentiality arising in government.[426] While the function had been conceived in 1949 (on the advice of the first Director-General of Security, Justice Reed) to focus specifically on those with access to secret or top secret material and concern only the security aspect of their suitability, it had been incrementally broadened to capture those in certain positions, regardless of their level of access, and refer to 'classified' rather than secret or top secret material.[427] , The grades of security check carried out by ASIO attached to the Commonwealth information classification system, whichset out four ascending levels of classification; Restricted, for official matters that did not warrant higher classification, and Confidential, Secret, and Top Secret (described by Hope as the 'security classifications'), which were expressed in terms of varying degrees of harm to interests of the nation.[428] While Hope noted that the Australian Government may establish any classification system it chose, the security checking function undertaken by ASIO must relate directly to security.[429] To this end, and to avoid unduly burdening ASIO's resources, Hope made recommendations to narrow the field of individuals who would be security checked, including through the designation of sensitive positions. Hope expressly concluded that positions on ministerial staff should be designated as sensitive.

Hope also made several recommendations addressing the civil liberties implications of security checking, including that it was not at that time subject to an appeals mechanism. Hope cited Australia's international obligations which, though allowing discrimination in respect of

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425 Cabinet Office, "Policy Regarding the Use of Security Classifications (Also Restrictive Markings on Official Documents)" (United Kingdom Government, 1971), TNA: CAB164/851, The National Archives (UK).

426 Robert Marsden Hope, "Second Report: Security Vetting and the Question of the Establishment of a Security Appeals Tribunal" (Commonwealth (Austl.): Royal Commission on Intelligence and Security, 1976), 24-25, para. 46.

427 Hope, "Second Report," 20-21, paras. 38-41.

428 Hope, "Second Report," 11-12, paras. 25-27.

429 Hope, "Second Report," 24-27, paras. 46-48.

employment based on national security considerations, required such discrimination to be appealable.[430] In particular, Justice Hope recommended that a system of security appeals be made available as soon as possible, and proposed legislation to establish a Security Appeals Tribunal with retrospective operation.[431] Justice Hope also recommended that a requirement be established to notify individuals who were the subject of an adverse or qualified security check of that outcome.[432] This recommendation echoed the unsuccessful 1956 attempts by the Labor Opposition to include appeal rights for individuals in the *ASIO Act 1956*. Appeal rights were ultimately included in the *Australian Intelligence and Security Organisation Act 1979* (Cth) (the *ASIO Act*), which established the Security Appeals Tribunal as an independent body to conduct reviews of ASIO assessments. It began operating in 1980, and was abolished in 1995 upon the creation of the Security Appeals Division of the AAT.[433]

Section 4.2.3: Government response

By the time the First Hope Royal Commission delivered its reports, the Whitlam Government had been controversially dismissed by the Governor General, Sir John Kerr. As such, the reports were received by the newly-installed Fraser Government. Shortly after the conclusion of the First Hope Royal Commission, several media outlets published sensational coverage of allegations of US intelligence agencies activities in Australia. On 24 May 1977, Prime Minister Fraser addressed Parliament regarding the allegations. Fraser referred to efforts "to expose some of Australia's most closely held secrets," and his intent to put the matters "in a proper perspective." In this context, Fraser reaffirmed the Government's commitment to NCND:

> It has been the Government's longstanding policy to avoid comment on matters involving intelligence and security. There are good reasons for this policy in that the mere act of denying specific allegations can often provide important leads and be damaging to our own and our allies' national security. I do not therefore intend to deal with specific allegations which have been made.[434]

This indicated that the Fraser Government had adopted NCND as the guiding principle of its public engagement on intelligence and security matters. This provided important context

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[430] Hope, "Second Report," 15-16, paras. 33-34.

[431] Hope, "Second Report," 64, 73-74, paras. 122-124, 142.

[432] Hope, "Second Report," 78-79, para. 151.

[433] Garry Downes, "The Security Division of the Administrative Appeals Tribunal," in *Procedural Fairness, Hearings and Decision-Making in the Security Context of the Administrative Appeals Tribunal* (Australian Government Solicitor Administrative Law Symposium, Sydney University Law School, 2010), 6.

[434] Malcolm Fraser, "Ministerial Statement: Central Intelligence Agency Activities in Australia" (House of Representatives Hansard: Commonwealth (Austl.), May 24, 1977).

for the Government's response to the First Hope Royal Commission, which a few months later would involve the reversal of long-held NCND in relation to ASIS and DSD.

The Fraser Government largely accepted the recommendations of the reports. While on Hope's recommendation the contents of a number of the reports remained classified for the protection of national security, including those in relation to ASIS and DSD, the Government did make public the subjects of each report and several recommendations contained in them that it sought to publicly pursue. All reports were made available to the then-Leader of the Opposition, Gough Whitlam, in an early indication of increased bipartisanship and relaxation of executive secrecy on national security matters. On 5 May 1977, the Fraser Government announced the introduction of new coordination mechanisms, to be further enhanced through the establishment of ONA, indicating investment in intelligence capabilities and laying the groundwork for a more sophisticated framework.[435] This aligned with the recommendations of the Royal Commission to reduce siloing and ensure whole-of-government objectives would be prioritised. Later that year, the Government went on to address a number of other recommendations of the Royal Commission, including official acknowledgement of the existence and role of ASIS and the role of DSD.[436]

A new precedent for disclosure

On 25 October 1977, Prime Minister Malcolm Fraser made a statement to the House of Representatives responding to the findings of the First Hope Royal Commission.[437] Fraser's statement included avowing the existence and roles of both ASIS and DSD. In this statement, the Prime Minister acknowledged that ASIS had not previously been publicly avowed, and articulated that the avowal was being made in accordance with the relevant recommendation of the First Hope Royal Commission. While this information itself could not be made public, as a demonstration of oversight and public assurance, the Prime Minister's statement of avowal included the conclusions drawn by the First Hope Royal Commission, including that the agencies were underpinned by appropriate objectives, were well-managed, and that avenues for further improvement of their operations had been identified.

Fraser affirmed that the primary function of ASIS "was to obtain, by such means and subject to such conditions as were prescribed by the Government, foreign intelligence for the purpose of protecting or promoting Australia or its interests."[438] The Prime Minister stated that

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[435] Samuels and Codd, "Report on the Australian Secret Intelligence Service," 2.

[436] Fraser, "Fraser, Ministerial Statement: Central Intelligence Agency Activities in Australia, Hansard (24 May 1977)"; Hope, "Fifth Report, Vol. 1," 16, para. 4; Blaxland and Birgin, *Revealing Secrets*, 271.

[437] Cornall and Black, "Report of the Independent Review of the Intelligence Community," 11–12.

[438] Fraser, "Ministerial Statement: Royal Commission on Intelligence and Security."

"ASIS's capacity to serve Australia's national interest would continue to depend on full protection of the secrecy of its activities."[439] Of DSD, the Prime Minister advised that it was an organisation "concerned with radio, radar and other electronic emissions from the standpoint both of the information and the intelligence that they can provide and of the security of our own Government communications and electronic emissions."[440]

In his concluding remarks, reminiscent of former Attorney-General Nigal Bowen's 1968 statement regarding ASIO (discussed in Chapter 3), Fraser reiterated that the Government would maintain its long-standing practice of not providing information by "way of comment, confirmation or denial, on matters affecting security or intelligence,"[441] noting that the Royal Commission had supported the continuation of the policy. This maintained commitment to the logical core of NCND in principle, and the ability of the current and future governments to deploy NCND in practice. Consistent with this policy, a D-Notice regarding the activities of ASIS was reaffirmed shortly after the delivery of the reports of the Royal Commissions. A historical D-Notice regarding the activities of DSD also remained in place.

This marked a significant turning point in the public discussion of national security matters. Where until this point, the handling of national security matters had either been out of the public eye or otherwise viewed as injudiciously public, in the independent review the Fraser Government had a new public platform to invoke as the basis for national security policy change. Fraser himself referenced Hope's recommendations in addressing Parliament to announce the existence of ASIS and DSD. In addition to its independent credentials, having been established by the previous Whitlam Labor Government, the First Hope Royal Commission already carried an implicit sense of bipartisan endorsement. This arguably broke the deadlock not only on the politicisation of Australia's intelligence and security framework, but also offered a new and more structured basis on which to modify official secrecy policy.

Fraser's avowals set a new and enduring precedent for the exercise of executive discretion in relation to national security matters, being considered and principled disclosure. The avowals had three primary elements: an explanation of the reasons for making and timing of the disclosure; a clear articulation of the limits of the disclosure; and a reaffirmation of commitment to ongoing NCND outside the scope of the disclosure. As examined in forthcoming chap-

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[439] Fraser.

[440] Samuels and Codd, "Report on the Australian Secret Intelligence Service," 2.

[441] Fraser, "Ministerial Statement: Royal Commission on Intelligence and Security."

ters, the precedent established by the Fraser Government would inform successive governments' public handling national security matters alongside NCND as a complementary practice of avowal.

The contours of NCND policy therefore underwent significant change during this period. While it had been strongly argued for and exercised by members of the Chifley Government in relation to the establishment and early operations of ASIO, NCND was effectively 'opened up' for scrutiny as part of Hope's scrutiny. While the First Hope Royal Commission considered NCND implicitly as part of its recommendation to publicly acknowledge ASIS and DSD, the Second Hope Royal Commission explicitly considered and made findings about the appropriateness of NCND in its specific reference to ASIO.

Section 4.2.4: Findings in relation to ASIO

While publicly acknowledged and established in legislation since 1956, ASIO had been a considerable source of public intrigue (and often debate) in the context of the Cold War. As noted in earlier chapters, little was known about its role and functions. As the Whitlam Government had been moved to instigate the Royal Commission in part due to the activities of ASIO, the report of the First Hope Royal Commission concerning its activities was made public. Critically, the refinement of ASIO's purpose and functions in legislation was found by Hope to be a way to increase transparency and accountability, and ultimately to build public trust in Australia's domestic security agency.

Prime Minister Fraser's parliamentary statement on 25 October 1977 reaffirmed the First Hope Royal Commission's findings that the "essential conception of ASIO" suited Australia's national circumstances, while also acknowledging the critiques of ASIO made in the report.[442] The statement laid out broad areas for reform in line with the findings, including legislatively refining the activities in relation to which ASIO would be responsible for (and authorised to) investigations and advice to Government; clarifying the relationship between the government and the Director-General of Security; regular briefings for the Leader of the Opposition on security matters; and the investment of increased funding in ASIO in recognition of its critical role in the maintenance of domestic security. The Prime Minister also gave an assurance on behalf of the Director-General that recommendations pertaining to ASIO's internal administration and management were being given effect.

In relation to security checking, the Prime Minister recounted the Royal Commission's view that "Australia has secrets which the Australian Government has a duty to protect in the

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[442] Fraser.

interests of the nation"[443] but acknowledged that the breadth of the checking process both unnecessarily constrained ASIO's resources, and was 'objectionable' from a civil liberties perspective. In discussing the existence of deficiencies in the preparation, content and use of security checking, the Prime Minister acknowledged the limitations of the framework (drawing on the Royal Commission's assessment that ASIO's information, "even if accurate, will rarely, if ever, be complete") and announced reforms to redress the balance between the protection of information and accountability.[444] These included notification procedures for individuals subject to adverse or qualified assessments involving provision of general supporting information to the extent that it would not threaten national security, and the establishment of a Security Appeals Tribunal where individuals could seek review of assessments.

In 1979, the Fraser Government went on to acquit many of Hope's recommendations in relation to ASIO through legislative amendments. The then-Attorney-General, Senator Peter Durack QC, introduced the bill that would become the *Australian Security Intelligence Organisation Act 1979* (Cth) (the *ASIO Act*) alongside amendments to the telecommunications interception framework in March 1979, which would replace the *ASIO Act 1956*. Durack explicitly spoke of his hope of a 'bi-partisan' approach to the legislation in his second reading speech, reiterating to the Senate that the First Hope Royal Commission had been established by the former Labor Government and arguing that the "national interest demands an approach above party politics to this legislation."[445] Durack also spoke of the need to 'balance' security with other democratic imperatives, arguing that the legislation:

> ...represents a balance between the needs of the nation for a strong, reliable and highly efficient security service and the need to preserve our individual rights and freedoms. Australia faces a number of serious threats to its internal security including persistent efforts on the part of hostile intelligence agencies to obtain intelligence from within Australia. This legislation... will equip ASIO with the powers essential for those tasks and at the same time provide safeguards for the rights of individuals and the continuation of our democratic institutions.[446]

The *ASIO Act* was passed in 1979, and went further than the 1956 legislation in detailing the functions, organisational structure, and control of the agency. In line with Hope's recommendations, the *ASIO Act* expanded the definition of 'security' to include "not only espionage, sabotage and subversion, but also active measures of foreign intervention," and defined

[443] Fraser.

[444] Fraser.

[445] Durack, "Second Readings: Australian Security Intelligence Organization Bill 1979, Telecommunications (Interception) Bill 1979, Telecommunications Amendment Bill 1979, Customs Amendment Bill (No. 2) 1979."

[446] Durack.

more clearly ASIO's remit in relation to this definition.[447] It also explicitly invested ASIO with special powers of intelligence collection, subject to certain safeguards.[448] The inclusion of these details in legislation both increased transparency regarding ASIO's activities and subjected those activities to a more rigorous framework of compliance.

Implications for NCND

Two major features of the evolution of official secrecy in Australia and NCND specifically emerged from the scrutiny of the First Hope Royal Commission. The first was a new basis on which to make policy change; one that could be seen as independent, readily employed by either side of politics, and invoked publicly by governments as a rationale for change, but that could still retain a significant level of information security. The second is that, in its acquittal of the recommendations of the First Hope Royal Commission, the Fraser Government evolved the 'baseline' set by the Chifley Government in discussing the activities of security and intelligence agencies. Rather than not being drawn on questions related to national security at all, it would under certain circumstances engage in considered and principled disclosure. These reforms recognised that greater transparency could be achieved in a considered manner without unacceptably compromising national security.

The reins were loosening on centralised executive discretion on official secrecy in national security matters. New caveats and mechanisms, this time demanded by domestic politics and the imperative for transparency, had been embedded. These new norms would go on to form an enduring part of the approach to official secrecy in Australia which continues today.

Section 4.2.5: Protective Security Review and legal action

Australia's security environment did not remain static during the Fraser Government's consideration of the First Hope Royal Commissions. On 13 February 1978, Australia experienced what Fraser described as the first instance of domestic terrorism with the bombing of Sydney's Hilton Hotel.[449] The attack had targeted the Commonwealth Heads of Government Regional Meeting, killing three individuals and injuring eleven others, and prompting Fraser to call out the Australian Defence Force as part of an operational response. Attribution of the Hilton Hotel bombing became the focus of public speculation, with some corners of debate

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[447] Durack; *Australian Security Intelligence Organisation Act 1979* (Cth) [As Made] (1979), secs. 4, 17.

[448] *Australian Security Intelligence Organisation Act 1979* (Cth) [As made], Part 3, Division 2.

[449] Malcolm Fraser, "Ministerial Statement: Protective Security and Counter-Terrorism" (House of Representatives Hansard: Commonwealth (Austl.), February 23, 1978).

alleging a cover up.[450] ASIO closed its investigation into the bombing in 1982. It concluded that members of the religious movement Ananda Marga had been responsible for the attack, the attempted target of which was Morarji Desai, the Indian Prime Minister.[451]

Following the attack, on 21 March 1978 the Fraser Government appointed Justice Hope to undertake a review of Australia's protective security arrangements. The Protective Security Review would examine the adequacy of the coordination and relationships between the relevant authorities, including law enforcement and intelligence agencies at the State, Territory and Commonwealth levels. The Protective Security Review reported on 15 May 1979, and found that Australia's security framework was fragmented and duplicative.[452] This and other issues raised in the course of the Protective Security Review also propelled the creation of the Australian Federal Police (AFP) via the passage of the *Australian Federal Police Act 1979* (Cth) (*AFP Act*). The *AFP Act* established the AFP as a consolidated law enforcement agency at the Commonwealth level, bringing together existing federal policing and narcotics agencies with the policing service of the ACT.

Unauthorised disclosure

Prime Minister Fraser had also tasked the Protective Security Review with examining the Commonwealth's arrangements for "securing and protecting information against unauthorised access and/or disclosure."[453] Having recently observed in the First Hope Royal Commission that the government was competent to implement any information classification system it saw fit,[454] Hope now turned to merit of the system that was in fact in place.

At an administrative level, Hope made a number of suggestions to improve the clarity and logic of the classification system, including abolishing the lowest classification (Restricted) due to its similarity with the second lowest (Confidential). At an investigative level, Hope reiterated that it was not a function of ASIO to enforce government security measures, and strongly cautioned against the use of ASIO to investigate unauthorised disclosures unrelated to national security. Hope considered that such investigations were the proper remit of police

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450 Imre Salusinszky, *The Hilton Bombing: Evan Pederick and the Ananda Marga* (Carlton, VIC: Melbourne University Publishing, 2019), 285–305; Blaxland and Crawley, *The Secret Cold War*, 96–97.

451 Report, "Ananda Marga (AM) in Australia" (September 1992), ASIO records, in Blaxland and Crawley, *The Secret Cold War*, 88.

452 Robert Marsden Hope, "Report of the Protective Security Review (Unclassified Version)" (Commonwealth (Austl.): Protective Security Review, May 15, 1979).

453 Hope, "Report of the Protective Security Review ," 181, para. 11.10.

454 Hope, "Second Report", 26, para. 48.

agencies, including in circumstances involving national security information, and in consultation with ASIO only in the most serious cases.[455] The *ASIO Act* later provided for co-operation with certain Commonwealth, State and Territory, and foreign authorities in the performance of ASIO's functions, though the enforcement of security measures within a Commonwealth authority was expressly excluded.[456]

Fairfax leaks

The 1980s commenced with domestic legal proceedings which would draw the Fraser and Hawke Governments into public debate about the contours of NCND and executive government discretion to make decisions about disclosure. *Commonwealth v John Fairfax & Sons* (and a number of related proceedings) concerned the publication of sensitive material which influenced the jurisprudence on open justice and official secrecy in Australia. In 1980, the Fraser Government sought an injunction to stop the publication of sensitive papers relating to Defence activities, in what became known as the 'Defence Papers Case' and ultimately proceeded to the High Court.[457] The Fraser Government had become aware of the imminent unauthorised disclosure of sensitive information via news media outlets the *Sydney Morning Herald* and *The Age*. The information comprised extracts from a forthcoming book entitled *Documents on Australian Defence and Foreign Policy 1968–1975*, which was understood to contain unpublished official assessments, briefings and cables relating to a wide range of defence and national security matters,[458] including:

> ..the East Timor crisis… the renegotiations of agreements covering United States military bases in Australia, the presence of the Soviet Navy in the Indian Ocean, Australia's support for the Shah of Iran and predictions for the future of his regime, the security of the Butterworth base in Malaysia, outlines of the structure of the US and UK intelligence services… and other matters, including the A.N.Z.U.S. Treaty.[459]

Before the injunction was considered by the Court, however, around 60,000 copies of a newspaper containing extracts of the book (and several copies of the book itself) had already been distributed.[460]

The Fraser Government had contended that the unauthorised disclosure would amount to a breach of the secrecy provision at section 79 of the *Crimes Act 1914* (Cth). Unusually, the

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455 Hope, "Report of the Protective Security Review (Unclassified Version)," 230–31, "Report of the Protective Security Review," 230-231, paras. 11.196-11.202.

456 Australian Security Intelligence Organisation Act 1979 (Cth), secs. 17, 19A.

457 Mason J, *Commonwealth v John Fairfax & Sons Ltd*.

458 Sadler, *National Security and the D-Notice System*, 153.

459 Mason J, *Commonwealth v John Fairfax & Sons Ltd*, para. 2.

460 Mason J, para. 4.

Government sought the issue of an injunction under the civil law to forestall the possible commission of an offence under the criminal law.[461] The Court found this attempted use of civil remedies exceptional, concluding that section 79 was limited to the creation of a criminal offence, finding "nothing to indicate that it was intended in any way to…restrain disclosure of confidential information."[462] This exposed a curious gap in the legislative frameworks governing the protection of sensitive information. There appeared to be no mechanism to prevent or restrain a breach of the secrecy offence before the fact, rather than sanction it after it had been commissioned.

Turning then to the balance between prejudice to national security and transparency imperatives, the Court considered that if it appeared that "national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained."[463] Ultimately, the Court did not accept that the classified nature of the documents alone meant their disclosure would prejudice national security.[464] This case also considered the principle of 'detriment' to the plaintiff, which it found did not apply to executive government as it might to an individual:

> …it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action."[465]

Ultimately, the Court restrained publication of the documents on the narrow grounds of breach of copyright. The then-Labor Opposition were critical of the Fraser Government's handling of the disclosures, describing the decision as sending it "tottering back into its corner." Shadow Attorney-General Gareth Evans denounced the possibility of copyright law becoming the government's "first line of defence against genuine attempts to make Australia's Government more open, accountable and genuinely democratic."[466]

As the subsequent sections will examine, the incoming Labor Government under Prime Minister Bob Hawke would go on to make significant public avowals in respect of national

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[461] Mason J, para. 19.

[462] Mason J, para. 19.

[463] Mason J, para. 29.

[464] Mason J, para. 33.

[465] Mason J, para. 27.

[466] Gareth Evans, "Press Release: Defence Papers Case - Government Wins Battle But Loses War," December 1, 1980.

security matters. However, before these avowals were to occur, the newly-elected Hawke Government faced its own publication crisis. In May 1983, the *National Times* (also published by John Fairfax and Sons Ltd) published a series of articles entitled 'The AUSTEO Papers,' which reproduced documents displaying security classification markings.[467] The articles claimed that the authenticity of the documents had been confirmed by interviews with official sources, and that the newspaper had access to tens of thousands of additional documents. Investigations into the source of the leak were inconclusive.[468] As had the Fraser Government, Hawke took action in the High Court to prevent further publication. Interim injunctions were granted on 5 May 1983,[469] and a settlement was ultimately reached in which the Hawke Government would review additional documents ahead of further publication by the *National Times*.

After launching the legal action, Hawke argued in a radio interview with Derryn Hinch on 9 May 1983 that the public and media had "to be prepared to exercise some degree of trust in the judgement of the Prime Minister and the Government," declining to "confirm or deny" the substance of the documents.[470] While Hawke emphasised both the occurrence of leaks "throughout the history of democratic government" and the importance of their investigation, Hinch challenged him on the implications of technological change on information security. Hinch described the "the xerox machine has become the truth serum of the 1980s," noting "it is very hard to plug leaks, harder than it would have been in the past… it's a huge job."[471] Hinch's questioning implicitly raised the impact of advances in information technology on the ability of executive governments to maintain information security, and therefore the discretion to disclose.

This issue was raised again in a separate 1984 publication by the *National Times* of a document entitled 'Strategic Basis of Australia's Defence Policy,' the authenticity of which the Hawke Government initially declined to confirm or deny, citing "a practice, and a very well founded one, that governments do not confirm or deny matters which are sensitive where there is a claim that there has been a leak."[472] Under questioning in Parliament premised on the

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[467] Brian Toohey, "The AUSTEO Papers," *National Times*, May 5, 1983.

[468] Lionel Bowen, "Answers to Questions: AUSTEO Papers" (House of Representatives Hansard: Commonwealth (Austl.), August 22, 1988).

[469] Robert Hawke, "Transcript 6103: Media Release - Interim Injunctions Regarding National Times Article" (Department of the Prime Minister and Cabinet, May 6, 1983).

[470] Hawke, "Transcript 6109."

[471] Hawke.

[472] William Hayden, "Discussion of Matter of Public Importance: Government's Defence and Foreign Affairs Policies" (House of Representatives Hansard: Commonwealth (Austl.), April 3, 1984).

authenticity of the document, then-Minister for Defence Gordon Scholes stated that the member of the Opposition "has not seen the strategic basis paper. The right honourable member has seen what he thinks is the strategic basis paper."[473] The then-Coalition Opposition took aim at the Government's use of NCND, arguing that it could not logically 'have it both ways' and:

> accuse the newspaper of telling lies and then refuse to confirm or deny whether the issue on which the paper based its comments is true or false. I think one draws from that that the Government is saying that the document is false. That then leads us into great difficulties with prominent members of the community who are in a position to know and have said openly that those leaked documents are true.[474]

On 10 May 1984, then-Attorney-General, Gareth Evans, stated in Parliament that while the Government had "done all it can" to keep documents secure, "Short of banning photocopiers… and other extraordinary steps, such as conducting searches of all public servants and other staff every time they leave their office, there is no real way to prevent such occurrences, however much we deplore the matter."[475]

These events demonstrated the Hawke Labor Government's willingness to vigorously protect national security matters from unauthorised disclosure and maintain commitment to NCND. With these credentials established, successive Labor governments would go on to take some of the most significant steps in considered and principled disclosure in the history of Australian official secrecy policy, as explored in Chapter 5 and 6. Before this, however, the Hawke Government would establish what would become the second defining independent review of Australia's intelligence and security framework.

Part 4.3: The Second Hope Royal Commission

While the First Hope Royal Commission had established both important principles of oversight and policy and fostered nascent bipartisanship on national security, the security environment continued to challenge Australian governments' approach to official secrecy. In addition to the publication of the Defence Papers and AUSTEO Papers, the early 1980s saw the threat of espionage reignited in public discourse. Notwithstanding the growing focus on the threat of terrorism, ASIO continued its Cold War focus on Soviet officials. Since June 1981, ASIO had been following the activities of a Soviet diplomat, Valeriy Ivanov, and by the March

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473 Gordon Scholes, "Questions Without Notice: Cabinet Documents" (House of Representatives Hansard: Commonwealth (Austl.), April 4, 1984).

474 Michael Macklin, "Discussion of Matter of Public Importance: Independence of the Media" (Senate Hansard: Commonwealth (Austl.), April 4, 1984).

475 Gareth Evans, "Ministerial Statement: Strategic Basis of Australian Defence Policy" (Senate Hansard: Commonwealth (Austl.), May 10, 1984).

1983 election had concluded Ivanov to be a KGB officer. Early in its tenure, the newly-formed Hawke Government publicly expelled Ivanov from Australia, with the support of the Opposition.[476] Ivanov had allegedly attempted to cultivate a relationship with David Combe, at that time a lobbyist and former National Secretary of the Labor Party. Having formed the view that Combe had indeed been compromised by Ivanov, the Hawke Government determined it "no longer appropriate" for Ministers to engage with Combe.[477] Prime Minister Hawke made statements in Parliament regarding the expulsion of Ivanov and, following disclosure of Combe's name and position in the media, the Government's decision in relation to Combe.

In the wake of the Combe-Ivanov Affair, on 17 May 1983 Prime Minister Hawke appointed Hope to undertake a new review, the *Royal Commission into Australia's Security and Intelligence Agencies* (RCASIA, or the Second Hope Royal Commission). The Second Hope Royal Commission would inquire into the operations, conduct, performance, control and accountability of the Australian intelligence agencies, including progress on the implementation of the recommendations of the First Hope Royal Commission. It would also inquire specifically into ASIO's advice and activities in relation to Ivanov.[478] A few months into the activities of the Second Hope Royal Commission, ASIS was catapulted back into the public consciousness following the Sheraton Hotel Incident. On 30 November 1983, several ASIS officers conducted a 'training exercise' involving the simulated rescue of a hostage from foreign intelligence officers at the Sheraton Hotel in Melbourne. While the exercise had been authorised by ASIS internally, no notice had been given to or request made of the Victorian authorities or staff of the Sheraton Hotel. As a result, upon discovering masked individuals carrying firearms inside the hotel, staff contacted the Victorian Police, who arrested a number of the individuals at the scene. The incident quickly became national news. Described by the Hawke Government as a "fiasco,"[479] the incident was referred to the Second Hope Royal Commission and formally added to its terms of reference.[480]

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[476] Bruce Goodluck, "Mr Valeriy Ivanov" (House of Representatives Hansard: Commonwealth (Austl.), May 12, 1983).

[477] Robert Hawke, "Ministerial Statement: Mr David Combe" (House of Representatives Hansard: Commonwealth (Austl.), May 11, 1983).

[478] Robert Marsden Hope, "Report on Term of Reference (c)" (Commonwealth (Austl.): Royal Commission on Australia's Security and Intelligence Agencies, December 1983), 159, para. 5.78.

[479] William Hayden (1984), quoted in NAA: A7452, A391 PART 1, "Files of the Department of the Prime Minister and Cabinet: Hope Commission Inquiry [RCSIA] into Sheraton Hotel Incident - Part 1," November 1984, 14, NAA: A7452, A391 PART 1, National Archives of Australia.

[480] Robert Marsden Hope, "Report on the Sheraton Hotel Incident" (Commonwealth (Austl.): Royal Commission on Australia's Security and Intelligence Agencies, February 1984), "Report on the Sheraton Hotel Incident," 2, para. 1.8.

The Second Hope Royal Commission delivered seven reports to the Hawke Government between December 1983 and December 1984. These comprised reports on general findings, the expulsion of Ivanov, the Sheraton Hotel incident, and on each agency, a number of which were publicly tabled in Parliament in declassified form. Broadly, the findings of the Second Hope Royal Commission again supported the need for Australia's intelligence and security agencies, justified investment in them, and recommended ASIO refine its internal policies and structure to become a more effective security service.

Section 4.3.1: Expulsion of Ivanov and Sheraton Hotel Incident

In advance of making its general findings, the Second Hope Royal Commission delivered two reports while its activities were still underway. These were the *Report on Term of Reference (c)*, relating to the expulsion of Ivanov, and the *Report on the Sheraton Hotel Incident*. Given the considerable public concern surrounding the events, the two dedicated reports were tabled in Parliament in December 1983 and February 1984 respectively.[481]

On 6 December 1983, in tabling the *Report on Term of Reference (c)* in Parliament, and Prime Minister Hawke made an accompanying statement about its findings.[482] Hope had reported on a number of detailed questions relating to ASIO's conclusions and the Government's actions in the course of the Combe-Ivanov Affair, largely finding that they had been accurate, justified and proper, including that it was proper for the Government to announce the expulsion of Ivanov "in the manner which it chose," being publicly.[483] Hope did find however that unauthorised disclosures regarding the expulsion of Ivanov had been made by the then-Special Minister of State Mick Young , who subsequently resigned his portfolio, and that some of the advising of the Government by ASIO had been delayed, incomplete or erroneous (though 'peripherally' so).

Hawke's statements to Parliament highlighted these matters in great detail, along with the report's discussion of the activities of ASIO and the deliberations of Cabinet, indicating a high level of transparency.[484] They also emphasised the Government's concern regarding the lack of legislative mechanism for individuals to receive a hearing in the context of an adverse ASIO assessment (which Hope would go on to recommend in his Report in December 1984).

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[481] Robert Hawke, "Report and Ministerial Statement: Report of the Royal Commission on Australia's Security And Intelligence Agencies" (House of Representatives Hansard: Commonwealth (Austl.), December 6, 1983); Robert Hawke, "Ministerial Statement: Sheraton Hotel Incident" (House of Representatives Hansard: Commonwealth (Austl.), February 29, 1984).

[482] Hawke, "Report and Ministerial Statement: Report of the Royal Commission on Australia's Security And Intelligence Agencies."

[483] Hawke.

[484] Hawke.

Hawke concluded by affirming that "[t]he legitimate and strong public interest in the issues and in the Government's handling of them called in time for the most thorough examination in order to clear the air."[485]

Hawke made similarly extensive statements to Parliament on 29 February 1984 and 22 May 1985 discussing the circumstances of the Sheraton Hotel Incident, Hope's findings and the Government's response. Hawke noted that to explain the training exercise, it was "necessary to consider briefly the functions of ASIS." Hawke subsequently elaborated that:

> The principal function of ASIS, under its directive, is the collection of foreign intelligence. A minor function, specified in the directive, requires ASIS to maintain a special operations capability for wartime and other very special situations.[486]

This minor function was noted by Hope and described by Hawke as being "maintained only on a contingency basis," being "well below" that of ASIS' main intelligence collection function.[487] Hope made sweeping recommendations regarding the special operations function of ASIS, defined as "unorthodox, possibly paramilitary, activity in foreign countries designed to be used in case of war or some other crisis."[488] The overall effect of these recommendations was that the function be abolished. The recommendations included that ASIS officers be prohibited from carrying firearms in public; that ASIS' weapons stocks be disposed of; and that its directive "be amended to exclude ASIS from carrying out covert action in the form of either special operations or special political action, and from undertaking training for such action."[489] Hawke advised that the Government accepted and acted upon these recommendations, advising that ASIS would no longer maintain capability for special operations or special political action.[490]

While the report dedicated to ASIS was not publicly released, Hope found in his General Report that the incident "was not representative of the quality or professionalism exhibited by ASIS in performing its principal tasks,"[491] and that robust steps had been taken to guard against similar incidents in the future. Still, after the conclusion of the Second Hope Royal Commission, the Director-General of ASIS, John Ryan, resigned from his position. The Hawke

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485 Hawke.

486 Hawke, "Hawke, Ministerial Statement: Sheraton Hotel Incident, Hansard (29 February 1984)."

487 Robert Hawke, "Report and Ministerial Statement: Royal Commission on Australia's Intelligence and Security Agencies" (House of Representatives Hansard: Commonwealth (Austl.), May 22, 1985).

488 Hawke.

489 Hawke.

490 Hon. Richard Alston, "National Security Controls on Information and Communication in Australia," *Government Information Quarterly* 4, no. 1 (January 1, 1987): 32, https://doi.org/10.1016/0740-624X(87)90048-7.

491 Hope, "General Report", paras. 2.28 and 2.15.

Government appointed as Acting Director-General Jim Furner CBE, former Brigadier and Director of the JIO. Furner was tasked with considering on reporting on disciplinary action for those involved, with the assistance of the retiring Chief Magistrate of the ACT, Clarence Hermes.[492]

At the time of the statement, state-level Victorian authorities were pursuing options to prosecute those involved, the names of whom were subject to a High Court injunction against release. Among the measures taken by the Victorian Government was passage of legislation to enable "confidentiality in court proceedings where necessary in the interests of the national or international security of Australia."[493] On the basis of the enactment of the Victorian legislation (and complementary federal legislation later in 1984[494]), Hawke notably committed the Commonwealth to withdrawing its objection to the release of the names, and promised "its best endeavours to secure an appropriate settlement of that case in terms that will allow communication of the relevant names to the Victorian Government."[495] This indicated a level of appetite for greater policy intervention in the 'balance' between open justice and national security imperatives, two decades before the passage of the *National Security (Criminal Proceedings) Act 2004* (Cth), which would address this very conundrum.

Section 4.3.2: Findings on NCND and avowal

In addition to the implications for official secrecy policy of its substantive findings in relation to intelligence and security agencies, the Second Hope Royal Commission specifically dealt with the neither confirm nor deny principle. The terms of reference directed the Royal Commission to examine the safeguarding of intelligence, including against unauthorised publication. In the *General Report*, Hope observed that "leaks of documents and information held under varying degrees of confidentiality by Australian government authorities have become too common."[496] Hope was persuaded that the public disclosure of classified information was properly the role of "ministers who are answerable to the nation through Parliament,"[497] not that

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[492] Letter on behalf of Director-General of ASIS to Mr T Brookes, Office of Security and Intelligence Co-ordination, Department of the Prime Minister and Cabinet, Disciplinary Enquiry Following the Sheraton Hotel Incident (26 February 1988), in NAA: A7452, A391 PART 1, "Files of the Department of the Prime Minister and Cabinet: Hope Commission Inquiry [RCSIA] into Sheraton Hotel Incident - Part 1," 20–21.

[493] Hawke, "Hawke, Ministerial Statement: Sheraton Hotel Incident, Hansard (29 February 1984)."

[494] NAA: A7452, A391 PART 1, "Files of the Department of the Prime Minister and Cabinet: Hope Commission Inquiry [RCSIA] into Sheraton Hotel Incident - Part 1," 14.

[495] Hawke, "Hawke, Ministerial Statement: Sheraton Hotel Incident, Hansard (29 February 1984)"; Later in the year, the High Court found that the ASIS officers were not immune from Victorian criminal law by virtue of acting on behalf of the executive; see Gibbs CJ, A v Hayden ("ASIS Case"), No. [1984] HCA 67; (1984) 156 CLR 532 (High Court of Australia November 6, 1984).

[496] Hope, "General Report", "General Report," 26, para. 4.1.

[497] Sir John Donaldson MR, in Hope, "General Report," 30, para. 4.16.

of individual public servants applying their own judgement. Hope further considered that national security imperatives warranted the highest degree of protection of material handled by intelligence agencies.

The First Hope Royal Commission had concluded that NCND should continue to apply to ASIO except in "very special cases."[498] The Second Hope Royal Commission elaborated on this question, acknowledging that some external circumstances may prompt the question of "whether there should be some flexibility in regard to the practice that no comment is made about security matters."[499] Hope considered these circumstances could include the publication of inaccurate or misleading information about the activities of intelligence agencies (such as false allegations of misconduct of ASIO officers, which could affect agency morale). Hope concluded again that, in general, introducing flexibility or selectivity into the neither confirm nor deny principle was imprudent. Doing so, he considered, would make it impossible to in future "avoid public disquiet about allegations that are not dealt with, or indeed to avoid a belief by the public that the allegations not dealt with are true."[500] The Second Hope Royal Commission ultimately contended that maintaining NCND would best serve the national interest.

As a complementary principle, however, Hope outlined specific circumstances which would warrant considered disclosure rather than the maintenance of NCND. He considered these to include circumstances so serious "that to maintain silence would be to prejudice national security itself."[501] Were a disclosure to be made in such circumstances, Hope considered that the government should make clear that any "statement is not to be taken as an affirmation or denial of any other allegation which has been or may be published."[502] Hope considered that in such cases as Combe-Ivanov Affair:

> very careful judgment is required to avoid the obvious dangers of such disclosure. The ready answering of questions to which a response can be made without damage… may compound the difficulty of dealing with another question which raises more sensitive implications for national security.[503]

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[498] Robert Marsden Hope, "Fourth Report: Australian Security Intelligence Organization, Vol. 1" (Commonwealth (Austl.): Royal Commission on Intelligence and Security, 1976), 219, para. 460.

[499] Hope, "General Report", 7, para. 2.8.

[500] Hope, "General Report," 7, para. 2.9.

[501] Hope, "General Report," 7, para. 2.9.

[502] Hope, "General Report," 7, para. 2.8.

[503] Robert Marsden. Hope, "Report on the Australian Security Intelligence Organization" (Commonwealth (Austl.): Royal Commission on Australia's Security and Intelligence Agencies, December 1984), 338, para. 17.9.

Hope also considered that some aspects of ASIO's activities could be publicly disclosed without damage, and commended the desire to inform the public.[504] Hope's proposals in respect of considered and principled disclosure further contributed to the formalisation of 'avowal' as a practice.

Section 4.3.3: Oversight and disclosure

Hope made two significant findings on the oversight framework related to Australian national security agencies and how this should be improved. These implicitly engaged the scope of NCND, as they addressed the issue of providing public assurance about activities to which NCND applied. Firstly, he recommended the establishment of an independent office which would be empowered to conduct classified oversight of agencies, and make some degree of public comment about investigations and findings.[505] This would become the Inspector-General of Intelligence and Security (IGIS), whose position and office were put on a statutory basis with the enactment of the *Inspector-General of Intelligence and Security Act 1986* (Cth) *(IGIS Act*). Hope considered that while "the public's curiosity about the facts" would not always be satisfied by such a mechanism, it would ensure that "the public will know whether it can have confidence in the integrity of the security and intelligence services; and the interests of any individual who might be adversely affected will be protected."[506] While Hope proposed that the IGIS report to the Attorney-General, This nevertheless marked another small departure from the Westminster convention of individual ministerial responsibility, and the incorporation of different international models into the Australian national security framework to give it a uniquely national character.

Secondly, Hope considered the appropriateness of existing Parliamentary oversight arrangements, and whether they should be increased. Hope explicitly noted the role of NCND in the context of Parliamentary questioning, referring to the practice of "not commenting, that is of neither confirming nor denying any allegations of presumed allegations," and reiterated his recommendation from the First Hope Royal Commission that the practice continue except in exceptional cases.[507] In a strong endorsement of confidential bipartisan information sharing, however, Hope considered it "highly desirable" that the briefing of the Opposition continue, on the basis that "[m]atters of domestic security affect the interests of the nation and not just those of the government of the day. Yet out of necessity they must remain veiled from broad scrutiny

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[504] Hope, "Report on the Australian Security Intelligence Organization," 337, para. 17.8.

[505] Hope, "Report on the Australian Security Intelligence Organization," 335, para. 16.102.

[506] Hope, "General Report", 8, para. 2.10.

[507] Hope, "Report on the Australian Security Intelligence Organization", 337, para. 17.6.

because of an overriding requirement of secrecy."[508] Hope also noted arguments for extending this briefing to other non-government parties in Parliament, but did not recommend doing so. In making the distinction, Hope referred to the special status of the "official Opposition" as "the alternative Government," with the implication that this status uniquely entitled it to such information.[509] This conclusion had implications for the use of NCND by Australian governments. It not only endorsed the exceptionality of the Opposition with regard to NCND, but contended that this exceptionality went beyond a practical matter. While the Menzies-Whitlam-Fraser-Hawke years had demonstrated that changes of government inevitably reduced information asymmetry over time, on Hope reasoning, the bipartisan information sharing should be a matter of principle in Australia's system of government: the security interests of the nation "ought to transcend" partisan considerations.[510] In effect, the implication was that the government 'of the day' should refrain from using its executive discretion to invoke blanket NCND when engaging with the 'alternative' government.

While strongly in favour of bipartisan information sharing, Hope recommended against the establishment of a Parliamentary committee to provide additional oversight of the Australian intelligence and security framework. Hope considered that the right balance was struck with the establishment of the IGIS, and did not consider further parliamentary control (other than the accountability through Ministerial control and the questioning of Ministers) to be necessary.[511] However, the Hawke Government's ambitions for the oversight of Australian national security were greater than Hope's. The Government resolved to establish a Parliamentary Committee to provide further oversight of its activities in relation to domestic security. Its role would be distinct from that of the IGIS (which would consider complaints), and would "supplement, not replace, the arrangements already in place for official briefings on national intelligence and security matters, on a personal and confidential basis, to nominated members of the Opposition, an approach which Mr Justice Hope has endorsed."[512] Hawke advised that:

> The Government has given a great deal of consideration to the question. It has weighed His Honour's comments about the adequacy of existing oversight and accountability measures-particularly when supplemented by the new office of Inspector-General. The Government accepts that these measures will be improved by the creation of the Office of Inspector-General.

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508 Hope, "Report on the Australian Security Intelligence Organization," 339, para. 17.14.

509 Hope, "Report on the Australian Security Intelligence Organization," 340-341, para. 17.21.

510 Hope, "Report on the Australian Security Intelligence Organization," 340, para. 17.17.

511 Hope, "General Report", 25, para. 3.28.

512 Hawke, "Report and Ministerial Statement: Royal Commission on Australia's Intelligence and Security Agencies."

> Nevertheless, it believes a further improvement can be obtained by directly involving the Parliament-on both sides and in both Houses-in imposing the discipline of an external scrutiny of the intelligence and security agencies quite independent of the Executive. While the Government has been conscious also of the need to carefully protect intelligence and security information, it believes that appropriate arrangements can be made to ensure that a small but informed parliamentary committee would operate effectively in the public interest. It notes, in this regard, relevant overseas experience of parliamentary scrutiny of intelligence and security agencies.[513]

The PJCASIO was established in August 1988 following 1986 amendments to the *ASIO Act*.[514] The PJCASIO, to be composed of members representative of the political parties in Parliament, was empowered to review elements of ASIO's activities upon referral, and to report to both the Attorney-General and each House of Parliament on its findings. Notably, referral pathways were not restricted to the executive: while the Attorney-General could make referrals to the PJCASIO (including at the PJCASIO's request), matters could also be referred via a resolution of either House of Parliament. The new legislation also imposed penalties for the disclosure of evidence provided to the PJCASIO in private without certain authorisations. Reflecting the generally accepted scope of NCND, the legislation specifically excluded certain ASIO activities relating to foreign intelligence, intelligence collection methods or sources, and operationally sensitive matters. The Hawke Government's express intention to impose scrutiny from "both sides" of politics via the establishment of the PJCASIO was an important step not only in the maturation of intelligence and security oversight in Australia, but in the bipartisan relationship between the two major political parties on issues of national security.[515] As explored in forthcoming chapters, the PJCASIO would go through many iterations to become the PJCIS, its current iteration at time of writing.

The establishment of the IGIS and PJCASIO constituted a strong endorsement of the value not only of transparency but of accountability mechanisms in Australia's liberal democratic governance. Hope's view that the IGIS could support public confidence in Australia's intelligence and security framework and its integrity without necessarily satiating public appetite for extensive detail was effectively the same reasoning that underpinned the principle of independent review. However, where independent reviews were still initiated and scoped by the executive, the structure of the IGIS and PJCASIO as established by the Hawke Government incrementally ceded executive discretion through the creation of independent avenues of review. While the new legislation included strong provisions for the protection of national

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513 Hawke.

514 *Australian Security Intelligence Organization Amendment Act 1986* (Cth) (1986).

515 Hawke, "Report and Ministerial Statement: Royal Commission on Australia's Intelligence and Security Agencies."

security information (as had the *FOI Act*), they nevertheless subtly modified official secrecy policy by re-orienting the posture of executive control over national security information.

Conclusion

Australia came out of the 1974-1984 decade with a significantly matured public discourse about official secrecy. Fraser's continuation of the 'open government' reforms as envisioned by Whitlam marked a turning point in the level of bipartisanship on national security and reflected a growing domestic consciousness of what liberal democracy meant for contemporary Australia and the role of official secrecy within it. As accountability and transparency frameworks became more structured, so too did governments' commitment to and use of NCND. In repositioning the business of government towards default openness, the passage of the *FOI Act* in 1982 formalised the language and logic of NCND in the Australian context. Further, the Hope Royal Commissions' consideration of (and suggestion of caveats to) NCND injected greater structure into its application, further refining the inadvertent policy created under Chifley and refined under Fraser. While the overarching effect of this period was to enshrine greater rigour into the Australian national security landscape, it also importantly saw a 'vindication' of NCND as appropriate policy for Australia's liberal democracy.

The Hope Royal Commissions also marked the beginning of an ongoing series of independent reviews into Australia's national security framework, which are ongoing to this day (a practice that would be formalised following a recommendation of the 2004 Flood Inquiry[516]). While these reviews have not had a strictly consistent focus, their function as a check on Australia's national security framework remains the same. The embedding of such reviews into the practice of Australian national security became a crucial and expected element of the expression of liberal democracy in Australia.[517] The use of independent review also created a precedent for a basis for public policy change on the activities and functions of national security agencies, including the nascent practice of avowal. Where previous governments had relied on executive discretion for secrecy or taken an unstructured approach to disclosure, the Hope Royal Commissions acted as a circuit breaker. They provided an independent view on whether policies were appropriate, functional, and working as they should, and a clear and public basis for policy change, rather than appealing to public trust or pursuing reform only in the wake of scandals. In particular, Fraser's avowal of the existence of ASIS and DSD set an enduring precedent for considered and principled disclosure by Australian governments; one which would be imminently repeated by the Hawke Government, as discussed in the next chapter.

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[516] Flood, "Flood Report," 63, 185.

[517] Leuprecht and McNorton, *Intelligence As Democratic Statecraft*, 140, 145.

Hope also strongly endorsed bipartisan information sharing as a matter of principle, effectively recognising that the special status of the Opposition in Australia's system of government conferred exceptionality with regard to the use of NCND.

Critically, the deep consideration of these issues in the domestic public consciousness set the stage for an upcoming period of upheaval in its external relationships. This time, the pendulum would swing back to the criticality of Australia's international alliances beginning with the onset and peak of the ANZUS crisis in the 1980s. But, where in the late 1940s the US (and UK) had argued that Australia did not have a mature national security framework (as examined in Chapter 2), Australia had now been through two public reckonings on the framework and activities of its national security landscape, and had made tangible, public policy and legislative changes which injected rigour into not only the agencies themselves, but public confidence in and expectations of its national security framework. This would put Australia in a very different position to that of 1948 to engage again with its great and powerful partners.

Chapter 5: Evolution of Alliances (1984–1990)

This chapter explores how NCND policy was shaped by the evolution of Australia's primary international alliances towards the end of the twentieth century. In particular, it examines statements made by the Hawke Governments during this period. It proceeds in two parts. The first part considers the Hawke Government's successive avowals of the Australia-US Joint Defence Facilities (JDFs), which had previously been subject to NCND. The second part considers more closely Australia's conduct throughout two NCND-related crises of alliance, being the 1984 ANZUS crisis, and the drydocking controversy between 1983-89.

The Hawke Government's avowals of the JDFs in 1984 and 88 and the domestic position on drydocking expanded the form established by Fraser's avowal of ASIS. These avowals referenced negotiations with partners, specifically the US, as an essential pre-requisite to the decision to avow. They also strongly referenced public safety concerns. This evolution demonstrated that while Australia remained committed to accommodating its security partnerships, it was willing (and able) to broker compromises within them. The contemporaneous ANZUS crisis further complicated the context of these negotiations, and informed Australia's approach to bilateral engagement with the US and UK during this period.

The events of this period challenged and laid bare the extent to which Australia would accept an NCND stance from its allies in the context of its major security partnerships. Unlike in the events surrounding the establishment of ASIO, by the mid-1980s the increased sophistication of Australia's intelligence and security frameworks and oversight mechanisms positioned it more strongly to broker compromises with security partners on avowals. This chapter finds that while Australia had developed a stronger national policy agenda on official secrecy in the wake of the Hope Royal Commissions, in practice domestic policy was still strongly shaped by its major international alliances. However, this chapter also argues that Australia had become more willing to advocate for modifications to NCND in the context of these alliances where in the national interest.

Part 5.1: Avowals of the Joint Defence Facilities

Section 5.1.1: 1984 Statement

The first case study in this period is the avowal of the JDFs at Pine Gap and Nurrungar. Australia had entered into agreements with the United States in 1966 to establish the Pine Gap facility, and 1969 to establish the Nurrungar facility.[518] While the existence of the facilities was officially recognised, their purposes were originally subject to NCND; the official approach to public discussions of the JDFs was further complicated by their status as joint facilities with the US. Over the course of the 1980s, however, the Hawke Government renegotiated with the US the application of NCND to the facilities and made two major public statements on their roles and functions. These statements arguably constitute avowals. This case study demonstrates how Australian governments have historically both approached, evaluated and amended the use of NCND, and navigated the application of official secrecy policy within alliance structures. This provides further evidence for the ongoing evolution of NCND policy and its role in Australian liberal democratic governance, and the factors that have shaped this evolution.

By the early 1980s, official secrecy surrounding the role and functions of the JDFs had become a subject of public controversy. While the JDFs were known to be military bases operated jointly with the US, few public statements had been made about their role and function, fuelling concerns that their presence made Australia a potential target of Soviet aggression.[519] Official statements from successive Australian Governments about the facilities emphasised the need for secrecy; early statements had gone as far as deferring to the US judgement on the matter. For example, when asked on 1 May 1969 about prejudicing the security of the installations, then-Prime Minister John Gorton remarked "I would not urge the United States to make public any information *which the United States felt* would derogate from the usefulness of those installations."[520]

The Whitlam Government had taken a different position on the appropriate arbiter of secrecy surrounding the JDFs. When asked on 20 February 1973 whether the government would seek 'clearance' from the US before making any statements about Pine Gap, then-Acting Prime Minister Lance Barnard responded "This is not a matter for the United States Government. This is a matter for the Australian Government, and it will determine the issue since it's a joint Defence installation. I would regard it as a matter of courtesy that the statement, once it is cleared by the Government, should be available to them."[521] Pressed on the issue of consultation with the US, Barnard advised he would "not be getting in touch" with the US.[522]

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518 Ball, *A Suitable Piece of Real Estate*, 58.

519 Editors, "Australia - Reliable Ally or Client State?," *Woroni*, April 1, 1984; David Mosler and Bob Catley, *America and Americans in Australia* (Westport, Conn.: Praeger, 1998), 36–37, http://archive.org/details/americaamericans0000mosl.

520 John Gorton, "Transcript 2042: Departure Press Conference given by the Prime Minister, Mr John Gorton at Mascot Airport" (Department of the Prime Minister and Cabinet, May 1, 1969) (emphasis added).

521 Lance Barnard, "Transcript 2821: The Acting Prime Minister's Press Conference at Parliament House, Canberra" (Department of the Prime Minister and Cabinet, February 20, 1973).

522 Barnard.

Despite the stronger emphasis on domestic discretion, however, the Whitlam Government ultimately declined to state the purposes of the JDFs. In lieu of doing so, Prime Minister Whitlam instead sought to assure the Australian public that he had "quite satisfied" himself that to state the purposes "would be to render the function quite futile" and that the facilities were "not part of any weapons system."[523] Further, scarcely a month on from Barnard's strong enunciation of domestic discretion, Whitlam elaborated on 25 March that "We can not disclose any more about their purposes because they're not our secrets."[524] In the same statement, Whitlam alluded to the possible future release of further information, stating "I can assure you that when in due course it's regarded as proper to release the information as to what is done at Pine Gap and Nurrungar, you will find it…acceptable."[525] While this reference to future disclosures invoked the ideal of transparency, the implicit indefinite deferment maintained the controversial status quo of secrecy and failed to quell speculation.

On 19 October 1977, the Fraser Government had announced the extension of the original 1966 agreement between Australia and the US for a further 10-year period. Echoing Whitlam, Fraser also referred to his confidence in broad public support for the arrangements:

> I have referred to the importance of the facility; the House will know that for security reasons I cannot elucidate on this. I do want to say that a sound and co-operative relationship with the United States is fundamental to this Government's foreign and defence policies and that the Government and, I believe, the great majority of the Australian people welcome this opportunity to extend our collaboration with our American friends and allies.[526]

By 1980, this controversy came to a head with the publication of the key monograph *A Suitable Piece of Real Estate* by Professor Demond Ball, which was specifically dedicated to, "in addition to highlighting the absurdity of the government's secrecy policy,"[527] heightening public understanding of the characteristics and functions of US installations in Australia. This text identified Pine Gap and Nurrungar as particularly problematic, arguing that it was in relation to these facilities in particular that the "American lack of candour and the extraordinary Australian penchant for secrecy have taken extreme forms."[528]

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523 Gough Whitlam, "Transcript 2842: The Prime Minister's Conference at Parliament House, Canberra" (Department of the Prime Minister and Cabinet, March 6, 1973).

524 Gough Whitlam, "Transcript 2866: Address by the Prime Minister, the Hon EG Whitlam, to the Victorian General Assembly of the ALP, St Kilda Town Hall" (Department of the Prime Minister and Cabinet, March 25, 1973).

525 Whitlam.

526 Fraser, "Fraser, Ministerial Statement: Joint Defence Space Research Facility, Hansard (19 October 1977)."

527 Ball, *A Suitable Piece of Real Estate*, 19.

528 Ball, 20.

Against this context, the Hawke Government's 1984 election campaign platform had included a commitment to making a public statement about the role and functions of the JDFs. After being returned to government, on 6 June 1984 Prime Minister Hawke made statements about the role and functions of the JDFs, significantly advancing what Australian governments had previously been prepared to share publicly about the facilities. Hawke contextualised the role and functions of the JDFs within the broader security objectives of the US and its allies:

> Timely knowledge of developments that have military significance is very important and can be critical for the security of the US and its allies, including Australia. Effective deterrence and hence avoidance of conflict depend on this. Similarly, effective measures for military restraint and for the control and reduction of armaments depend upon reliable assessments of military developments. Arms limitation arrangements between the United States and the Soviet Union specifically provide for verification. The general purpose of the facilities that we operate at Nurrungar and Pine Gap with the Americans is to contribute to all of these objectives.[529]

Hawke went on to explicitly limit the scope of the avowal, and reiterate the commitment to secrecy beyond this scope:

> Among the functions performed are the provision of early warning by receiving from space satellites information about missile launches, and the provision of information about the occurrence of nuclear explosions, which assists in nuclear test ban monitoring and supports nuclear non-proliferation measures. Disclosures of other technical functions of the classified facilities would involve damage to both US and Australian interests and cannot be justified.[530]

Hawke also specifically referred to the fact that negotiations had taken place with the US Government, which had acceded "at its highest levels" to the issuance of the statement. Hawke expressed concern that:

> such a statement should not damage our own and our allies' interests and accordingly the Government does not intend to act unilaterally and in disregard of international assurances about preservation of secrecy given by our predecessors for over a decade. Nevertheless, there is a good deal that can be said to provide reassurance to the Australian people.[531]

This indicated that, while the Hawke Government maintained the priority of bilateral consensus within the US security partnership, it saw value in advocating for greater domestic transparency in Australia. Further, it indicated that the government was able successfully to broker agreement to that effect with its alliance partner regarding a shared matter of national security.

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[529] Hawke, "Hawke, Ministerial Statement: Arms Control and Disarmament, Hansard (6 June 1984)."

[530] Hawke.

[531] Hawke.

Section 5.1.2: 1988 Statement

While the 1984 statements eased some corners of national debate, they fuelled concerns that Australia, as a key part of the arms verification apparatus of the US and its Cold War allies, was a target of Soviet aggression. Speculation continued regarding the JDFs and, in November 1988, Prime Minister Hawke made a further statement to Parliament on the facilities. As part of this statement, Hawke avowed that Pine Gap collected intelligence data as part of arms verification and disarmament agreements, and that Nurrungar controlled satellites in the US Defence Support Program, providing early warning of intercontinental ballistic missile attack.[532] Again following the precedent of Fraser, Hawke reaffirmed commitment to “the practice of successive Australian Governments not to comment on intelligence matters.”[533] Hawke also explicitly ruled out divulging details relating to the intelligence capabilities of the JDFs, on the basis that their disclosure was not in the national interest.

The statement provided further context on the role of the facilities within broader national security policy, articulating the role of the facilities in the 1987 attainment of the Intermediate-Range Nuclear Forces Treaty, and the likelihood that they would be a critical element of the future Strategic Arms Reduction Treaty. The Prime Minister also spoke strongly on the role of the facilities and their “irreplaceable contribution” in ensuring global security and stability, particularly the pursuit of global peace, arguing that:

> I think it is important for those who have urged us over the years to close Pine Gap and Nurrungar to reflect on the undoubted fact that, had we done as they urged, the INF treaty could not have been signed and the START process would not have got under way. With the information now on the public record about the roles played by these facilities in preventing nuclear war, I think it is clear that nobody seriously committed to peace could argue for their closure.[534]

The official statements on the JDFs were not only significant in their character as avowals alone, but in what they indicated about the Australia’s relationship with its key security ally, and growing position as a national security partner in the alliance context. This was a noteworthy evolution, given the previously significant lack of US (and UK) confidence in Australia’s ability to appropriately manage secrecy surrounding shared matters of national security in the context of the establishment of ASIO (as examined in Chapter 4).

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[532] Hawke, “Ministerial Statement: Joint Defence Facilities.”

[533] Hawke.

[534] Hawke.

Part 5.2: Crises among allies

The second key dynamic unfolding in this period was a breakdown in the delicate international consensus that held together the logical core of NCND, and therefore the overall perceived effectiveness of the policy. Australia found itself on the frontlines of two such crises among allies; the ANZUS crisis with the US and New Zealand, and the controversy with the US and the UK over (and eventual Senate inquiry into) the safety risks of nuclear vessels visiting Australia. Australia's conduct during these events brought into strong relief its evolving approach to the practical application of NCND, and the function of official secrecy more broadly.

Section 5.2.1: *Spycatcher* (1986-8) and a test of alliance

In the midst of these international negotiations, the Hawke Government was again drawn into a legal dispute regarding the publication of sensitive information. On this occasion, however, the circumstances had a decidedly international tone, and would be an element in the test of Australia's relationship with the UK. The *Spycatcher* case was prompted by the attempted (and eventual) publication by Peter Wright, a retired MI5 officer, of his memoirs. Having been banned from publication in the UK on a court order obtained by the UK Thatcher Government in 1985, Wright sought publication in a number of other jurisdictions including Australia.[535]

The Thatcher Government sought similar orders in Australia, sending senior civil servant Sir Robert Armstrong, Secretary of the UK Cabinet, as representative. The UK had also been seeking through officials the Hawke Government's support in the case for several months.[536] While the Australian Government had in 1985 initially publicly stated the case was "essentially a matter for the British Government,"[537] it would reconsider the following year. On 3 November 1986, the Australian Security Committee of Cabinet considered advice from the Department of the Prime Minister and Cabinet (PM&C) that the Thatcher Government considered Australia's:

> support to be essential if they are to succeed, because the trial judge, Powell J, has…several times said in preliminary hearings that he understands and accepts that Wright's manuscript is of concern to British national security, but since he is judging in

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535 Grube, "Spycatcher Scandal."

536 "Cabinet Minute" (3 November 1986) in NAA: A14039, 4433, "Cabinet Memorandum 4433 - Proceedings to Prevent Publication of Books about Intelligence and Security Matters - Decision 8678/SEC" (1986), 4, NAA: A14039, 4433, National Archives of Australia Notably, parts of this archival document remain redacted at time of writing.

537 Gareth Evans, "Questions Without Notice: Freedom of Speech" (Senate Hansard: Commonwealth (Austl.), September 16, 1985).

> an Australian Court under Australian law, he wants the Executive to tell him if and how publication would affect Australia's public interest. Australian intervention may therefore be crucial to the outcome, and is so perceived by the British Government.[538]

On the point of the effect on Australia, PM&C's advice (prepared in consultation with the Attorney-General's Department, ASIO and DSD) elaborated that while Australian national security would not be directly threatened by publication, "the indirect effects could well be substantial and damaging."[539] The advice quoted the Director-General of Security in support:

> Failure by the Australian Government, and its intelligence community, and notably ASIO… to intervene in court against publication could well result in:
>
> (a) an erosion of the British goodwill through which Australia [redacted]…
>
> (c) a serious weakening of the Australian intelligence community's defences against Archives Act and FOIA demands, flowing from the precedent which would be drawn from the Government's evident lack of concern to protect shared intelligence secrets in the Wright case; and
>
> (d) an invitation, if not a legal precedent, to disaffected Australian officers to make similar public revelations…' There is agreement among officials from the relevant departments and agencies (PM&C and Attorney-General's, ASIO and DSD) that the Australian Government should support the British case, by filing and affidavit that affirms the broad general principle that security intelligence liaison is important to the public interest and would be damaged.[540]

The Minute attached a draft affidavit, to be sworn by PM&C Secretary Michael H Codd (who in 1994 would act as one of the Commissioners of the *Inquiry into the Australian Secret Intelligence Service*, as explored in Chapter 6). The Security Committee of Cabinet approved Codd's swearing of a redrafted affidavit the following week, having sought revisions to emphasise Australia's national security concerns first.[541] Despite the Hawke Government's intervention, the injunctions sought by the Thatcher Government were successfully resisted by then-barrister and future Prime Minister Malcolm Turnbull, appearing for the publisher. A challenge proceeded to the High Court of Australia. Though apparently "unmoved by the Australian Executive's claim" that the publication of *Spycatcher* was contrary to Australian interests, the High Court ultimately rejected the appeal on the basis that details of the matter dictated that it should

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538 NAA: A14039, 4433, "Cabinet Memorandum 4433 - Proceedings to Prevent Publication of Books about Intelligence and Security Matters - Decision 8678/SEC," 4.

539 NAA: A14039, 4433, "Cabinet Memorandum 4433 - Proceedings to Prevent Publication of Books about Intelligence and Security Matters - Decision 8678/SEC."

540 NAA: A14039, 4433, 5.

541 John Button, "Answers to Questions: Wright Case" (Senate Hansard: Commonwealth (Austl.), December 4, 1986).

have been dealt with via legislation (and therefore Parliament, rather than the Courts).[542] *Spycatcher* was published in Australia in 1988.

The publication ban in the UK was subsequently lifted in October 1988 on the ruling of five judges of the House of Lords.[543] The ruling considered that while "members and former members of the Security Service do have a lifelong obligation of confidence owed to the Crown," the information in question was "no longer secret" given its publication internationally.[544] One of the judges stressed that the conclusion was not based:

> upon any balancing of public interest nor upon any considerations of freedom of the press, nor upon any possible defences of prior publication or just cause or excuse, but simply upon the view that all possible damage to the interest of the Crown has already been done by the publication of *Spycatcher* abroad and the ready availability of copies in this country.[545]

The *Spycatcher* affair drew together several threads of Australia's approach to official secrecy in the 1980s. It demonstrated that Australian intelligence and security agencies were significantly exercised by the status of their international relationships, and the possibility that failing to resist one unauthorised disclosure would extend an 'invitation' to more. The Hawke Government's apparent change of heart in joining the case demonstrated that it was receptive to these arguments, despite explicit advice from intelligence and security agencies that there existed no direct threat to Australia's national security.

Section 5.2.2: ANZUS Crisis

In parallel with navigating the UK security relationship and domestic implications of unauthorised disclosures as part of the *Spycatcher* affair, NCND remained a live issue for the Hawke Government in the US security partnership. Having pursued greater transparency surrounding the JDFs bilaterally, Australia found itself in the midst of growing unrest between its two ANZUS partners. Primarily a dispute between the US and New Zealand, the ANZUS crisis arose from the conflict between New Zealand's anti-nuclear public sentiment (later formalised in government policy) and the US' NCND stance in relation to nuclear-capable warships, which

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[542] Matthew Howard, "Spycatcher Downunder: Attorney General for the United Kingdom v. Heinemann Publishers Australia Note," *University of Western Australia Law Review* 19, no. 1 (1989): 167, 169.

[543] Jane E. Kirtley, "The Law Lords Take a Detour: Chapter Two of the Spycatcher Saga," *Government Information Quarterly* 7, no. 1 (January 1990): 53–58, https://doi.org/10.1016/0740-624X(90)90006-A.

[544] *Attorney General v Guardian Newspapers Ltd* (No 2), No. [1987] 1 WLR 776 (United Kingdom House of Lords October 13, 1988).

[545] *Attorney General v Guardian Newspapers Ltd* (No 2).

ultimately saw the Reagan Administration suspend the US' ANZUS obligations towards New Zealand in 1986.[546]

In 1984 the New Zealand Government, led by Prime Minister David Lange, passed legislation declaring its territories to be a nuclear-free zone, requiring all visiting ships to confirm the absence of nuclear weapons. This stance was incongruous with US defence policy, which operated explicitly as a nuclear umbrella and relied on the logic of NCND for its effectiveness. As outlined in Chapter 1, the US had publicly espoused the logic of NCND and stated that it was committed to preserving the logical core above all other concerns.

Despite extensive diplomatic attempts to resolve the issue and preserve the relationship, both the New Zealand and the US governments gave indications that any compromise of their respective positions would be viewed as undermining the fundamental premise of their policy. This created a impasse that threatened the logical core of NCND, being that its effectiveness in creating strategic ambiguity relied on unbroken application. The Reagan Administration argued that its warships could not visit New Zealand if this carried any implication that the relevant warship was not nuclear armed (amounting to a confirmation), and specifically stated that it would not provide any assurances to New Zealand, and that New Zealand was itself not to provide any assurances (private or public) that it had been advised of the nuclear status of the warship. The US also feared a 'domino effect' of bowing to New Zealand's policy, with Reagan Administration officials reported by the *New York Times* on 14 February 1985 as stating "Unless we hold our allies' feet to the fire over ship visits and nuclear deployments, one will run away and then the next."[547] New Zealand, on the other hand, argued that it could not consider itself nuclear-free while allowing US warships (of inherently ambiguous nuclear status under the blanket NCND policy) in its territory, given that the US had also specifically stated publicly that it would not be giving New Zealand any assurances as to the nuclear status of the ships.

This impasse was not, however, unique to New Zealand and the US. Similar apparent policy conflicts had arisen between the US' NCND stance and other friendly nations, such as Denmark and Japan, which had reached diplomatic conclusions based in acceptance of ambiguity.[548] While this appeared to offer some precedent for a possible resolution of the issue, this was ruled out by both major parties in New Zealand politics. Shortly after defeating the

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[546] Pugh, *The ANZUS Crisis, Nuclear Visiting and Deterrence*.

[547] Gelb, "U.S. Tries to Fight Allied Resistance to Nuclear Arms"; Kristensen, "The Neither Confirm Nor Deny Policy: Nuclear Diplomacy at Work," 31; Andrew Mack, "'Nuclear Allergy' in the South Pacific," *The Pacific Review* 2, no. 4 (January 1, 1989): 328, https://doi.org/10.1080/09512748908718832.

[548] Olesen, "Tango for Thule: The Dilemmas and Limits of the 'Neither Confirm Nor Deny' Doctrine in Danish-American Relations, 1957-1968."

Lange Labour Government in 1990, the National Party addressed the ANZUS crisis, with Minister of Foreign Affairs Don McKinnon arguing that while New Zealand's "security interests in the South West Pacific certainly do involve the United States and Australia… I don't believe it'll be a diplomatic sleight of hand and I've said that things like the Danish solution and the Japanese solution are not relevant to New Zealanders."[549] This appeared to rule out a solution based in constructive ambiguity.

The UK, another of New Zealand's nuclear-armed security partners, was following the crisis closely. Archival records demonstrate that the UK Government's internal reporting on the issue was specifically concerned with the costs of the impasse on all parties. The British High Commission in Wellington reported back to the Foreign Office in February 1990 on the reduction of influence New Zealand had experienced due to its commitment to being nuclear-free, noting: "Mr Lange and his government were guilty of trivialising the serious issues raised by their non-nuclear policy, the consequence of which has been to exclude New Zealand from influence…to ensure that it has no effective say in the current disarmament negotiations."[550] However, it noted that the overall detriments accrued to all parties, particularly including Australia:

> we also face a paradox in handling the New Zealand non-nuclear issue. Unless we keep up pressure and make the policy hurt there will be little incentive to change it (and less disincentive to third countries to follow the New Zealand pattern). But if the embargo is prolonged and thorough-going, as the American one is, it can only serve to reduce over time the effectiveness of the New Zealand armed forces: and so long as it seems likely to do, the effectiveness of its small armed forces is of some interest to us – and of considerable interest to the Australians with whom we cooperate.[551]

The UK's focus on the risks to the international relationship constituted a markedly different framing from the bold and intransigent positions of its allies at the heart of the crisis. This indicated that, while the UK both publicly and privately shared the US' commitment to the principle of NCND, it was keenly aware of the costs associated with the preservation of the logical core above all else.

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[549] Transcript, "Interview with Minister for Foreign Affairs on RNZ Checkpoint Programme on 8 November 1990" (12 November 1990), in TNA: FCO 46/7388, "Neither Confirm Nor Deny (NCND) Policy: Possible Visits by Royal Navy Nuclear-Capable Warships to New Zealand," 1990, 4–5, The National Archives (UK).

[550] Correspondence from Byatt to Beamish, Foreign and Commonwealth Office, Subject: New Zealand Nuclear Policy (9 February 1990), in TNA: FCO 46/7388, 22.

[551] Correspondence from Byatt to Beamish, Foreign and Commonwealth Office, Subject: New Zealand Nuclear Policy (9 February 1990), in TNA: FCO 46/7388, 22.

Section 5.2.3: Senate Inquiry into Visits by Nuclear Vessels

On a much smaller scale, the issues at the heart of the ANZUS crisis were also arising in Australia regarding its allies' NCND policies. US and UK warships routinely visited Australian ports, and were regularly met with protest activity. While the Hawke Government's negotiations with the US over statements relating to the JDFs indicated that the US could be willing to modify some applications of NCND under the right circumstances, the ANZUS crisis had freshly tested and made clear the limits of that willingness. The issue that brought Australia's stance on NCND to a head was the drydocking of US and UK nuclear-capable ships in Australian ports. The drydocking of nuclear capable ships was ultimately scrutinised via an *Inquiry into Visits to Australia By Nuclear Armed or Powered Vessels* by the Senate Standing Committee on Foreign Affairs, Defence and Trade (Senate Inquiry).[552] The Senate Inquiry reported in 1989 and provided a degree of resolution at the political level, in contrast to the trajectory of the ANZUS crisis.

As early as December 1983, the Hawke Government had refused to allow a UK warship, HMS Invincible, to drydock to complete repairs as "The [Commanding Officer] had refused to confirm or deny the presence or absence of nuclear weapons onboard, and the absence of a denial posed the possibility that the drydocking of the INVINCIBLE might contravene…policy not to allow nuclear weapons on Australian soil."[553] The HMS Invincible had determined not to drydock in Australia rather than modify its NCND stance. Following the controversy, the UK Foreign Office internally noted that the Australian Government was "If necessary… prepared to use Naval labour and management staff to complete necessary work"[554] on a foreign warship to which NCND applied, and regarded this positively as a "price [the Australian Government] is prepared to pay in the interests of its alliance relationship."[555]

Despite the Australian Government's broadly accommodating stance towards US and UK warship visits and their ambiguous nuclear status, by 1988 anti-nuclear protest activity

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[552] Senate Standing Committee on Foreign Affairs, Defence and Trade, "Report of the Inquiry into Visits to Australia by Nuclear Powered or Armed Vessels: Contingency Planning for the Accidental Release of Ionizing Radiation" (Commonwealth (Austl.), 1989).

[553] Attachment to Memorandum, Taylor, US Department of the Navy, to Campbell, Australian Naval Attache, Subject: Emergency Drydocking of USN Ships in the Australian Drydocks (2 August 1990), in TNA: FCO 46/6753, "Neither Confirm Nor Deny (NCND) Policy," 82.

[554] Attachment to Memorandum, Taylor, US Department of the Navy, to Campbell, Australian Naval Attache, Subject: Emergency Drydocking of USN Ships in the Australian Drydocks (Undated: Presented 25 October 1989), in TNA: FCO 46/6753, 86.

[555] Attachment to Memorandum, Taylor, US Department of the Navy, to Campbell, Australian Naval Attache, Subject: Emergency Drydocking of USN Ships in the Australian Drydocks (Undated: Presented 25 October 1989), in TNA: FCO 46/6753, 86.

surrounding naval visits had become a significant disruption, described by the UK Foreign Office as "unhappy and embarrassing."[556] The UK Foreign Office noted internally that:

> Problems were encountered in September last year when the ships of the OUTBACK 88 Task Group Visited Australia. The union blacking [sic] of ships which were considered to be nuclear capable created considerable public backlash, and the Australian Government was forced to step in to prevent further disruption of visits… Parallel problems arose when it appeared that HMS EDINGBURGH would require dry-dock facilities in Sydney. Ostensibly on safety grounds, the Australians sought assurances over de-ammunitioning that would have breached NCND.[557]

Further, by 1989 the Australian Government had begun prohibiting nuclear-capable vessels from visiting certain ports for any reason. Internal UK Ministry of Defence correspondence noted that "[o]n 13 December, the federal government announced a ban on nuclear powered or armed ships visiting Hobart... The ban would stop all American warships visiting Hobart because they would neither confirm nor deny they carried nuclear weapons."[558] In the midst of the increasingly high profile of ship visits, the UK Government issued the following guidance to Commanding Officers (COs), which included a specific form of words espousing NCND:

> Purpose of NCND: (2) NCND is designed to:
>
> - complicate the targeting calculations of potential enemies;
> - complicate the threat assessments of potential enemies;
> - avoid attracting terrorists to particular ships;
> - avoid attracting ANDs to particular ships.
>
> NCND has been the policy of every British Government since… the late 1950s. It is also the policy followed by the United States and France. We would cancel a visit rather than compromise NCND. It is essential that this form of words be followed exactly. This applies not only to public statements (to the Press, for instance), but also to private statements. It should be remembered that NCND is Government policy and can be altered only by Government decision. COs do not have discretion to vary the policy.[559]

This internal UK policy had significant implications for Australia's own posture on NCND as it applied to nuclear-capable vessels. Notably, the guidance specifically instructed COs to

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556 Correspondence from Mackley to Yarnold, Foreign and Commonwealth Office, Subject: Australia: RN Ship Visits (10 May 1990), in TNA: FCO 46/7390, "Neither Confirm Nor Deny (NCND) Policy: Possible Visits by Royal Navy Nuclear-Capable Warships to Australia," 1990, 37, The National Archives (UK).

557 Brief for US/UK POL MIL Talks on 19 October: Ship Visits and NCND (Undated: Received 26 October 1989), in TNA: FCO 46/6753, "Neither Confirm Nor Deny (NCND) Policy," 29.

558 Correspondence from Coles to Brown, Foreign and Commonwealth Office, Subject: Tasmania: October-December 1989, containing extract of letter from Brown to Coles, 15 January 1990 (19 January 1990), in TNA: FCO 46/7390, "Neither Confirm Nor Deny (NCND) Policy," 45.

559 Memorandum, McClelland, Ministry of Defence, Subject: Anti-Nuclear Demonstrations Against HM Ships – Guidance to Commanding Officers (6 July 1990), in TNA: FCO 46/7387, "Neither Confirm Nor Deny (NCND) Policy," 1990, 15, The National Archives (UK).

maintain the specific wording even in private; this explicitly scoped out any abrogation of NCND even in the context of confidential discussions with security and defence allies. Given the extensive existing enmeshment between the Australian and UK intelligence apparatus, the UK's rationale for this was unlikely to be a fundamental lack of trust in its discretion and information security. Instead, this stance appeared to be aimed at preserving the logical core of NCND, and thereby strategic ambiguity as to the nuclear-armament status of warships. The UK Foreign Office went further, issuing instructions that:

> In all cases, it is essential also that the HOST AUTHORITIES are careful not to make statements which would embarrass us. For instance, they should not make statements which might give the impression that they know – or have reason to believe – that a ship is carrying or not carrying nuclear weapons… if you discover that the host authorities are planning to say…anything which goes beyond what we would say, every effort should be made to forestall this: as a general guide, we would insist, courteously but firmly, that our hosts be prepared to say that they are aware that our policy is NCND, and…make it clear that no assurances relating to the carriage or non-carriage of nuclear weapons have been given by the UK.[560]

Against the backdrop of the ongoing dispute with New Zealand, the UK Government internally expressed concerns that the report of the Senate Inquiry would contain recommendations that would make visits by UK warships to Australia untenable, such as requiring assurances of the nuclear status of the ships (as occurred with HMS Edinburgh in October 1988) or requiring that ships be inspected by the host country.

By 1989, the UK High Commission in Australia briefed the UK Foreign Office that Australia was considering a policy position on drydocking that would apply to both the UK and US. The instructions from the UK Foreign Office were that a visit would be cancelled rather than permitted "to go ahead under circumstances which entailed an erosion of NCND."[561] It reaffirmed that the purpose of NCND was "to ensure that any potentially hostile power, or a terrorist group should have no help in identifying which of our ships should be selected as priority targets."[562] Alluding closely to the logical core of NCND, the UK Foreign Office argued that "Denying the presence of nuclear weapons is as unacceptable as confirming it," as "otherwise it would soon become apparent that ships unable to issue a denial were carrying them."[563] In

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[560] Memorandum, McClelland, Ministry of Defence, Subject: Anti-Nuclear Demonstrations Against HM Ships – Guidance to Commanding Officers (6 July 1990), in TNA: FCO 46/7387, 16.

[561] Correspondence from Dart to Fisher, Foreign and Commonwealth Office, Subject: Ship Visits and NCND ([11] October 1989), in TNA: FCO 46/6753, "Neither Confirm Nor Deny (NCND) Policy," 3.

[562] Correspondence from Dart to Fisher, Foreign and Commonwealth Office, Subject: Ship Visits and NCND ([11] October 1989), in TNA: FCO 46/6753, 3.

[563] Correspondence from Dart to Fisher, Foreign and Commonwealth Office, Subject: Ship Visits and NCND ([11] October 1989), in TNA: FCO 46/6753, 3.

relation to a feared requirement for warships to submit to inspections, the UK Foreign Office stated that:

> For the same reason we could not submit our ships to a formal assessment by any other government to determine whether or not they are carrying nuclear weapons. Even if the result of any such assessment was not announced publicly, the knowledge that such an assessment had taken place would permit the conclusion to be drawn that a ship was not carrying nuclear weapons. This would thereby compromise our NCND policy.[564]

While it remained the UK Foreign Office's judgement that public statements by the then-Australian Minister for Defence Kim Beazley could be taken as reaffirmations of the commitment to defence alliances with the US and UK,[565] it also specifically advised its diplomats in Canberra to avoid raising the issue with Australia:

> Obviously this is not a subject you should seek to discuss with host government ahead of visits by RN ships if there is any risk that this would prompt them to assert a non-nuclear line which could cause us difficulty. You should report immediately at the least sign that problems are brewing over NCND. Time is valuable if we need to consider how a formula might be prepared to get around any potential difficulty."[566]

The Senate Inquiry made 39 recommendations, the majority of which dealt with safety procedures relating to port visits by nuclear-capable vessels. Ultimately, only one recommendation was of particular interest to the UK and US, though neither nation pressed the point publicly with Australia. Recommendation 37 proposed that:

> no dry-docking of nuclear weapons capable vessels be permitted unless <u>either</u> the vessel has been de-ammunitioned outside Australia <u>or</u> it can be guaranteed that the level of safety is at least as high as that for vessels berthed alongside a wharf, as it the normal practice.[567]

This "either/or" recommendation specifically applied to nuclear weapons-capable vessels, to which (in the case of US and UK vessels) NCND would in turn apply. On its face, the first option to de-ammunition would not logically be compatible with NCND, as providing any sort of assurance that vessels had been de-ammunitioned was tantamount to confirming that they were not nuclear-armed. The second option, guaranteeing an equivalent or higher level of safety than that for vessels berthed alongside (the standard practice), was therefore only

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[564] Correspondence from Dart to Fisher, Foreign and Commonwealth Office, Subject: Ship Visits and NCND ([11] October 1989), in TNA: FCO 46/6753, 3.

[565] Cable, Ministry of Defence to Foreign and Commonwealth Office, Subject: Drydocking of Nuclear Ships in Australia (25 October 1989), in TNA: FCO 46/6753, 18.

[566] Correspondence from Dart to Fisher, Foreign and Commonwealth Office, Subject: Ship Visits and NCND ([11] October 1989), in TNA: FCO 46/6753, 4.

[567] Senate Standing Committee on Foreign Affairs, Defence and Trade, "Report of the Inquiry into Visits to Australia by Nuclear Powered or Armed Vessels: Contingency Planning for the Accidental Release of Ionizing Radiation," xvii. Emphasis original.

viable option for US and UK nuclear-capable vessels visiting Australia. The issue of logic was not lost on the UK and US. Australia's major security partners took different views of the recommendation, though both considered internally (and were prepared to state externally) that Recommendation 37 was compatible with NCND. Internal UK correspondence indicated that:

> The Americans see no problem with the fact that Recommendation 37 is set explicitly in the context of nuclear capable ships (para 5A of our Telno 1663). They consider that definition to cover ships that have the capability to deliver nuclear weapons: and they argue by extension that to admit that a ship is non-nuclear-capable does not preclude the possibility that it may be transporting nuclear weapons. NCND, they maintain, is thus preserved. The British approach is simpler: we refuse to discuss whether a ship is nuclear capable, however defined.[568]

While UK Ministers "specifically endorsed the idea that we concert our response to the report with the Americans,"[569] (and the Foreign Office's view that the UK should engage promptly with Australia on drydocking issue "lest Mr Beazley unwittingly says something unhelpful"[570]), the US did not seek to coordinate with the UK on a formulation of words ahead of agreeing them with Australia, which the UK regarded as a "pity".[571]

Ultimately however, the issue was again one of consensus. If Australia and its partners were to accept that NCND was compatible with Recommendation 37, the impasse would not arise. As the US reasoning indicates, all parties appeared motivated to find a consensus that would allow safety guarantees to be provided without breaching NCND. This would position all parties to assert that the policies were compatible. However, it appeared that even as the bureaucracies were seeking formulations to construe that Recommendation 37 and NCND were compatible, both the US and UK were internally questioning how the safety assurances of option two could even be met: "[Siefkin] will have to put these and the question of whether the US could "give a guarantee that any dry docked vessel is at least as safe as one berthed alongside" to his US Navy experts neither he nor I are aware of what this would mean in practice."[572]

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568 Cable, Ministry of Defence to Foreign and Commonwealth Office, Subject: Drydocking of Nuclear Ships in Australia (25 October 1989), in TNA: FCO 46/6753, "Neither Confirm Nor Deny (NCND) Policy," 19.

569 Handwritten Annotation by Noakes on Draft Letter, Sawyer to Buchanan, Foreign and Commonwealth Office, subject: Drydocking of Nuclear Ships in Australia (14 September 1989), in TNA: FCO 46/6753, 78.

570 Correspondence from Sawyer to Buchanan and Patey, Foreign and Commonwealth Office, subject: Drydocking of Nuclear Ships in Australia (14 September 1989), in TNA: FCO 46/6753, 75.

571 Cable, Foreign and Commonwealth Office, Subject: Drydocking of Nuclear Ships in Australia (5 October 1989), in TNA: FCO 46/6753, 40.

572 Correspondence from Buchanan to Sawyer, Foreign and Commonwealth Office, Subject: Drydocking of Nuclear Ships in Australia (20 September 1989), in TNA: FCO 46/6753, 70.

Informed by the overarching difference in foreign policy objectives, the distinction with the New Zealand case appeared to be semantic; New Zealand's presupposition and public assertions that its policies were incompatible with NCND ensured their incompatibility, whereas Australia was open to a more nuanced interpretation of the challenge, and therefore to alternative resolutions. The UK Foreign Office noted that "the Lord President raised the question of ship visits. Senator Ray responded that the problem was not visits but the dry docking of Royal Navy ships. The Australians were still trying to work out conditions for dry docking, but they were quite clear that they welcome vessels to ports."[573] The UK Foreign Office also instructed its Canberra diplomats to "Please try to get from him [Beazley] a private assurance that we would always be allowed to take the second option (which we could, if necessary, accept)."[574] They also requested that the Canberra High Commission:

> propose the following draft public statement for the contingency use by both sides in the event of the drydocking of RN ships in Australia: quote the United Kingdom Government has confirmed that the preparations made by the Royal Navy for the drydocking of HMS… meet the Royal Australian Navy's technical safety requirements for explosive ordnance as set out in RAN ABR 862. Unquote. That is, of course, similar to the US-Australian formulation.[575]

The internal (and proposed to be external, if necessary) suggestion that Recommendation 37 was consistent, or did not interfere, with NCND provides insight into the evolution of the use of NCND policy. It also demonstrated an alternate resolution to the circumstances of the ANZUS crisis.

Conclusion

While Australia had developed a stronger national policy agenda on official secrecy in the wake of the Hope Royal Commissions, its contours were still being refined. In practice, official secrecy policy was still strongly influenced by major international alliances, which were central to the government of the day's considerations and judgement. This came to a head during the 1980s, during which Australian governments pursued and achieved US support to advance national security transparency, even as the US retreated from its other ANZUS alliance partner, New Zealand.

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573 File Note, Lord President's call on Senator Ray, 22 August 1990 (copy received 8 October 1990), in TNA: FCO 46/7390, "Neither Confirm Nor Deny (NCND) Policy," 15.

574 Cable, Ministry of Defence to Foreign and Commonwealth Office, Subject: Drydocking of Nuclear Ships in Australia (25 October 1989), in TNA: FCO 46/6753, "Neither Confirm Nor Deny (NCND) Policy," 19.

575 Cable, Ministry of Defence to Foreign and Commonwealth Office, Subject: Drydocking of Nuclear Ships in Australia (25 October 1989), in TNA: FCO 46/6753, 19.

This demonstrated a continued propensity of Australian governments (of both sides of politics) to consistently advance what they were prepared to say publicly about national security. Notably, the avowals made by the Hawke Government, repeating the three ‘elements’ of avowal established by Fraser, and specifically referenced evolving security threats and contexts, negotiations with security partners, and public safety. This added to the precedents on which national security matters would be avowed by future Australian governments.

Chapter 6: Turn of the Millennium (1990–2005)

The turn of the millennium saw a whiplashing security environment, with global tensions easing at the end of the Cold War only to rise again with the terrorist attacks of September 11. This had a profound effect on Australia's approach to official secrecy, prompting very different responses from the Keating and Howard Governments. This chapter observes that circumstances of both increased and decreased security threats were associated with the continued refinement of official secrecy policy, including avowal, further demonstrating the increasing complexity of the relationship between secrecy and security. Notably, this chapter finds that this period also saw the use of NCND continue beyond the Cold War environment in which it was first adopted by the Chifley Government. This indicated that Australian governments saw the principle as independent of its originating security context.

This chapter proceeds in two parts. The first part examines the transparency and accountability reforms pursued by the Keating Government in response to the post-Cold War security environment and waning public mandate for security measures, particularly in connection with the Samuels and Codd inquiry into ASIS. Commissioned by the Keating Government following a series of unauthorised disclosures in the media, the Samuels and Codd inquiry continued the precedent of independent review, and made several recommendations in relation to official secrecy. Broadly, Samuels and Codd supported the continuing need for secrecy surrounding ASIS in general, but argued for more transparency consistency across ASIS and ASIO (the latter of which had been on a statutory footing since 1956, as discussed in Chapter 3).

Early in the new millennium, global tensions mounted again in the wake of the September 11 attacks in the US, which precipitated a raft of terror legislation across many nations, including Australia. The second part of this chapter examines the passage of the *IS Act* (and the crystallisation of the oversight framework with which we are familiar today) under the Howard Government, and the subsequent Flood Inquiry. The early millennium also saw the specific threat of unauthorised disclosure re-enlivened through the attempt of former intelligence officer to sell information to a foreign power, prompting the Howard Government to enact legislation for the protection of national security information in the context of legal proceedings.

Part 6.1: Transparency and accountability frameworks

As the imperative to look globally and invest in international alliances eased with the end of the Cold War, the early 1990s saw renewed public scrutiny of Australia's intelligence and security frameworks. Over the course of the decade, this resulted in further advances in what Australian Governments would say publicly about national security matters, as well as legislative reforms that would enshrine additional transparency and accountability measures.

Section 6.1.1: The Gibbs Review, harm, and whistleblowers

One aspect of the evolution of official secrecy during this period related to its structure in legislation. In 1987, the Hawke Government had established a comprehensive review of Commonwealth criminal law, with the aim of codifying such law on a more principled and structured basis (the Gibbs Review). The review was undertaken by a committee led by former Chief Justice of the High Court, the Rt Hon Sir Harry Gibbs GCMG AC KBE, and delivered its final report in December 1991.[576] While the focus of the Gibbs Review was consistency in the principles of criminal responsibility, it also considered the categories of offences, including offences relating to the unauthorised disclosure of official information. Part V of its *Final Report* dealt with the existing Australian law, comparable laws among the Five Eyes, and protections for whistleblowers.[577] The framing of Australia's offences (and, conversely, certain protections) for unauthorised disclosure interacted with Australian governments' use of NCND by effectively broadening (or narrowing) executive discretion to reveal or conceal, and therefore to maintain an NCND footing.[578] While a number of the review's recommendations would not be addressed in legislation until the new millennium (in the context of the security reforms discussed in the second part of this chapter), the issues raised further refined the context in which Australian governments approached official secrecy and used NCND.

The Gibbs Review considered that, across public discourse on unauthorised disclosures (and particularly in the context of the *Fairfax* proceedings), that broad consensus existed on three principles. These were that, in a democratic society, "restraint on the public of information relating to the Government" was not warranted where the only harm of disclosure damage would be public discussion and criticism of the government; that criminal law should not apply to the disclosure of *all* kinds official information; and that criminal law should apply to the disclosure of *some* kinds of official information.[579] The Gibbs Review recommended a modified version of the UK *Official Secrets Act 1989* (*Official Secrets Act 1989* (UK), which by that time had replaced the original *Official Secrets Act 1911* (UK)), which limited offences to narrowly

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[576] Harry Gibbs, R Watson, and A Menzies, "Final Report (Together with an Accompanying Paper by the Attorney General)" (Commonwealth (Austl.): Review of Commonwealth Criminal Law, December 1991).

[577] Gibbs, Watson, and Menzies, pt. V.

[578] Gibbs, Watson, and Menzies, pt. V. For a discussion of the framing of Australia's secrecy offences, see in particular chapters 25, 31-32, and 34.

[579] Gibbs, Watson, and Menzies, 233.

described categories of information, and in many cases required the prosecution to prove damage resulting from disclosure.[580] Notably, the modifications to the UK legislation referenced by the Gibbs Review were aimed at, in the context of a modern democratic society, "the public having access to as much information as to the workings and activities of the Government as is compatible with the effective functioning of Government."[581] These included defences for whistleblowers, as examined below.

The Gibbs Review was persuaded by the conclusion of the Hope Royal Commissions, including Hope's observation that "the disclosure of secrets…can result in just as much damage to the national interest as can result from espionage or sabotage."[582] The Gibbs Review concluded that existing Australian law did not sufficiently protect against harm to the public interest resulting from unauthorised disclosures. Nevertheless, the Gibbs Review concluded that the existing 'catch-all' secrecy offences at sections 70 and 79 of the *Crimes Act* were inappropriate, and should be replaced with more narrowly-framed offences applying to specific categories of information.[583] Submissions from government agencies to the Gibbs Review regarding the framing of these categories provide insight into the evolving considerations of government regarding official secrecy. Agencies argued against framing these categories in excessive detail, on the basis that "today's specific descriptions of information of particular sensitivity may not necessarily apply tomorrow," and that the creation of detailed categories (or their future invocation in prosecutions) may itself disclose sensitive information.[584]Notably for this thesis, these arguments acknowledged that the sensitivity of information is not static but context-dependent, and may change over time or based on other pieces of information available.

Ultimately, the Gibbs Review recommended the offences at section 70 and 79 of the *Crimes Act* be repealed and replaced with offences applying to "specific categories of information no more widely stated that in required for the effective functioning of Government."[585] These categories, it determined, should include information relating to the intelligence and security services, defence, foreign relations; information obtained in confidence from foreign governments and international organisations; and information the disclosure of which gives

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580 Gibbs, Watson, and Menzies, 234.

581 Gibbs, Watson, and Menzies, 234.

582 Robert Marsden Hope, "Report on the Australian Security Intelligence Organization" (1983), para 9.26, cited in Gibbs, Watson, and Menzies, 297.

583 Gibbs, Watson, and Menzies, 317; John McGinness, "Secrecy Provisions in Commonwealth Legislation," *Federal Law Review* 19, no. 1 (March 1990): 89, https://doi.org/10.1177/0067205X9001900103.

584 Gibbs, Watson, and Menzies, "Final Report," 308.

585 Gibbs, Watson, and Menzies, 331.

rise to other specified circumstances related to criminal offending.[586] These recommendations were not implemented by government, and the section 70 and 79 *Crimes Act* offences remained in place until their repeal in 2018 with the passage of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (*EFI Act*). The *EFI Act* would create new offences at Part 5.6 of the Commonwealth Criminal Code (schedule to the *Criminal Code Act 1995* (Cth)).[587] The *EFI Act* also introduced the concept of 'inherently harmful information,' on which the new offences were premised, being information that is security classified; obtained or produced by a domestic or foreign intelligence agency (or on their behalf); or pertaining to certain aspects of domestic or foreign law enforcement agency operations.[588]

Harm

The question of harm was specifically addressed by the Gibbs Review, which considered the appropriateness of requiring prosecutions to prove harm resulting from unauthorised disclosures of information as part of the framing of offences. The Gibbs Review concluded that proof of harm should be required for certain categories of information. However, the Gibbs Review accepted that a proof of harm should not be required in all cases, concluding it reasonable, for example, for members of the intelligence and security services to be subject to a "lifelong duty of secrecy as regards information obtained by virtue of his or her position."[589] Further elaborating on the issue of harm, the Gibbs Review considered the question of preventative civil measures against disclosure. Speaking directly to Mason J's view in the *Fairfax* proceedings that the use of injunctions to restrain breaches of criminal law was "exceptional" (as examined in Chapter 4), the Gibbs Review noted that Mason J's statement only applied "in the absence of relevant statutory provisions," citing precedent for such statute.[590] The Gibbs Review recommended the creation of statutory provisions enabling injunctions in respect of threatened breaches of secrecy offences, which would also be subject to a requirement to prove harm.[591] Though the question of harm remains a live issue at time of writing, the Gibbs Review nonetheless consolidated and advanced many of the considerations which continue to inform contemporary debate.[592]

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[586] Gibbs, Watson, and Menzies, 327.

[587] National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (Cth).

[588] These provisions were very recently reviewed by the INSLM; see Blight, "Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995."

[589] Gibbs, Watson, and Menzies, "Final Report," 323.

[590] Gibbs, Watson, and Menzies, 327.

[591] Gibbs, Watson, and Menzies, 327.

[592] See Blight, "Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995", in particular chapters 4-5 and 8-9.

Whistleblower protections

One of the penultimate chapters in the *Final Report* dealt with protections for whistle-blowers. The issue of whistleblower protections had already been under scrutiny for some time, and was the subject of an unsuccessful Australian Greens Bill introduced to the Senate also in December 1991.[593] The Gibbs Review considered that the question of such protections, closely linked to that of a public interest defence, comprised "not only special statutory exemption from criminal liability, by also protection from retaliatory measures"[594] for individuals who without authorisation disclosed illegality, maladministration, or substantial danger to public safety.[595]

The Gibbs Review expressed two main views on public interest disclosures. Firstly, it concluded that, in lieu of a public interest defence, a robust framework be established for the making of complaints first to a designated officer within the relevant agency, and second to an independent Commonwealth agency responsible for ensuring proper investigation (the number and nature of response to which should be published in annual reports). The Gibbs Review put forward the offices of the Ombudsman and Auditor-General for consideration, excepting members of the intelligence and security services, in relation to which it suggested that the IGIS "must obviously be considered" for this purpose.[596] The Gibbs Review recommended that individuals be able to make such disclosures to these agencies "regardless of any requirement of law."[597]

Secondly, the Gibbs Review concluded that, under certain circumstances, individuals making such disclosures "to any person including the media" should be exempted from any disciplinary action.[598] These circumstances were where the disclosure in question was not captured by its proposed categories of secrecy offence (or any other special offences), and that both the individual making the disclosure had a reasonable belief in the accuracy of the information, and that the disclosure was "excusable in the circumstances" (regardless of whether the individual had first exhausted the recommended internal reporting framework).[599] The

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[593] Australian Greens, "Whistleblowers Protection Bill 1991," Cth § (1991).

[594] Gibbs, Watson, and Menzies, "Final Report," 335.

[595] Gibbs, Watson, and Menzies, 353.

[596] Gibbs, Watson, and Menzies, 338–40.

[597] Gibbs, Watson, and Menzies, 353.

[598] Gibbs, Watson, and Menzies, 354.

[599] Gibbs, Watson, and Menzies, 354.

Gibbs Review did not recommend extending these protections to defamation or other laws of general application however.

The recommendations of the Gibbs Review in respect of whistleblowing protections would not be implemented until the new millennium. Nevertheless, the question of protections for public interest disclosures had taken hold in the public consciousness. In addition to the 1991 Greens Bill, the issue had already been considered in detail by the Queensland Electoral and Administrative Review Commission, was scrutinised in the course of the activities of a number of Parliamentary Committees.[600] In September 1993, the Senate established a Select Committee on Public Interest Whistleblowing which acknowledged whistleblowing as a "legitimate form of action within a democracy," and under some circumstances "the only available avenue for the concerned ethical citizen to expose wrongdoing" in its August 1994 report."[601] The Samuels and Codd Inquiry (explored below) would also recommend the introduction of whistleblowing legislation. While in October 1995 the Keating Labor Government gave in principle approval for the development of Commonwealth legislation,[602] it would lose government at the March 1996 federal election without having enacted any such legislation. Elements of the recommendations of the Gibbs Review, Senate Select Committee and Samuels and Codd inquiry would be implemented by the Gillard Labor Government via passage of the *Public Interest Disclosure Act 2013* (Cth) (*PID Act*) (examined further in Chapter 7).

The public discourse surrounding whistleblowing in the early 1990s nonetheless cemented two key, enduring considerations in relation to official secrecy. These were the requirement to prove harm in the prosecution of secrecy offences, and the appropriateness of a legislated pathway for the public disclosure of certain kinds of information. While almost all reviews of whistleblower protections excluded intelligence information (variously defined) from this pathway, the concept of express provision for public disclosure by individual public servants nevertheless complicated the concept of 'authorised disclosure'. In this sense, the logic which would ultimately result in the *PID Act* of 'disclosure by exception' as a democratic failsafe was similar to that of the *FOI Act* over thirty years prior.

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[600] Queensland Electoral and Administrative Review Commission, "Report on Protection of Whistleblowers," October 1991; Senate Standing Committee on Finance and Public Administration, "Review of the Office of the Commonwealth Ombudsman" (Commonwealth (Austl.), February 1992); Senate Standing Committee on Finance and Public Administration, "Report on the Management and Operations of the Department of Foreign Affairs and Trade" (Commonwealth (Austl.), December 1993); House of Representatives Standing Committee on Banking, Finance and Public Administration, "Focusing on Fraud: Report of the Inquiry into Fraud on the Commonwealth" (Commonwealth (Austl.), November 1993).

[601] Senate Select Committee on Public Interest Whistleblowing, "Report: In the Public Interest" (Commonwealth (Austl.), 1994), xiii.

[602] Duncan Kerr, "Ministerial Statements: Report of the Senate Select Committee on Public Interest Whistleblowing - Government Response" (House of Representatives Hansard: Commonwealth (Austl.), October 26, 1995).

Section 6.1.2: Inquiry into Australian Secret Intelligence Service

Not long after the Gibbs Review reported, in 1993 the Keating Government found itself in the midst of media controversy regarding ASIS following allegations by former officers of mistreatment and other maladministration, including possibly illegal activities.[603] The disclosures culminated in a February 1994 *Four Corners* news story featuring the former ASIS officers and their spouses.[604] On 15 March 1994, the Keating Government appointed Gordon J Samuels AC QC and Michael H Codd AC to head a Commission of Inquiry into the Australian Secret Intelligence Service. The terms of reference for the inquiry were:

> (a) to inquire into the effectiveness and suitability of existing arrangements for -
>
> i) the control and accountability of ASIS;
>
> ii) the organisation and management of ASIS;
>
> iii) the protection of ASIS intelligence sources and methods;
>
> iv) the resolution of grievances and complaints relating to ASIS; and
>
> (b) to consider whether any changes in existing arrangements are required or desirable.[605]

The inquiry reported in two classified volumes on 31 March 1995 (the Samuels and Codd Report), large sections of which were tabled publicly in Parliament on 1 June 1995. While Samuels and Codd considered it likely that the timing of inquiry was influenced by the unauthorised disclosures in the media, they nonetheless recognised at the outset of their Report that the reason for the Keating Government's establishment of the inquiry was its perception of a "normative case for periodic root and branch review of secret organisations," particularly heightened by the ending of the Cold War.[606] Elsewhere in the Samuels and Codd Report, the Commissioners acknowledged that there existed "quite properly, concerns in the community about the role of intelligence and security agencies in the post-Cold War environment."[607] This indicated that, based on the evidence before it, Samuels and Codd considered that changes

[603] Anthony Stuart Farson and Mark Phythian, *Commissions of Inquiry and National Security: Comparative Approaches*, *Commissions of Inquiry and National Security: Comparative Approaches* (Praeger, 2011), 21, https://www.proquest.com/docview/876184984?parentSessionId=PhDGKyzVgY3t3LTkpZzBeS0XWzrQZzL4KcPk9Wyl6Gs%3D&pq-origsite=summon&.

[604] Samuels and Codd, "Report on the Australian Secret Intelligence Service," xiii.

[605] Samuels and Codd, "Report on the Australian Secret Intelligence Service."

[606] Samuels and Codd, xxi.

[607] Samuels and Codd, 194.

in the security environment had altered the dynamic between security and liberal democratic imperatives. This would inform a number of their findings on NCND and official secrecy.

Government response

In tabling the Samuels and Codd Report on 1 June 1995, then-Foreign Minister Gareth Evans made a public statement in Parliament. The statement also covered the Government's response to the key findings of the Samuels and Codd Report, which included many changes relevant for policy on official secrecy. The Keating Government accepted the majority of the recommendations, though diverged from the views of the Commissioners on some matters.

Many of the cases where the Keating Government's appraisal of the recommendations differed from those of Samuels and Codd related to the appropriateness of consistency of official secrecy across ASIO and ASIS. The Keating Government explicitly disagreed with consistency across security agencies, arguing that greater transparency was warranted regarding ASIO due to the potential for the infringement of Australians' rights.[608] The Keating Government saw a greater justification for transparency measures relating to ASIO, citing the greater potential for its activities to infringe on the privacy of Australians or to be misused for political purposes. It contended that in the case of ASIS, on the other hand, enshrined transparency measures were less warranted as its activities had "far less potential to affect the civil rights of Australians or to conduct activities with domestic political implications."[609] This reasoning extended to the Commissioners' recommendations in respect of oversight. In addition to the minor widening of the role of the IGIS to include a retrospective auditing function, the Commissioners recommended the creation of a single Parliamentary Committee on intelligence and security to oversee both ASIS and ASIO, considering the agencies to have "similar needs for secrecy."[610] ASIO's activities at that time were overseen by the PJCASIO, while ASIS was not subject to scrutiny via Parliamentary Committee. However, Evans argued that:

> Whereas the domestic security agency's activities necessarily have great potential to impinge on the rights and privacy of Australians, this potential does not exist in the case of ASIS, whose activities are focused almost exclusively overseas. In the Government's view, this means the case for parliamentary scrutiny of ASIS is more qualified than it is in the case of ASIO.[611]

This indicated that the government considered the relative impact of ASIS and ASIO's activities on liberal democratic imperatives to be relevant to the level of oversight, rather than

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608 Gareth Evans, "Ministerial Statement: Australian Secret Intelligence Service" (Senate Hansard: Commonwealth (Austl.), June 1, 1995).

609 Evans.

610 Samuels and Codd, "Report on the Australian Secret Intelligence Service," xxix–xxxi.

611 Evans, "Evans, Ministerial Statement: Australian Secret Intelligence Service, Hansard (1 June 1995)."

solely their ‘similar need for secrecy’ as identified by Samuels and Codd. Instead, the Keating Government proposed a small, dedicated Committee of six security-cleared Parliamentarians, which would oversee ASIS specifically.[612] The arguments advanced by Evans on the distinction between ASIO and ASIS provides further insight into the reasoning of executive governments about when secrecy and transparency are appropriate, and in particular when secrecy should remain the discretion of the executive rather than be regulated in legislation.

The Samuels and Codd Report also supported the practice of briefing the Opposition Leader and relevant shadow Ministers on intelligence and security matters as appropriate, established in 1972 by the Whitlam Government. The Commissioners went so far as to recommend that this be enshrined in legislation to establish ASIS, alongside the imposition of certain duties of secrecy.[613] This would again bring ASIS into line with the parallel legislative requirement regarding ASIO.[614] Evans similarly advised that, while the Keating Government supported the continuation of the practice of Opposition briefing (and would commit to expanding that practice to providing 6-monthly briefings), it preferred to retain discretion over the requirement, timing, and appropriateness of the practice, rather than to enshrine it in legislation.[615]

Of note, the Commissioners re-iterated the Second Hope Royal Commission’s recommendation that ASIS be placed on a legislative footing, which had been left unacquitted by successive governments. The Commissioners went as far as preparing a draft Bill to achieve this.[616] Samuels and Codd noted that this would bring ASIS into line with both ASIO and the UK Secret Intelligence Service[617] and would be of benefit in both principle and practice.[618] The Commissioners concluded that legislation should provide public reassurance “in a way that statements by the Minister of the Director-General cannot do” and “help to dispel the persistent mythology that [ASIS] is unaccountable and out of control.”[619] While the Keating Government accepted this recommendation in principle, it would not be acquitted until the passage of *IS Act* in 2001 under the Howard Coalition Government.

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[612] Evans.

[613] Samuels and Codd, “Report on the Australian Secret Intelligence Service,” 38, 41.

[614] Australian Security Intelligence Organisation Act 1979 (Cth) [As made], sec. 21.

[615] Evans, “Evans, Ministerial Statement: Australian Secret Intelligence Service, Hansard (1 June 1995).”

[616] Samuels and Codd, “Report on the Australian Secret Intelligence Service,” xxix.

[617] Samuels and Codd, 32, 187.

[618] Richardson, “Volume 1,” 128–29.

[619] Samuels and Codd, “Report on the Australian Secret Intelligence Service,” xxix.

Findings on NCND

In addition to these recommendations relating to the 'framework' elements of official secrecy, the Samuels and Codd Report made a number of findings and recommendations relating to the broader use of executive discretion in maintaining secrecy around ASIS. These included the revival of the D-Notice system, and many proposals for greater contact between ASIS and the media, including an increased public profile for the Director-General of ASIS and the appointment of an ASIS media liaison officer.[620] In accordance with term of reference (a)(ii) relating to the protection of intelligence sources and methods, Samuels and Codd specifically considered the use of NCND in relation to ASIS, as had the Second Hope Royal Commission in relation to ASIO.[621] The Commissioners considered the logical core of NCND "obvious enough", noting that:

> to confirm an accurate allegation would convert mere assertion into official fact, while to deny an untruthful allegation would imply confirmation of any subsequent allegation which was not denied… What is significant here is the uninformative and unresponsive attitude which NCND epitomises. [622]

While Hope had supported the general use of NCND in relation to ASIO, Samuels and Codd recommended "an appropriately limited modification of the Government's 'neither confirm nor deny' policy" in relation to ASIS.[623] In their deliberations, Samuels and Codd considered the views of both Evans and ASIS in relation to engagement with the media, including that the substantial amount of information about ASIS in the public domain was 'overwhelmingly' negative and largely misinformed, and that the government's failure to challenge sensationalised reporting affected staff morale.[624] Samuels and Codd pointed to the increasing media engagement by ASIO as 'well-received', and successfully reducing the "aura of mystery which had made ASIO an attractive media target."[625] The Commissioners also considered that NCND acted as a significant limitation on Parliamentary oversight, which was effectively "subject to Government control, since the Government can refuse access to necessary information" by invoking NCND.[626]

In different words, Samuels and Codd also considered 'logical core' of NCND. Citing the denial of claims about ASIO activities within Macedonian and Aboriginal communities,

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[620] Samuels and Codd, xxxvi.

[621] Hope, "General Report," 7.

[622] Samuels and Codd, "Report on the Australian Secret Intelligence Service," 175, xxxvi.

[623] Samuels and Codd, xxxvi.

[624] Samuels and Codd, 176.

[625] Samuels and Codd, 186.

[626] Samuels and Codd, 17.

Samuels and Codd observed ASIO's adoption of the practice of 'selective denials' in circumstances where "allegations are inflammatory and likely to cause conflict in the wider Australian community."[627] However, Samuels and Codd also recognised the disadvantages of using NCND inconsistently, including Evans' view that issuing selective denials in "the pressure of the moment" undermines the overall principle in the longer term. Despite elsewhere drawing an equivalence between the aspects of the two agencies (including their need for secrecy), Samuels and Codd saw a distinction between selective official disclosures about ASIO in the context of domestic political controversy, which they viewed as less of a risk than such disclosures about ASIS, which could provide information "to a watchful overseas intelligence agency." They further considered that "claims could be made in the media in the hope of obtaining a denial and thus allowing information about ASIS operations to be gleaned by a process of elimination,"[628] noting that, as Minister, Evans himself had already confronted the dilemma of whether to break NCND to deny various 'bizarre allegations' about ASIS in the media.[629] While elucidating these positions, however, the Commissioners did not advance a principled basis on which to modify NCND, instead considering that, hypothetically, a "carefully chosen form of words" coupled with an overall increase in the official disclosure of information about ASIS may allow governments to address misinformation while maintaining NCND.[630]

Ultimately, however, Samuels and Codd concluded that blanket NCND was no longer appropriate in the post-Cold War environment. The Commissioners considered that "NCND allows any claim about ASIS to go unchallenged, even where it is entirely fanciful or seriously damaging."[631] Samuels and Codd also considered that NCND may have disadvantages, concluding that "[s]ilence in the face of repeated assertions about ASIS can be taken by a foreign government or a sceptical public as confirmation."[632] Instead, the Commissioners considered it "essential to distinguish between the attitude which [ASIS] adopts towards the media, on the one hand, and the nature of the information which ASIS provides to the media, on the other," advocating for greater engagement between ASIS and the media.[633] While recognising the need to protect operations and individuals, Samuels and Codd saw "advantage, and no disadvantage" in public disclosure of other categories of information, including:

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[627] Samuels and Codd, 192–93.

[628] Samuels and Codd, 193.

[629] Samuels and Codd, 192.

[630] Samuels and Codd, 193.

[631] Samuels and Codd, 192.

[632] Samuels and Codd, 192.

[633] Samuels and Codd, 189.

(a) ASIS's functions - what it does and does not do;

(b) the public and governmental purposes which it serves;

(c) how it is controlled and to whom it is accountable;

(d) why the nature of the work requires a high degree of secrecy; and

(e) the similarities (as well as the differences) between ASIS's management and staffing arrangements and those of other government departments.[634]

Samuels and Codd also considered that the enactment of legislation would improve public knowledge in relation to these categories of information, which would allow the government to "dismiss out of hand" outlandish allegations regarding ASIS.[635] Where Hope considered that the establishment of ASIS in legislation could "well enhance" its security,[636] Samuels and Codd saw a legislative basis as the foundation of their recommendation that "as much information as possible about ASIS should be on the public record."[637]

ASIS avowals

In addition to providing the Government's policy positions on specific issues raised by the inquiry, Evans' statement on 1 June 1995 also acquitted some of the Commissioners' recommendations in respect of NCND by providing a significantly increased level of detail about the role and functions of ASIS. This mirrored the approach of Fraser and Hawke following the recommendations of the Hope Royal Commissions (the latter also having been in the context of the public controversy arising from the Sheraton Hotel Incident, as discussed in Chapter 4).[638] Evan's statement expanded on what Australian governments historically had said publicly about national security matters, to which Evans drew particular attention , noting:

> In tabling this Report, the Government is making a significant advance in what it is prepared to say publicly about ASIS. In the past, successive Governments have strictly limited the extent of their public comment on ASIS in the interests of national security.[639]

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[634] Samuels and Codd, 189.

[635] Samuels and Codd, 193.

[636] Hope, "Fifth Report, Vol. 1," 157.

[637] Samuels and Codd, "Report on the Australian Secret Intelligence Service," 195.

[638] Fraser, "Ministerial Statement: Royal Commission on Intelligence and Security"; Hawke, "Hawke, Ministerial Statement: Sheraton Hotel Incident, Hansard (29 February 1984)."

[639] Evans, "Evans, Ministerial Statement: Australian Secret Intelligence Service, Hansard (1 June 1995)," 717.

The statement arguably constituted an avowal, as it replicated the three key elements of the precedent established by Fraser and repeated by Hawke. These elements were an articulation of the rationale for the disclosure, a clear limitation of its scope, and a reiteration of commitment to NCND.:

> But while we judge that it is now an appropriate time to be more forthcoming than we have been in the past, there is still a self-evident need for certain kinds of information relating to ASIS, and intelligence and security in general, to remain secret so as to protect national security, the safety of individuals, and Australia's international relations. This especially includes information that could identify ASIS officers, sources and methods; places of ASIS deployment and operation; areas and issues of intelligence interest; and the purpose or objectives of individual operations, be they past, current or projected. The continuing need for certain details about ASIS to remain secret is wholeheartedly endorsed by the Commissioners.[640]

The Keating Government, however, was unpersuaded by Samuels and Codd's broadly-stated recommendation to 'modify' NCND. The Keating Government remained committed to the logical core of NCND (being effectiveness via unbroken application), with the balance of its assessment falling to retain NCND as the broad rule. As Evans stated:

> The Commissioners have suggested that the Government could be more open about ASIS in its public comments. They suggest that the 'neither confirm nor deny' approach to questions about ASIS could be modified in some circumstances, and that a complete prohibition on discussion of past ASIS operations may be unnecessary. The Government would prefer the basic rule to remain one of neither confirming nor denying reports and allegations. There may from time to time be instances where it is possible, indeed desirable, to be more forthcoming, e.g. in response to allegations of activities which are clearly proscribed by legislation.
>
> But the Government is strongly of the view that the disclosure not only of the identity of individuals, but of the detail of ASIS operations—past, present or future—can be damaging to our foreign relations, can compromise operational methods and techniques, and can endanger sources.[641]

As examined above, Samuels and Codd's recommendations to modify NCND were framed alongside an overall "public information strategy" involving greater public discussion regarding ASIS.[642] Among these recommendations was the reinvigoration of the D-Notice system and ad hoc media liaison.[643] This was particularly pertinent, given the impetus for the inquiry was a series of unauthorised news media disclosures; consistently with these circumstances, the Samuels and Codd Report found that the D-Notice system "was ineffective in

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[640] Evans, 717.

[641] Evans, 723–24.

[642] Samuels and Codd, "Report on the Australian Secret Intelligence Service," 193.

[643] Samuels and Codd, 113–24.

preventing the disclosures on ASIS made in the lead-up to the Inquiry."[644] Evans referred to both the Government's lack of early engagement with the media and the attitude of the media itself in assessing the factors that contributed to the unauthorised disclosures. Minister Evans also referred to the reliance of the D-Notice system on the "goodwill and cooperation of the media", and observed that "It seems to be an unhappy fact of life at the moment that, if the media sees advantage for itself in running a manifestly national security-sensitive story, its collective instinct is to publish come what may."[645] It was against these sentiments that he outlined the Keating Government's response to the D-Notice recommendations, committing the Government to "update and reinvigorate" the D-Notice system in consultation with the media. Evans emphasised the important of an ongoing consultative dialogue with media, noting that a key pitfall of a system of voluntary cooperation would arise if the media either did not accept or understand the underlying imperative for secrecy.[646] Finally, the statement responded to the Samuels and Codd Report's recommendation to appoint an ASIS media liaison officer. Here, Minister Evans noted that such an appointment would likely result in "enhanced expectations" of transparency, which ASIS would have a "very small likelihood" of being able to meet. In lieu of such an appointment, Minister Evans instead referred to an expanded profile for the Director-General of ASIS under the new establishing legislation, which he suggested may acquit a similar goal.[647]

The Keating Government's disclosures regarding ASIS further refined the precedent for avowal of national security matters. Evans specifically drew attention to the increased detail the government was prepared to share in his statement, while speaking about further accountability and transparency measures expected with the acquittal of the recommendations (or, in some cases, spirit) of the Samuels and Codd Report. These included the establishment of ASIS in legislation, a dedicated Parliamentary Committee on ASIS, and an increased profile for the Director-General of ASIS under the new regime.[648] However, the statement also explicitly ruled out some of the transparency recommendations, some of which would have brought ASIS into alignment with the transparency measures associated with ASIO. These included the enshrinement in legislation of a requirement to brief the Opposition on the activities of ASIS, and establishment of a media liaison officer in ASIS. In these cases, Evans did not adduce a difference in the operational imperative for secrecy across the two agencies, but again

[644] Evans, "Evans, Ministerial Statement: Australian Secret Intelligence Service, Hansard (1 June 1995)," 723.

[645] Evans, 723.

[646] Evans, 723.

[647] Evans, 724.

[648] Evans, 718–20, 724.

pointed to the distinction between the likelihood of the activities of ASIS and ASIO respectively to have domestic political implications, or to infringe on the ‘civil rights’ of Australians. Here, the case for official secrecy was connected explicitly with the upholding of liberal democratic values domestically.

The end of the Cold War saw a changed dynamic between security and liberal democratic imperatives. This new dynamic led to fresh scrutiny of ASIS and the secrecy by which it was surrounded, which once again saw the logic of NCND validated by independent review. The new dynamic ultimately prompted the Keating Government to undertake public disclosures regarding national security while simultaneously reaffirming an overarching commitment to NCND. The form and detail of these disclosures reinforced the existing precedent for avowal, and advanced explicit basis for the variation in levels of secrecy between intelligence and security agencies. The events of this period demonstrate that the use of NCND continued to be shaped by changes in the dynamic between security and liberal democratic imperatives. They further demonstrate that Australian governments (and independent Commissioners) had come to see NCND as a standalone principle with a valuable role to play in Australian liberal democratic governance, independent of its original Cold War security context.

Part 6.2: Terrorism and new legislation

Section 6.2.1: September 11 and *Intelligence Services Act 2001* (Cth)

Despite the recommendations of cumulative independent reviews, and the fact that ASIO had first been put on a legislative footing in 1956, ASIS was still operating on the basis of an Executive Directive at the turn of the millennium.[649] The Directive contained minimal detail and could be amended any time by the executive with no legislative or judicial process.[650] This would change in the new millennium with the passage of the *IS Act* in 2001.[651] It made significant changes to Australia’s intelligence and security frameworks, including to put ASIS on a statutory footing as envisioned by Hope.[652]

[649] *Australian Security Intelligence Organization Act 1956* (Cth) [As made]; Samuels and Codd, “Report on the Australian Secret Intelligence Service,” 12.

[650] Samuels and Codd, “Report on the Australian Secret Intelligence Service,” xxix, 34.

[651] *Intelligence Services Act 2001* (Cth) [As made].

[652] Hope, “Fifth Report, Vol. 1,” 154, para. 302; Patrick F. Walsh, “Transforming the Australian Intelligence Community: Mapping Change, Impact and Challenges,” *Intelligence and National Security* 36, no. 2 (February 23, 2021): 244, https://doi.org/10.1080/02684527.2020.1836829; Michael Kirby, “The Changing Legal Framework of the Australian Intelligence Community: From Hope to Richardson,” *Australian Law Journal* 95, no. 10 (2021): 754.

Introducing the legislation to Parliament on 27 June 2001, then-Foreign Minister, Alexander Downer, noted that placing ASIS on a statutory footing brought it in line with it counterparts in "most other Western democracies," including UK, US, Canada and New Zealand, being Australia's Five Eyes partners.[653] Downer also recognised Samuels and Codd's view that ASIS "should obtain from parliament the maximum authority and control consistent with the essential need for secrecy," noting that:

> This bill seeks to achieve that objective by establishing the framework within which ASIS must operate, detailing arrangements for ministerial control and expanding accountability and oversight mechanisms. Concurrently, the bill sets out in legislation the existing control and accountability framework for DSD, creating a balance between greater openness and the need for continued secrecy.[654]

The legislation achieved passage on 27 September 2001, Parliamentary consideration having been expedited by the September 11 terrorist attacks in the US. Shortly after the attacks, while the legislation was still before Parliament, then-Attorney-General Daryl Williams observed that:

> There has been much discussion about security and an open and democratic society. The two are not incompatible. Indeed, it is essential that we do not lose sight of the fact that it is our very democratic traditions which at the end of the day provide our strongest defence against the evils of the intolerance, bigotry and inhumanity enshrined in terrorism.[655]

The *IS Act* outlined the role and functions of ASIS and DSD in legislation for the first time, providing a greater level of not only transparency but democratic control via the legislative process. DSD, however, remained part of the Department of Defence; its establishment in legislation as an independent agency would occur in 2018 under the Turnbull Coalition Government.[656]

In line with the recommendation of the Samuels and Codd Report, the *IS Act* also established the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD, a predecessor of the current PJCIS), which replaced the existing PJCASIO. The Bill as introduced had not included DSD within the remit of the Committee, the Howard Government having considered its existing oversight as part of the Department of Defence sufficient.[657] DSD was included

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653 Downer, "Second Reading: Intelligence Services Bill 2001" (House of Representatives Hansard: Commonwealth (Austl.), June 27, 2001).

654 Downer.

655 Daryl Williams, "United States of America: Terrorist Attacks" (House of Representatives Hansard: Commonwealth (Austl.), September 17, 2001).

656 *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018* (Cth) (2025).

657 Downer, "Second Reading: Intelligence Services Bill 2001" (House of Representatives Hansard: Commonwealth (Austl.), June 27, 2001).

in the remit of the Committee via government amendments as recommended by the Joint Select Committee on the Intelligence Services, which was appointed to inquire into and report on the new legislation.[658] Among the functions of the PJCAAD specified in the *IS Act* was the conduct of reviews of the administration and expenditure for each of the three agencies.[659] In 2005 the remit of the Committee was again widened in response to the Flood Inquiry with the passage of the *Intelligence Services Legislation Amendment Act 2005* (Cth).[660] The Committee was renamed the PJCIS and, in addition to overseeing ASIO, ASIS and ASD, took responsibility for oversight of ONA, and the military intelligence agencies DIO and Defence Imagery and Geospatial Organisation (DIGO, a predecessor of the current Australian Geospatial-Intelligence Organisation, AGO).

Section 6.2.2: War and Flood Inquiry

Global tensions continued to mount in the aftermath of the September 11 terrorist attacks, and on 19 March 2003, a coalition of governments of the US, UK and Australia launched military action in Iraq. The publicly-articulated basis of the action was intelligence indicating Iraq's possession of weapons of mass destruction, in contravention of United National Security Council resolutions.[661] Prime Minister Howard and other Government Ministers explicitly drew on intelligence products in public statements in relation to the military action.[662] Between September 2002 and February 2003, the US and UK governments released unclassified documents outlining the intelligence supporting this assessment. On 4 February 2003, Howard had made the first of a number of statements linking the decision to go to war with intelligence assessments, stating in Parliament that "intelligence material collected over recent times, to which Australia has contributed, points overwhelmingly to Saddam Hussein having…sought to reconstitute a nuclear weapons program."[663] Rather than shoring up public confidence, the release of these documents (and their apparent key role in the decision to go launch military

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[658] House of Representatives, "Supplementary Explanatory Memorandum: Intelligence Services Bill 2001" (Commonwealth (Austl.), 2001).

[659] *Intelligence Services Act 2001* (Cth) [As made], sec. 29.

[660] *Intelligence Services Legislation Amendment Act 2005* (Cth) (2005).

[661] Howard referred in particular to Security Council Resolution 1441 (adopted by the Security Council at its 4644th meeting, on 8 November 2002), which in turn referred to nine previous Security Council resolutions dating back to 1990. Security Council, "S/RES/1441 (2002)" (United Nations, November 8, 2002).

[662] Parliamentary Joint Committee on ASIO, ASIS and DSD, "Report of the Inquiry into Intelligence on Iraq's Weapons of Mass Destruction" (Commonwealth (Austl.), December 2003), 32.

[663] John Howard, "Transcript 20524: Ministerial Statement to Parliament on Iraq" (Department of the Prime Minister and Cabinet, February 4, 2003).

action) generated intense international scrutiny and controversy over the accuracy of the intelligence and, therefore, the legitimacy of the extraordinary military action premised upon it.[664]

This controversy prompted two related inquiries in Australia. The PJCAAD was referred the matter for inquiry on 18 June 2003 and reported in December 2003, tabling its report in Parliament on 1 March 2004.[665] The terms of reference focussed on the accuracy and independence of intelligence relating to weapons of mass destruction, and the public representation of this intelligence by the Howard Government.[666] While the inquiry was ongoing, Howard defended his use of intelligence, stating at a press conference on 22 July 2003 that "We had intelligence assessments of WMD capability, and we reacted appropriately to those assessments. We did not mislead the Australian public but we did have those assessments."[667]

While the PJCAAD was statutorily precluded from receiving operational information, it received and extensively quoted from intelligence assessments, in part for the purpose of evaluating the integrity with which the Howard Government presented this intelligence to the public.[668] The PJCAAD dedicated a chapter of its report to the presentation of the pre-war intelligence, including its accuracy and completeness. The Report found that "the Prime Minister and Ministers are more strongly worded than most of the AIC judgements" and that "Government presentations were in some areas incomplete, notably in respect of some of the available United Nations information on Iraq."[669] Ultimately, the report concluded that the government's

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[664] In addition to the scrutiny in the Australian context (explored below), international controversy generated multiple inquiries in both the US and UK, including The Commission on the Intelligence Capabilities of the United States Reporting Weapon of Mass Destruction, "Report to the President of the United States" (United States Government, March 31, 2005); Senate Select Committee on Intelligence, "Report on Intelligence Activities Relating to Iraq Conducted by the Policy Counterterrorism Evolution Group and the Office of Special Plans within the Office of the Under Secetary of Defense for Policy" (United States Government, June 2008), https://web.archive.org/web/20080611232445/http://intelligence.senate.gov/080605/phase2b.pdf; Robin Butler, "Review of Intelligence on Weapons of Mass Destruction: Implementation of Its Conclusions" (United Kingdom Government, July 14, 2004); John Chilcot, "The Report of the Iraq Inquiry" (United Kingdom Government, July 2016), https://www.gov.uk/government/publications/the-report-of-the-iraq-inquiry.

[665] Parliamentary Joint Committee on ASIO, ASIS and DSD, "Report of the Inquiry into Intelligence on Iraq's Weapons of Mass Destruction."

[666] Parliamentary Joint Committee on ASIO, ASIS and DSD, ix.

[667] John Howard, "Transcript 20814: Press Conference, Canberra" (Department of the Prime Minister and Cabinet, July 22, 2003).

[668] Parliamentary Joint Committee on ASIO, ASIS and DSD, "Report of the Inquiry into Intelligence on Iraq's Weapons of Mass Destruction," 28; Intelligence Services Act 2001 (Cth) [As made], sec. 29 and Schedule 1, Part 1, sec. 1.

[669] Parliamentary Joint Committee on ASIO, ASIS and DSD, "Report of the Inquiry into Intelligence on Iraq's Weapons of Mass Destruction," 94–95.

public description of Iraq's armament status was "not the picture that emerged from an examination of all the assessments provided to the Committee," implying some degree of divergence between the intelligence and its representation by the Howard Government.[670]

The PJCAAD Inquiry had been initiated by the Senate (rather than the executive government) and observed in its Report that Prime Minister Howard considered the inquiry "premature."[671] However, three days after release of the PJCAAD Inquiry Report, the Howard Government announced on 4 March 2004 that Philip Flood AO would lead an *Inquiry into Australia's Intelligence Agencies* (the Flood Inquiry).

The Flood Inquiry carried on the mantel of independent reviews in Australia's intelligence and security framework.[672] The terms of reference requests that the inquiry provide advice on (among other things), "the effectiveness of the intelligence community's current oversight and accountability mechanisms," and the independence and contestability of intelligence assessments provided to government.[673] The Howard Government indicated that the Inquiry should focus on the five foreign intelligence agencies, and therefore the Flood Inquiry excluded specific review of ASIO or domestic security and intelligence arrangements from its report. However, in reviewing the resourcing, communication, and division of labour between agencies in the context of both enduring regional imperatives and growing threats such as terrorism, the Flood Inquiry delivered a comprehensive and future-focussed report. The Flood Inquiry is considered to have laid the groundwork for the future conception of the 'National Intelligence Community' (NIC), which would be formalised through the recommendations of the 2017 *Independent Intelligence Review* (examined further in Chapter 8 of this thesis).[674]

The Flood Inquiry made a number of recommendations and observations of general relevance to official secrecy policy. Significantly, it recommended that, "beyond all these standing measures," independent intelligence reviews be undertaken every five to seven years.[675] This would formalise the unofficial rhythm begun with the First Hope Royal Commission in the

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670 Parliamentary Joint Committee on ASIO, ASIS and DSD, 93.

671 Parliamentary Joint Committee on ASIO, ASIS and DSD, vii.

672 Chris Taylor, "An Inflection Point for Australian Intelligence: Revisiting the 2004 Flood Report" (Australian Strategic Policy Institute, 2023), 2–3, https://www.jstor.org/stable/resrep52701; Walsh, "Transforming the Australian Intelligence Community: Mapping Change, Impact and Challenges," 245–46; Kirby, "The Changing Legal Framework of the Australian Intelligence Community: From Hope to Richardson," 755.

673 Flood, "Flood Report," 1.

674 Chris Taylor, "The Flood Report and the Building of Australia's Intelligence Community," *The Strategist*, August 2, 2023, https://www.aspistrategist.org.au/the-flood-report-and-the-building-of-australias-intelligence-community/.

675 Flood, "Flood Report," 62–63.

early 1970s. At the outset of its report, the Flood Inquiry listed the enduring principles established by previous external reviews, indicating a favourable assessment of the value of their contributions to the development of a "uniquely Australian model" of intelligence and security.[676] Rather than considering the proper arrangement of intelligence and security functions (and their oversight) as static, Flood took the view that an "evolving field like intelligence warrants occasional external examination," which could supplement standing accountability mechanisms "bringing fresh perspectives and assurance that systems are modern and effective."[677] The practice of regular external review is followed to this day by successive Australian governments, arguably indicating ongoing bipartisan commitment to national security accountability and improvement.[678]

In addition to formalising a practice of external review, Flood also made recommendations relating to the legislated oversight mechanisms of the intelligence community, including amendments to the jurisdiction and powers of the IGIS and the PJCAAD. Significantly, the Flood Inquiry recommended the jurisdiction of the PJCAAD be expanded to include ONA and DIO, which was achieved in 2005.[679] The Flood Inquiry noted that the activities of ONA and DIO, as assessment rather than collection agencies, were distinct from those of the agencies within the PJCAAD's existing jurisdiction. Flood considered that ONA and DIO did not require specific legislation to legalise their activities, nor did their activities encroach on the privacy of Australians.[680] This latter observation echoed the logic of the Keating Government in drawing a distinction between the imperative for scrutiny in relation to ASIS and ASIO respectively (as examined in Chapter 6). However, Flood considered that:

> ...the functioning of Australia's intelligence agencies is a matter of greater public interest and scrutiny than it has been in the past; and that interest is now strong in relation to assessment agencies as well as collection agencies. In these circumstances, it is appropriate that the parliament and, through it, the public should enjoy greater confidence in the activities of the assessment agencies.[681]

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[676] Flood, 4–5.

[677] Flood, 63.

[678] The Albanese Labor Government commissioned the most recent Independent Intelligence Review in 2023, co-led by Heather Smith PSM and Richard Maude. The report was provided to government in 2024 and has not been publicly released at time of writing. See "2024 Independent Intelligence Review," Australian Government, Department of the Prime Minister and Cabinet, 2025, https://www.pmc.gov.au/international-policy-and-national-security/national-security/2024-independent-intelligence-review.

[679] *Intelligence Services Legislation Amendment Act 2005* (Cth).

[680] Flood, "Flood Report," 58; The successor organisation to ONA, the Office of National Intelligence (ONI), was put on a legislative basis in 2018 with the passage of the *Office of National Intelligence Act 2018* (Cth) (2025), https://www.legislation.gov.au/C2018A00155/latest/text.

[681] Flood, "Flood Report," 3.

Consistent with the origins of his commission, Flood also considered the 'public presentation' of intelligence by government. Unlike those of a number of previous independent reviews,[682] the circumstances precipitating the Flood Inquiry were unusually centred around the official, rather than unauthorised, disclosure of national security material. Accordingly, it focussed on the reduction of risk involved in disclosure by government of such material, rather than protections against unauthorised disclosure. Despite this shift in emphasis, Flood's deliberations involved similar themes to those of previous reviews. The Flood Inquiry cited the imperative to handle "the protection of sources and methods and the identities of Australian intelligence staff," and (perhaps with the lessons of the Iraq disclosures in mind) the risk of public disclosure of intelligence distorting the assessment process.[683] The Flood Inquiry also implied that the perspectives of the government and the intelligence agencies may diverge on the public presentation of intelligence:

> The question of whether, when and how governments should use intelligence in support of policy is one that has attracted public attention and causes some discomfort within intelligence agencies around the world. The issue is not an easy one. Public disclosure of intelligence assessments carries real risks.[684]

While favouring accountability through mechanisms other than public disclosure of intelligence, ultimately, the Flood Inquiry considered that:

> Nevertheless, there will be circumstances in which the public's right to know and the government's wish to explain the context of important policy decisions require some public presentation of intelligence-based material. It is legitimate, under certain circumstances, for governments to commission assessment agencies to prepare material for public release and to release publicly other intelligence-based material.[685]

The Flood Inquiry also considered that there was "no legitimate place" for policymakers or political advisers to release intelligence material without appropriate authorisation, or to influence the content of such material, as had the First Hope Royal Commission.[686] The Flood Inquiry proposed a set of guidelines to facilitate the public presentation of intelligence material while safeguarding the intelligence process. The Flood Inquiry suggested that such requests should come from the Prime Minister to the Director-General of ONA, who would also have final approval of any material proposed for public disclosure. Flood recommended that Director-General have complete responsibility for the material, including ensuring that it would not

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[682] Owen, Philp, and Ligertwood, "Report of the Royal Commission on Espionage"; Hope, "First Report"; Hope, "General Report"; Samuels and Codd, "Report on the Australian Secret Intelligence Service."

[683] Flood, "Flood Report," 158.

[684] Flood, 158.

[685] Flood, 158.

[686] Flood, 158–59; Hope, "General Report," 154–56.

"compromise sources, breach intelligence-sharing arrangements, or reveal sensitive national security information," which Flood considered "may mean that some issues cannot be covered in a useful way."[687]

Unlike Samuels and Codd's detailed consideration of and recommendations regarding NCND in the context of the 'public face' of ASIS, Flood did not raise the question of NCND or engage with its underlying logic. However, while not advancing a comprehensive overall position on the scope of official secrecy, Flood did make reference to a number of categories of information as (at a minimum) raising the question of protection, which significantly overlapped with the scope of matters to which NCND had come to apply. Flood framed the need for secrecy in relation to these categories in a variety of different terms throughout his report, as follows:

> There are legitimate and important issues surrounding the protection of sources and methods and the identities of Australian intelligence staff. These need to be handled very carefully.[688]
>
> The Director-General of ONA must ensure that the content of any assessment [proposed for public release] does not compromise sources, breach intelligence-sharing arrangements or reveal sensitive national security information.[689]
>
> [I]t is imperative for intelligence agencies and government generally to avoid disclosure of material that could prejudice the capabilities of the agencies to support the national interest.[690]
>
> The public interest in having access to information used by government, and government requirements to use intelligence to support policy, must be balanced against both the protection of intelligence sources and methods, and the integrity of the intelligence process.[691]

Outside of these categories, Flood appeared to sustain Samuels and Codd's advocacy of greater disclosure, arguing that "material that can be put in the public domain in relation to the agencies should be."[692] Despite this exhortation, however, Flood considered that "governments should take a cautious approach to public release of intelligence."[693] This was reflected in the structure of Flood's recommendations, which implied a further decentralisation of members of government's executive discretion to disclose. Flood recognised that the "public's right

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687 Flood, "Flood Report," 159–60.

688 Flood, 158.

689 Flood, 160.

690 Flood, 160.

691 Flood, 175.

692 Flood, 160.

693 Flood, 175.

to know and the government's wish to explain" certain policy decisions may require "some" public disclosure of intelligence material. However, the implication of Flood's recommendations was that the ultimate determination of this material should nevertheless fall with the (explicitly independent) judgement of the Director-General of ONA. Further, Flood suggested that one legitimate outcome of this exercise of judgement was that some issues were not "covered in a useful way," implying that the matters to which the Director-General's decision should have reference should, indeed, trump the public's right to know and the government's wish to explain.[694]

Unlike previous shifts in executive discretion such as open government legislation, which generally decentralised executive discretion by creating structures to authorise greater disclosure, Flood's recommendations were weighted towards restraining official disclosure. Concerns about politicisation had long accompanied Australia's intelligence and security activities (particularly discussed in Chapter 3). While they had occasionally arisen in relation to proactive official disclosures, such as in the apparent intent of the Whitlam Labor Government to present material which would contrast statements by the previous Coalition Government (as examined in Chapter 3), concerns about politicisation had been typically focussed on the internal nature and activities of intelligence and security agencies. The international furore over the use of intelligence in the Iraq War had inverted these concerns. This was reflected in Flood's elevation of the imperative to protect the integrity of the intelligence process itself, alongside national security information as traditionally recognised, in the making of official disclosures.

Section 6.2.3: *Lappas*, ALRC and new legislation

Contrasting with the Flood Inquiry's consideration of the risks associated with disclosure by governments of national security information, the issue of unauthorised disclosure was re-enlivened by the events surrounding the prosecution of Simon Lappas. These events precipitated the Howard Government to enact legislation increasing protections for national security information in the context of legal proceedings. Previous independent reviews and governments alike had grappled with the role of the Court in the maintenance of official secrecy, including through the admissibility of evidence relating to national security, the adjudication of

[694] Flood, 160.

secrecy offences, and the use of injunctions to restrain unauthorised disclosures.[695] The prosecution of Lappas, however, put the tension between secrecy and transparency at the centre of not only the substance of the case, but of the legal process itself.

Lappas, a former intelligence officer, was prosecuted in 2001 in the ACT Supreme Court for attempting to sell classified national security information.[696] While the prosecution was ultimately successful on a number of charges in the *R v Lappas and Dowling* case, proceedings on at least one charge were stayed due to an inability to prevent the public disclosure of certain sensitive documents which would have been adduced as evidence were the charge to proceed.[697] This revealed an apparent logical conundrum for government; under current legislation, its two primary options were either further undesirable disclosures in the course of prosecuting offences intended to protect national security information, or abandoning the prosecution of such offences in order to continue to protect national security information. In response, the Howard Government commissioned the Australian Law Reform Commission (ALRC) in 2003 to conduct a review of "measures designed to protect classified and security sensitive information in the course of investigations and proceedings."[698] On 31 May 2004, the ALRC delivered its *Keeping Secrets* Report (the 2004 ALRC Report), which addressed the *Lappas* case in detail and put forward a proposal for reforms to protect sensitive information with national security implications in the context of federal criminal proceedings. The 2004 ALRC Report characterised the challenge as broader than simply balancing the interests of national security secrecy and the liberal democratic transparency:

> It would be an oversimplification, however, to characterise the task as striking a balance between the right of an individual to a fair and open trial with the need of the Government to maintain official secrets. Due consideration and weight also must be given to the broader and compelling public interests in:
>
> - safeguarding national security and strategic interests;
> - facilitating the successful prosecution of individuals who engage in acts of terrorism or espionage;

[695] Owen, Philp, and Ligertwood, "Report of the Royal Commission on Espionage," 301; Mason J, *Commonwealth v John Fairfax & Sons Ltd*; Hawke, "Transcript 6103: Media Release - Interim Injunctions Regarding National Times Article."

[696] Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information," 9.

[697] Gray J, *R v Simon Lappas and Sherryll Ellen Dowling*, No. [2001] ACTSC 115 (ACT Supreme Court November 26, 2001).

[698] Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information," 5; Pender, "Open Justice, Closed Courts and the Constitution," 164.

- maintaining the fundamental fairness, integrity and independence of our judicial processes; and
- adhering, to the greatest extent possible, to the principles and practices of both 'open justice' and open and transparent executive government.[699]

As framed by the ALRC, the task was not about balancing two exclusive, competing imperatives. Rather, it was to determine procedures to navigate a range of expressions of these imperatives, some of which were implicitly interdependent. However, just days after the delivery of the *Keeping Secrets*, the Howard Government introduced detailed legislation to Parliament to address the issues raised in *Lappas*. The Bill which would ultimately become the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (*NSI Act*) was introduced to Parliament on 27 May 2004. The scope of the *NSI Act* was initially limited to criminal proceedings, and was expanded to include civil proceedings the following year.[700] The explanatory memorandum supporting the 2004 Bill explicitly addressed the decision that governments may face under the status quo between pursuing prosecutions for certain offences and risking damage to national security:

> Prosecutions for espionage, treason, terrorism and other security-related crimes may require the disclosure of such information to persons who are not security cleared, including members of a jury. As a consequence, the Commonwealth may be faced with a choice between accepting the damage resulting from the disclosure of information or protecting that information by abandoning the prosecution.[701]

Section 3(1) of the *NSI Act* specified that the object of the Act was to:

> prevent the disclosure of information in federal criminal proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.[702]

The meaning of 'security' was set out in the *ASIO Act 1979*, which in 2004 was centred on the protection of Australia from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, acts of foreign interference, and the discharge of Australia's responsibilities to foreign countries in respect of the previously-mentioned matters.[703] However, the new legislation was specifically framed around the concept

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[699] Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information," 10–11.

[700] *National Security Information Legislation Amendment Act 2005* (Cth) (2005).

[701] Explanatory Memorandum to "National Security Information (Criminal Proceedings) Bill 2004," Cth § (2004), 2.

[702] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) [As Made] (2004), sec. 3(1).

[703] *Australian Security Intelligence Organisation Act 1979* (Cth) [Superseded Version] (2004), sec. 4.

of ‘national security.’[704] Accordingly, Division 2 of the *NSI Act* introduced a definition of ‘national security,’ being “Australia’s defence, security, international relations or law enforcement interests,” with a number of the constitutive terms of the definition further defined.[705] Notably, the *NSI Act* defined ‘security’ to have the same meaning as the *ASIO Act 1979*, implying both only a distinction between the two, and also that ‘national security’ was the more expansive concept. This reflected the evolution and increasing complexity of both the information itself, and the structures in place to protect it.[706]

‘Open justice’ and NCND

The key effect of the NSI Act in relation to NCND was to create a procedure for the executive to introduce certain sensitive information into proceedings without public disclosure. The explanatory memorandum described the aim of the bill as being to allow such information to be “introduced in an edited or summarised form so as to facilitate the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial.”[707] While the aim described included avoiding prejudice to the right to a fair trial, the *NSI Act* drew public criticism for apparently being anathema to the liberal democratic principle of ‘open justice’. A later ALRC report (*Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*), described the principle of open justice, one of the “fundamental attributes of a fair trial,” as:

> That the administration of justice must take place in open court is a ‘fundamental rule of the common law’. The High Court has said that ‘the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances’.[708]

The ARLC also noted that one of the functions of open justice is “to maintain confidence in the integrity and independence of the courts,” and that the open nature of courts of law “is an essential aspect of their character” which “distinguishes their activities from those of administrative officials.”[709] This distinction was implicitly consistent with the character of executive

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[704] Luke Beck, “Fair Enough? That National Security Information (Criminal and Civil Proceedings) Act 2004,” *Deakin Law Review* 16, no. 2 (December 1, 2011): 405–7, https://doi.org/10.21153/dlr2011vol16no2art108.

[705] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) [As made] (2004), div. 2.

[706] As noted in the Introduction to this thesis, analyses of the evolving concept of “national security” in Australia are given in Brand, “In the Name of National Security”; and Mortensen, “On the Historical Breadth of Australian National Security.”

[707] Explanatory Memorandum to National Security Information (Criminal Proceedings) Bill 2004, 2.

[708] Australian Law Reform Commission, “Traditional Rights and Freedoms: Encroachments by Commonwealth Laws,” Interim (Commonwealth (Austl.), August 3, 2015), 285.

[709] Harry Gibbs (1976), cited in Australian Law Reform Commission, 285.

discretion as inherent to the executive, and not invested in the judiciary (or, indeed, the legislature).[710] In practice, however, many details of legal proceedings were (and are) routinely not made public. The ALRC identified several such circumstances in addition to national security, such as anticipated breaches of confidence and the names of victims of blackmail.[711]

In this sense, then, the *NSI Act* was not introducing a new 'ground' against which to 'balance' open justice, but putting additional structure around an already-accepted principle (albeit a perennially controversial one with regard to scope and application).[712] What was new, however, were the processes by which this principle would be expressed, and additional guidance in the 'balancing' exercise to be undertaken by the Court in determining whether to make orders to protect sensitive information.

Conclusion

Despite an easing of global tensions with the end of the Cold War, the turn of the millennium brought with it significant challenges for official secrecy policy. Some of these challenges arguably arose from the waning public mandate for and acceptance of secretiveness in Australia's security and intelligence institutions; for example, increased media scrutiny and unauthorised disclosures led to significant avowals of the functions and activities of ASIS and DSD (propelled by the recommendations of the Samuels and Codd Review). Others arose from perceived security threats, which prompted the controversial government disclosure of national security information to justify policy responses. While circumstances of both decreased and increased security tensions produced disclosures, these were qualitatively different The Keating Governments' disclosures regarding ASIS conformed to the precedent of avowal established by Fraser and refined by Hawke, including to explain and reaffirm commitment to NCND (in the context of scrutiny via independent review). In contrast, the Howard Government's disclosures of intelligence in connection with Australia's involvement in the Iraq War bore no resemblance to the elements of avowal, raising questions about the accuracy and

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[710] A subsequent INSLM review of the operation of the *NSI Act* framed it as effectively transferring secrecy between branches of government: "Even though the NSI Act provides for greater disclosure by executive government to parties in court proceedings, it requires that court processes are more secretive. Overweening secrecy of executive government is replaced by secrecy of some extremely important work of courts." Donaldson, "Report into the Operation and Effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004*," 4.

[711] Australian Law Reform Commission, "Traditional Rights and Freedoms: Encroachments by Commonwealth Laws," 287.

[712] See Emma Cunliffe, "Open Justice: Concepts and Judicial Approaches," *Federal Law Review* 40, no. 3 (September 1, 2012): 385–411, https://doi.org/10.22145/flr.40.3.4, particularly p. 386-391 and 396. See also Hardy and Williams, "Terrorist, Traitor, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information", particularly 787; and Jacqui Ewart, Mark Pearson, and Joshua Lessing, "Anti-Terror Laws and the News Media in Australia Since 2001: How Free Expression and National Security Compete in a Liberal Democracy," *Journal of Media Law* 5, no. 1 (July 10, 2013): 104–32, https://doi.org/10.5235/17577632.5.1.104.

public presentation of intelligence amidst wavering public confidence. This chapter finds that, while the evolution of official secrecy and NCND remained responsive to security threats, the increasing complexity of the security environment starkly demonstrated that increased tensions did not inherently translate into increased national security secrecy (or vice versa). In turn, it demonstrated that reductions in national security secrecy did not inherently translate into increased public confidence in government. Rather, this period reinforced the interdependence between liberal democratic and national security imperatives.

Chapter 7: The Information Age (2005–2017)

The early millennium saw a new period of challenge for Australia's national security framework. The dawn of the information age brought with it both risks and opportunities; as intelligence collection and analysis was increasingly enhanced by technological breakthroughs, similar technology was increasingly accessible to the public.[713] The large, even massive-scale collection, analysis and dissemination of intelligence, once the sole purview of governmental intelligence apparatus, was increasingly no longer its preserve alone.[714] The mass disclosure events associated with WikiLeaks and Edward Snowden heralded a new set of challenges for governments and their ability to keep secrets globally. These developments put significant pressure on the logic of NCND and Australia's commitment to it as a policy. This chapter explores how the 'information age' heralded another major round of scrutiny and maturation of Australian official secrecy policy, and explores whether this context was a further evolution, or more significant 'revolution', for official secrecy and NCND.

This chapter proceeds in two parts, as follows. The first part examines the new information security context characterised by mass unauthorised disclosure events, such as WikiLeaks and the Snowden disclosures, and the effect of these on official secrecy policy and NCND. It observes how rapid changes in information technology enabled mass disclosure events and in turn saw Australian government adapt their approach to official secrecy. While the early millennium saw a significant evolution of Australia's security and intelligence frameworks, the major paradigm-shifting developments of the information age for official secrecy were the mass disclosure events associated with WikiLeaks and Edward Snowden. These events changed the information dynamic between the public and governments. Along with calls for increased government openness, they prompted media and public suggestion that NCND had been rendered obsolete in the new information environment.[715]

The second part analyses the evolving approach to official secrecy in the second decade of the millennium, including regularised reviews and disclosures of national security information that diverged from established precedent. This increased focus on transparency

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[713] Robert Dover and Michael S. Goodman, "Spooks and Hacks: Blood Brothers," *British Journalism Review* 20, no. 4 (December 1, 2009): 59, https://doi.org/10.1177/0956474809356846.

[714] Blaxland and Birgin, *Revealing Secrets*, 341.

[715] Ben Saul, "WikiLeaks: Information Messiah or Global Terrorist?," in *Spooked: The Truth about Intelligence in Australia*, ed. Daniel Baldino (Sydney: University of New South Wales Press, 2014), 207; Norton-Taylor, "Why 'Neither Confirm Nor Deny' Has Become Untenable for British Spies"; Kevin, "Abbott's Spy Games."

measures was taken up by both sides of politics. The years following this step-change in the information security environment saw changes in Australia's approach to publicly discussing national security matters. The Labor Rudd and Gillard Governments also commissioned key reviews addressing whistleblowing, official secrecy and intelligence and security agencies.[716] This contributed to the regularisation of reviews of the intelligence and security framework, in line with the recommendations of the Flood Inquiry. In 2013, the Gillard Government issued a 'declaration of open government', signalling a strong goal of both policy and cultural change to meet the contemporary information environment. In 2015, the Liberal-National Coalition was returned to power under Prime Minister Malcolm Turnbull. The Turnbull Government continued in the vein of increased transparency, releasing Australia's first Commonwealth *Cyber Security Strategy* in 2016, and commissioning the next regular intelligence review in 2017. Notably, the Turnbull Government combined these formalised processes with significant official disclosures relating to the activities and capabilities of intelligence agencies, in particular the cyber function of ASD. While consistent with the broad turn towards transparency, the cyber capability disclosures did not conform to the historical precedent for avowals. This divergence would shape the public discourse surrounding Australia's intelligence and security activities for the remainder of the decade (as examined in Chapter 8).

Part 7.1: Mass disclosure and policy shifts

While the early millennium saw a significant evolution of Australia's security and intelligence frameworks, the major paradigm-shifting developments of the information age for official secrecy were the mass disclosure events associated with WikiLeaks and Edward Snowden. These events shifted the information dynamic between the public and governments. While the balance was still nowhere near approaching symmetrical, the threat of mass disclosure events and the intelligence that could be gained through open-source means was game-changing.[717]

Section 7.1.1: WikiLeaks and Snowden

The WikiLeaks online platform was first launched in 2006 by Australian activist Julian Assange for the purpose of facilitating the release of large datasets of classified material (or

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[716] House of Representatives Standing Committee on Legal and Constitutional Affairs, "Inquiry into Whistleblowing Protection within the Australian Government Public Sector" (Commonwealth (Austl.), 2009); Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia"; Cornall and Black, "Report of the Independent Review of the Intelligence Community."

[717] Mary-Rose Papandrea, "The Publication of National Security Information in the Digital Age," *Journal of National Security Law & Policy* 5, no. 1 (2011): 123–27.

‘leaks’). The first iterations of its online platform displayed the motto "The method is transparency, the goal is justice."[718] WikiLeaks’s website claims to have published over 10 million “documents and associated analyses.”[719] In 2007, WikiLeaks released a large cache of material that appeared to comprise classified documents from a number of governments, including Australia. Among the revelations were 90,000 documents relating to NATO and ISAF military activities in Afghanistan, and 400,000 documents relating to Iraq.[720] The Australian Government undertook a review of the release of the documents, finding that there had been “no adverse implications for our national security interests” in relation to the Afghanistan documents.[721] An AFP evaluation concluding on 17 December 2010 did not identify “the existence of any criminal offence where Australia would have jurisdiction” in relation to the release of material.[722]

The second major event of mass disclosure came in 2013. Edward Snowden, a former CIA officer and then an intelligence contractor with the US National Security Agency, disclosed without authorisation highly classified material which appeared to reveal details of intelligence programs of many governments, including the Five Eyes.[723] Unlike WikiLeaks, Snowden worked with traditional journalists to facilitate the public release of the material, claiming he did not share the full cache with anyone and criticising WikiLeaks’ methods of unfiltered public release.[724] While the total size of the disclosures remains unknown (at time of writing), in 2014 the US Department of Defense estimated that he had taken approximately 1.7 million files, “the single largest theft of secrets in the history of the United States.”[725] It also concluded that the disclosures could gravely impact US national security and threaten the safety of personnel. A declassified version of an investigative report by the US House Permanent Select Committee

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718 Jason Pontin, “Secrets and Transparency: What Is Wikileaks, and What Is Its Future?,” *MIT Technology Review*, January 26, 2011.

719 Wikileaks, “What Is WikiLeaks,” November 3, 2015, https://wikileaks.org/What-is-WikiLeaks.html.

720 Stephen Smith, “Questions Without Notice: Wikileaks” (House of Representatives Hansard: Commonwealth (Austl.), October 26, 2010).

721 Smith.

722 Joseph Ludwig, “Questions On Notice: Wikileaks” (Senate Hansard: Commonwealth (Austl.), February 10, 2011).

723 Craig Bauer, *Secret History: The Story of Cryptology* (London: Routledge & CRC Press, 2021), 364–70, https://www.routledge.com/Secret-History-The-Story-of-Cryptology/Bauer/p/book/9780367685744.

724 House Permanent Select Committee On Intelligence, “(U) Review of the Unauthorized Disclosures of Former National Security Agency Contractor Edward Snowden,” i. Snowden, Tweet, ‘Democratizing information has never been more vital, and @Wikileaks has helped. But their hostility to even modest curation is a mistake.’ 28 July 2016.

725 House Permanent Select Committee On Intelligence, “Press Release: HPSCI Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger: ‘Snowden’s Acts of Betrayal Truly Place America’s Military Men and Women in Greater Danger around the World,’” January 9, 2014, https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=381.

on Intelligence concluded that the disclosures had already revealed sources and methods to adversaries, noting that:

> although Snowden's professed objective may have been to inform the general public, the information he released is also available to Russian, Chinese, Iranian, and North Korean government intelligence services; any terrorist with Internet access; and many others who wish to do hard to the United States.[726]

The report also concluded that Snowden was not a whistleblower, finding no evidence that he had attempted to communicate to any officials his concerns regarding the legality or morality of the intelligence programs.[727]

The implications of the WikiLeaks and Snowden disclosures for the Australian Government were significant. In addition to Australia's enmeshment in the intelligence programs of the Five Eyes and its alleged overreaches, the Snowden disclosures appeared to reveal historical Australian intelligence operations targeting friendly neighbours such as Indonesia.[728] This both generated domestic public outcry and threatened the relationship with Indonesia, which withdrew its Ambassador to Australia and suspended a number of operational and diplomatic activities.[729] Though the alleged operation related to the term of the previous Labor Government, the allegations came to light following the Abbott Coalition Government's September 2013 electoral victory. Addressing the allegations, Prime Minister Tony Abbott made statements in Parliament emphasising both the bipartisan stance on national security and the practice of declining to discuss intelligence and security activities. Under questioning from Independent Bob Katter, Abbott responded that he would "not be critical of the former government's conduct in respect of intelligence,"[730] later remarking that that:

> there have been calls for Australia to detail our intelligence operations…this government will support the national security decisions of previous ones, as we will expect future governments to respect ours... Australia should not be expected to detail what we do to protect our country any more than other governments should be expected to detail what they do to protect theirs.[731]

Abbott also reiterated Australia's "deep respect" for Indonesia and expressed regret for any embarrassment to President Yudhoyono, referring to Yudhoyono as "one of the best

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726 House Permanent Select Committee On Intelligence, "(U) Review of the Unauthorized Disclosures of Former National Security Agency Contractor Edward Snowden," ii.

727 House Permanent Select Committee On Intelligence, 18.

728 Blaxland and Birgin, *Revealing Secrets*, 306.

729 Laurie Oakes, "Spy Saga Tests Tony Abbott's Mettle," *The Daily Telegraph*, November 23, 2013.

730 Tony Abbott, "Questions Without Notice: Indonesia" (House of Representatives Hansard: Commonwealth (Austl.), November 19, 2013).

731 Tony Abbott, "Statements On Indulgence: National Security" (House of Representatives Hansard: Commonwealth (Austl.), November 19, 2013).

friends we have anywhere in the world."[732] Nevertheless, the statements clearly signalled an intention to maintain an NCND posture. Australia's response attracted international criticism, including from Yudhoyono himself on Twitter,[733] and from Indonesian Foreign Minister Marty Natalegawa, who commented "Why would the president of Indonesia be embarrassed? The embarrassment should belong to the government of Australia."[734] The Abbott Government, however, remained intransigent on NCND.

As explored in Chapters 3 and 4, the conventions of bipartisan information sharing on national security had long since reduced the use of NCND between the government and the Opposition, which had been central to its adoption in 1948 and early uses. However, Abbott's statements went further than indicating support for bipartisan information sharing; they referred to mutual support and respect between past, present and future governments for national security decisions, reminiscent of Hope's conviction that national security should transcend partisanship.[735] By implication, this support extended to restricting information about the national security decisions of previous governments, including those formed by the other major party, and including in the context of questioning by members of the Parliamentary crossbench.

Implications for NCND

Media coverage of the WikiLeaks and Snowden events argued that the mass disclosure era rendered NCND obsolete. In circumstances where the public or international governments could apparently independently corroborate the truth of allegations, refusing to officially confirm or deny appeared meaningless, even absurd. The UK media declared that "NCND has become a farce" in the wake of Snowden's disclosures about apparent mass surveillance.[736] In Australia, in the context of allegations of an Australian intelligence operation targeting Indonesian officials, the media argued:

> Edward Snowden's revelations of systematic and routinised five-power (US, UK, Canada, Australia, NZ) electronic spying on friendly government leaders and politicians create a new policy environment in which 'neither confirm nor deny' no longer works as a policy response.[737]

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[732] Abbott.

[733] Susilo Bambang Yudhoyono, "Saya Juga Menyayangkan Pernyataan PM Australia Yang Menganggap Remeh Penyadapan Terhadap Indonesia, Tanpa Rasa Bersalah. *SBY*," Tweet, November 18, 2013, https://x.com/SBYudhoyono/status/402484882804199424.

[734] Marty Natalegawa, quoted in Oakes, "Spy Saga Tests Tony Abbott's Mettle."

[735] Hope, "Report on the Australian Security Intelligence Organization", "Report on the Australian Security Intelligence Organization," 340, para. 17.17.

[736] Norton-Taylor, "Why 'Neither Confirm Nor Deny' Has Become Untenable for British Spies."

[737] Kevin, "Abbott's Spy Games."

The existence of vast, unquantified amounts of unsecured material, widely considered to be credible despite some attempts at dismissal by governments,[738] challenged the authority of official narratives and raised questions about the fundamental logic of NCND. In parallel, public commentary (including scholarship) increasingly contemplated the changing dynamics of intelligence collection, including the rising value of open-source data.[739] Alongside the reality and ongoing prospect of mass unauthorised disclosure, advances in technology significantly reduced the resource-intensiveness of collecting and analysing large amounts of data. This not only revolutionised government intelligence operations from a 'cloak and dagger' activity to primarily an exercise in data analytics,[740] but put such data analytics within reach of non-traditional intelligence actors. While "[t]he intelligence business was initially, if not inherently, about secrets" and the resources and risks associated with their collection, increasingly "more value can be generated" by sharing and analysing publicly available information.[741] As observed by Blaxland and Birgin in their 2023 history of Australian signals intelligence, "Nowadays, intelligence agencies are not the sole repositories of impressive computing power, nor of open-source intelligence analysis and reporting. There are several examples of companies delivering accurate and timely reporting that once was the preserve of the intelligence agencies, but drawing on open-source intelligence."[742] Recalling the fundamentals of mosaic theory, a basic precept of intelligence analysis,[743] the ability to draw inferences from incomplete information was put in the hands of non-traditional actors by the exponentially advancing capacity to access, disseminate, and aggregate data at minimal time and financial cost.

The cumulative effects of the information age increased public expectations of transparency. In such a landscape, argue Blaxland and Birgin, a "no-comment, or refusal to confirm or deny, let alone engage in a meaningful way, can be as damaging as a leak."[744] As observed by Andrew Brunatti, the Australian Government's initial response of refraining from public acknowledgement "rang hollow and, to an extent, reinforced Snowden's narrative" of 'overwhelming' government secrecy on national security.[745]

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[738] Ian McDonald, "Questions Without Notice: Take Note of Answers" (Senate Hansard: Commonwealth (Austl.), June 16, 2015).

[739] Daniel Baldino and Caroline Milligan, "Optimising Open-Source Intelligence in the Information Age," in *Intelligence and the Function of Government*, ed. Rhys Crawley and Daniel Baldino (Melbourne: Melbourne University Press, 2018), 79–95.

[740] Pozen, "The Mosaic Theory, National Security, and the Freedom of Information Act."

[741] Clive Thompson, "Open-Source Spying," *New York Times*, December 3, 2006.

[742] Blaxland and Birgin, *Revealing Secrets*, 341.

[743] Pozen, "The Mosaic Theory, National Security, and the Freedom of Information Act," 630.

[744] Blaxland and Birgin, *Revealing Secrets*, 339.

[745] Brunatti, "Managing Reputational Risk in National Intelligence," 162–63.

The following years would indeed see successive governments explore new approaches to disclosure, as examined in the next part of this chapter. However, NCND was not abandoned as policy. Rather, this thesis argues government responses to pressure to disclose during this period indicate that NCND had evolved beyond a mere secrecy policy. The Abbott Government's handling of questions about the national security decisions of the previous Labor government demonstrates that the conventions of ongoing protection of national security information had grown to facilitate a level of mutual confidence between the major parties, and across successive governments more generally. These conventions were underpinned by NCND, as summed up by the then-Attorney-General in the Abbott Government, George Brandis. Under questioning by Australian Greens member Scott Ludlam about separate allegations of an intelligence operation against Timor-Leste, Brandis responded "you should know that governments of both sides of politics neither confirm nor deny nor comment on operational matters" (a position that would later be maintained by the Albanese Labor Government, as further discussed in Chapter 8).[746] This thesis therefore finds that NCND, in its capacity as structured and well-established precedent for the protection of information, had become a key tool of bipartisanship on national security.

Part 7.2: New approaches to official disclosure

Following the WikiLeaks disclosures, then-Attorney-General Robert McClelland in the Rudd Labor Government asked the Standing Committee on Legal and Constitutional Affairs on 10 July 2008 to conduct an *Inquiry into whistleblowing protection within the Australian Government public sector*. While whistleblowing had been considered in detail in the 1990s, including in Parliament via a Greens Bill, there still existed no comprehensive legislation to protect public interest disclosures.[747] The inquiry held several days of public hearings, and convened a roundtable of academic experts, media representatives, Commonwealth and State and Territory authorities.[748] Evidence to the inquiry specifically referenced the way in which the

[746] George Brandis, "Estimates - Attorney-General Portfolio - National Archives of Australia" (Senate Hansard: Commonwealth (Austl.), February 24, 2014); Dreyfus, "Transcript: Press Conference on Bernard Collaery."

[747] Standing Committee on Legal and Constitutional Affairs, "Media Alert: New Inquiry - Legislation to Protect Whistleblowers in the Australian Government Public Sector" (Commonwealth (Austl.), July 11, 2008); Gibbs, Watson, and Menzies, "Final Report," 335; Australian Greens, Whistleblowers Protection Bill 1991; Queensland Electoral and Administrative Review Commission, "Report on Protection of Whistleblowers"; Senate Standing Committee on Finance and Public Administration, "Review of the Office of the Commonwealth Ombudsman"; Senate Standing Committee on Finance and Public Administration, "Report on the Management and Operations of the Department of Foreign Affairs and Trade"; House of Representatives Standing Committee on Banking, Finance and Public Administration, "Focusing on Fraud: Report of the Inquiry into Fraud on the Commonwealth"; Senate Select Committee on Public Interest Whistleblowing, "Report: In the Public Interest."

[748] House of Representatives Standing Committee on Legal and Constitutional Affairs, "Roundtable Discussion: Protecting Whistleblowers within the Federal Government Public Sector" (Commonwealth (Austl.), September 9, 2009).

advent of mass disclosure platforms such as WikiLeaks had changed the nature of public disclosures. Paul Chadwick, former Victorian Privacy Commissioner and then-Director of Editorial Policies at the ABC, noted that:

> As a result of the media disclosure, more eyes are watching the watchers... nowadays almost every person has the power to publish or broadcast irretrievably to the world via the internet. Anyone who has ever visited the site Wikileaks will know the force of that observation.[749]

The inquiry reported on 25 February 2009 recommending a comprehensive scheme for Commonwealth whistleblowers.[750] In announcing the report on the inquiry, the Chair of the Committee (and member of the Rudd Government) Mark Dreyfus KC noted that "Public interest disclosure legislation should play a central role in identifying and addressing wrongdoing in the public sector."[751] The report itself noted that:

> If the Commonwealth does not legislate on disclosures to the media, it may be overtaken by technological advances enabling the anonymous disclosure of official information on the internet on sites such as Wikileaks. The Wikileaks website contains measures to protect the identities of its contributors and does not include any Australian filtering mechanism.[752]

This demonstrated that, while the Australian Government may have placed inherent value in the transparency measure, the Parliament was alive to the risk that advances in information technology would threaten the discretion of executive government to make decisions about information disclosure.

In parallel with the inquiry into whistleblowing, on 5 August 2008 McClelland had commissioned the ALRC to undertake a comprehensive review of secrecy laws. The terms of reference requested that the review report on "options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government through providing appropriate access to information."[753] The ALRC delivered its *Secrecy Laws and Open Government* report on 11 Decem-

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[749] Paul Chadwick (ABC) (9 September 2008), Evidence before House of Representatives Standing Committee on Legal and Constitutional Affairs, "Inquiry into Whistleblowing Protection within the Australian Government Public Sector."

[750] "Whistleblower protection: a comprehensive scheme for the Commonwealth public sector" (25 February 2009), Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs.

[751] Mark Dreyfus, Media Release, Report recommends a comprehensive scheme for Commonwealth whistleblowers, (25 February 2009), House of Representatives Standing Committee on Legal and Constitutional Affairs.

[752] "Whistleblower protection: a comprehensive scheme for the Commonwealth public sector" (25 February 2009), Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs.

[753] Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia," 5.

ber 2009 (2009 ALRC Report). As had the Gibbs Review, the ALRC recommended the replacement of the *Crimes Act* secrecy offences with a harm-based approach.[754] The ALRC also considered that secrecy and freedom of information frameworks should be explicitly integrated, recommending amendments to the *FOI Act* to include a 'definitive list of secrecy provisions' in the exemptions to disclosure obligations (echoing the original intent of the Fraser Government, and the report on the original legislation by the Senate Committee on Constitutional and Legal Affairs[755]), outside of which the *FOI Act* would override non-disclosure obligations.[756] This would give effect to the ALRC's view that the only appropriate circumstances for secrecy provisions to trump the freedom of information framework were where the Parliament had considered and endorsed the effect on open government.[757]

Section 7.2.1: 'Open government' reinvigorated

In June 2010, the Rudd Labor Government was replaced by the Gillard Labor Government without having implemented the recommendations of the inquiry. The incoming government continued to develop policy reforms in the context of the new information technology environment, both to increase transparency measures and modernise the powers of intelligence and security agencies. On 23 December 2010, the Gillard Government announced that Robert Cornall AO (former Secretary of the Attorney-General's Department) and Associate Professor Rufus Black would undertake an *Independent Review of the Australian Intelligence Community* (Cornall and Black Review). The Cornall and Black Review was the first review to be conducted in line with the recommendation of the 2004 Flood Inquiry that the intelligence community be externally reviewed every five to seven years.[758] At time of writing, the classified report to government of the Cornall and Black Review has not been released, though a 22-page (plus appendices) unclassified report was tabled in Parliament on 7 February 2012.[759]

As an indication of how the mechanism of regular independent intelligence review might operate, the unclassified report drew public and media criticism for its brevity and lack of detail, including from two former Deputy Secretaries of the Department of Defence in the

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754 Australian Law Reform Commission, 9.

755 Lindsay Curtis, in Transcript of Evidence, 139 (Attorney-General's Department), Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978," 234.

756 Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia," 18.

757 Australian Law Reform Commission, 569.

758 Flood, "Flood Report," 63.

759 "Documents: Tabling" (Senate Hansard: Commonwealth (Austl.), February 7, 2012), Australia.

Sydney Morning Herald.[760] Other media coverage noted that the omission of recommendations and much of the evidence behind the conclusions left a "gap at the heart of what has been released."[761] Notably, subsequent independent intelligence reviews would be significantly longer and include recommendations.

Nonetheless, the unclassified report did provide a board indication of the reviewer's deliberations. Cornall and Black specifically noted Flood's recommendation, and that their inquiries were "being conducted as a periodic review" rather than in response to a precipitating event or concern.[762] However, Cornall and Black also framed their recommendations in terms of significant changes in national security since 2004, including the "growing security challenges of the 9/11 decade" and "adoption of an all hazards approach to national security."[763] Cornall and Black observed that this had seen an increase in the agencies comprising the national security community from the 'traditionally' identified six (ONA, ASIO, ASIS, DSD, DIGO and DIO, within the remit of the PJCIS) to the intelligence functions of the military, AFP, Australian Crime Commission (ACC, now Australian Criminal Intelligence Commission, ACIC), Australian Customs and Border Protection Service (now Australian Border Force, ABF), the Department of Foreign Affairs and Trade and the Department of Immigration and Citizenship. Cornall and Black considered that cooperation between the core six and the wider group would only become more critical over time.[764] The Cornall and Black Review identified the pace of information technology change as a major influence on intelligence and security activities, particularly the evolution of the internet and growing abundance of information. While Flood had viewed open-source information a 'supplement' to intelligence, being "covertly obtained information," by 2011 the Director-General of ONA considered intelligence to encompass "useful information irrespective of source."[765] Cornall and Black observed that the challenge for intelligence agencies contemporarily was determining what to collect, given the "ready availability of huge amounts of information which would previously have been difficult to obtain or simply not available."[766]

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760 Hugh White and Paddy Gourley, in Paddy Gourley, "I Spy Another Intelligence Whitewash," *The Sydney Morning Herald*, April 2, 2012, sec. National, https://www.smh.com.au/public-service/i-spy-another-intelligence-whitewash-20120403-1wa51.html.

761 Graeme Dobell, "Hope's Ghost Lingers in a Secret Security World," *Inside Story*, April 11, 2012, https://insidestory.org.au/hopes-ghost-lingers-in-a-secret-security-world/.

762 Cornall and Black, "Report of the Independent Review of the Intelligence Community," 2.

763 Cornall and Black, 15–16, 2.

764 Cornall and Black, 2.

765 Cornall and Black, 27.

766 Cornall and Black, 26.

Broadly, Cornall and Black advocated 'realistic' expectations of intelligence, not only in terms of the practical extent to which security threats could be mitigated, but also the appropriate protection of "civil and political freedoms," arguing "[f]or all that intelligence has done and can do, there are real limits on intelligence in a free society in a complex world."[767] Cornall and Black saw this tension as a balance between "individual rights and our security as a community."[768] While endorsing the language of 'balance,' Cornall and Black also implicitly acknowledged the growing nuance of this dynamic, particularly in relation to the threat of terrorism. Cornall and Black invoked the analysis of the former Attorney-General of Canada Irwin Cotler, that terrorism constituted a:

> fundamental assault both on the security of a democracy… [as well as] the rights to life, liberty and security of the person. Accordingly, counter-terrorism involves the protection of both the security of a democracy – including the protection of international peace and security – and the protection of the most fundamental of our rights.[769]

In Cornall and Black's view, "the legal framework that enshrines that balance is sound and does not need any adjustment at present."[770] Nonetheless, the report affirmed the necessity of periodic reforms to keep pace with evolving security threats.

Declaration of open government and whistleblowing legislation

Alongside the increasing enactment by many nations (including Australia) of 'open government' legislation in the preceding decades, the concept of open government was becoming increasingly formalised internationally in the early millennium. A growing focus saw the development of the multilateral Open Government Partnership, officially launched at a 2011 United Nations (UN) General Assembly meeting, and increasing coordination through the Organisation for Economic Cooperation and Development (OECD).[771] In Australia, the Rudd Government had enacted amendments to the *FOI Act* to establish a new Office of the Australian Information Commissioner to oversee the proactive release of publication, and a 'Government

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[767] Cornall and Black, 9, 21–22, 23.

[768] Cornall and Black, 21.

[769] Irwin Cotler, Address to the Fifth Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Americas (April 28, 2004), in Cornall and Black, 33.

[770] Cornall and Black, 21.

[771] Barack Obama, "Remarks by President Obama at Open Government Partnership Meeting" (The White House, September 24, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/24/remarks-president-obama-open-government-partnership-meeting; Organisation for Economic Co-operation and Development, "Recommendation of the Council on Open Government," OECD Legal Instruments, December 14, 2017, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0438.

2.0' taskforce to identify policies to promote information accessibility and greater public participation in government via information technology.[772] In line with the key recommendation of the Taskforce, on 16 July 2010, the Gillard Government issued a 'Declaration of Open Government.' Lindsay Tanner, then Minister for Finance and Deregulation, announced that the declaration was part of the government's commitment to "creating a culture of public sector openness, transparency and engagement."[773] Tanner indicated the 'open government' comprised three key principles:

- Informing: strengthening citizens' rights of access to information, establishing a pro-disclosure culture across Australian Government agencies including through online innovation, and making government information more accessible and usable

- Engaging: collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought, and

- Participating: making government more consultative and participative.[774]

In a demonstration of bipartisanship on open government, Australia's commitment would later be formalised further by the Turnbull Coalition Government, under which Australia joined the Open Government Partnership in November 2015. Membership "requires governments to work with civil society to 'co-create' a National Action Plan every two years," in line with which *Australia's First Open Government National Action Plan 2016–18* was released on 7 December 2016, followed by second and third plans in September 2018 and December 2023 respectively.[775]

In 2013, the Gillard Government introduced legislation to Parliament to acquit the many "false starts" historically for a comprehensive Commonwealth scheme for public interest whistleblowing.[776] The legislation created procedures protecting disclosures, and obliging the investigation, of 'disclosable conduct.' Disclosable conduct was a new concept, the extensive definition of which included breaches of law, the perversion of justice, corruption, abuse of public trust, endangerment of health and safety, endangerment of the environment, and a

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[772] Adrian Cunningham, "The Government 2.0 Taskforce 2009: Recordkeeping Risks and Opportunities," *Archives and Manuscripts - The Journal of the Australian Society of Archivists* 38, no. 2 (November 1, 2010): 20–21.

[773] Lindsay Tanner, "Declaration of Open Government," July 16, 2010.

[774] Tanner.

[775] Department of the Prime Minister and Cabinet, "Australia's First Open Government National Action Plan 2016-18," December 7, 2016, 5; Attorney-General's Department, "Australia's Second Open Government National Action Plan 2018-20," September 21, 2018; Attorney-General's Department, "Australia's Third Open Government Partnership National Action Plan 2024-2025," December 15, 2023.

[776] Andrew Wilkie, "Public Interest Disclosure Bill 2013, Public Interest Disclosure (Consequential Amendments) Bill 2013: Second Reading" (House of Representatives Hansard: Commonwealth (Austl.), June 19, 2013).

range of other maladministration.[777] Speaking on the Bill in Parliament, the Attorney-General, Mark Dreyfus, clarified that the reforms applied to intelligence agencies, with caveats.[778] While the protections for non-intelligence officers included an ultimate pathway for external public interest disclosures (following the use of internal reporting and investigation procedures), no external pathway existed for intelligence officers. Instead, the legislation extended protections to intelligence officers making disclosures to authorised individuals within the intelligence agency, or to the IGIS.[779] This built on the existing model of accountability through oversight by independent bodies, which Hope had in 1984 considered could support public confidence in the integrity of intelligence and security agencies without necessarily satisfying "the public's curiosity about the facts."[780] Dreyfus also made clear that the lawful conduct of intelligence agencies in line with their legislated functions in the *IS Act* and *ASIO Act* could not form the basis for a public interest disclosure, citing the high level of accountability embedded in such establishing legislation. Dreyfus explained that these restrictions were necessitated by the risk of disclosure of sensitive information:

> Inadvertent or inappropriate disclosure of intelligence information may compromise national security and potentially place lives at risk. Australian intelligence agencies also have obligations to their foreign partners to maintain the confidentiality of information shared with them.[781]

The resulting *PID Act* provided a lengthy definition of 'intelligence information,' which referred to, among many other things, information concerning or that might reveal intelligence sources, technologies, methods, and operations; the identity of intelligence officers; engagement with foreign intelligence agencies; and sensitive law enforcement information.[782] This definition had significant implicit overlap with the exemptions under the *FOI Act*, though notably included law enforcement information in the definition of intelligence information, while the *FOI*

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[777] *Public Interest Disclosure Act 2013* (Cth) [As Made] (2013), sec. 29.

[778] Mark Dreyfus, "Public Interest Disclosure Bill 2013, Public Interest Disclosure (Consequential Amendments) Bill 2013: Second Reading" (House of Representatives Hansard: Commonwealth (Austl.), June 19, 2013).

[779] Danielle Ireland-Piper and Jonathan Crowe, "Whistleblowing, National Security and the Constitutional Freedom of Political Communication," *Federal Law Review* 46, no. 3 (September 1, 2018): 344, https://doi.org/10.1177/0067205X1804600301.

[780] Hope, "General Report," 8; For a discussion of the application of the PID Act to intelligence agencies, see Rebecca Ananian-Welsh, Rose Cronin, and Peter Greste, "In the Public Interest: Protections and Risks in Whistleblowing to the Media," *UNSW Law Journal* 44, no. 4 (November 2021): 1259–61, 1267, https://doi.org/10.3316/informit.181889397858866; and A. J. Brown, "Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience," *E-Journal of International and Comparative Labour Studies* 2, no. 3 (October 31, 2013): 29–31.

[781] Dreyfus, "Public Interest Disclosure Bill 2013, Public Interest Disclosure (Consequential Amendments) Bill 2013: Second Reading."

[782] *Public Interest Disclosure Act 2013* (Cth) [As made], sec. 41.

Act considered with these subject matters to be separate.[783] Reflecting the debate in the 1980s over the philosophical and practical interaction of disclosure and secrecy laws in the context of the *FOI Act*, the new legislation also explicitly overrode secrecy provisions (with some specific exceptions).[784]

A culmination of decades of debate, the 2013 enactment of the *PID Act* was a significant evolution of Australian official secrecy policy, and refinement of the footing on which Australian governments used NCND. As had the creation of the freedom of information framework, the creation of the public interest disclosure framework decentralised executive discretion to disclose by 'authorising' individual public servants to make certain kinds of disclosures under their own judgement. Where the *FOI Act* had established a posture of default openness, the *PID Act* through the creation of the category of 'disclosable conduct' gave explicit form to the kinds of information the government considered important to disclose. While significant demonstrations of both liberal democratic values, however, neither framework was absolute in its reorientation of official secrecy policy. Explicit in both was the retention of executive discretion in respect of intelligence and security. This gave further structure to the basis on which Australian governments would use NCND.

Section 7.2.2: Cyber capability disclosures

Another key development in the evolution of official secrecy policy in the information age was the increasing engagement of Australian governments on cybersecurity, both in a policy sense and in public discourse. The developments included increasing official disclosures about the Australian government's cyber and intelligence activities and, notably, unprecedented revelations about offensive cyber capability. These built upon some of the oldest elements of the Australian intelligence community, being the signals intelligence capability which existed as a formal part of Australia's intelligence apparatus as early as pre-World War I.[785]

2016 Cyber Security Strategy

The first Commonwealth *Cyber Security Strategy* was announced by the Turnbull Government in 2016. In a speech announcing the launch of the strategy on 21 April 2016, Prime Minister Turnbull described the internet as "the most transformative piece of infrastructure ever created," and asked whether it was "as big a moment in our evolution as fire, or the wheel, or

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783 *Freedom of Information Act 1982* (Cth), secs. 33, 37.

784 *Public Interest Disclosure Act 2013* (Cth) [As made], secs. 11, 11A, 24, 75. Exemptions included offences relating to false or misleading information, designated publication restrictions, and forgery.

785 See Blaxland and Birgin, *Revealing Secrets*, particularly p. 300, 311-225, and 332-344.

electricity? A watershed past which nothing can entirely be the same again?"[786] Turnbull discussed the security environment not only in terms of traditional threats such as terrorism, but the threat of unauthorised disclosure by trusted insiders such as Edward Snowden (in a later press conference, Turnbull would refer to the human threat as 'warmware,' and the "biggest vulnerability" in the cyber domain[787]). Expressly citing a "spirit of openness, and the need for clear leadership to break down a culture of denial as to the scope and scale of cyber threats," he also confirmed that the Bureau of Meteorology and Department of Parliamentary Services had recently experienced significant cyber intrusions.[788]

In this context, Turnbull went on to describe the kinds of capabilities at the disposal of ASD, and the circumstances under which they would be used. Turnbull acknowledged that ASD housed "an offensive cyber capability,"[789] claiming that "[a]cknowledging this offensive capability, adds a level of deterrence. It adds to our credibility as we promote norms of good behaviour on the international stage. And importantly, familiarity with offensive measures enhances our defensive capabilities as well."[790] The Turnbull Government continued to highlight ASD's role and make disclosures about its offensive cyber capability over the coming months. While in a November 2016 national security update to Parliament Turnbull briefly declined to "go into the details" of operations, he nonetheless confirmed the offensive capability being used and "making a real difference" in military operations against Daesh in Iraq.[791] In June the following year, the Turnbull Government further announced it had directed ASD to use the capability to "disrupt, degrade, deny and deter organised offshore criminals."[792]

Unlike previous official disclosures, these statements of ASD capability did not follow the precedented elements of avowal. As established by Fraser, and refined by Hawke and Evans, these elements were an explanation of the reasons for making the disclosure; a clear articulation of the limits of the disclosure; and a reaffirmation of commitment to ongoing NCND outside the scope of the disclosure. While Turnbull's April 2016 statement did not refer to a

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786 Malcolm Turnbull, "Transcript 40308: Launch of Australia's Cyber Security Strategy Sydney" (Department of the Prime Minister and Cabinet, April 21, 2016).

787 Malcolm Turnbull, "Transcript 40705: Doorstop with the Minister Assisting the Prime Minister for Cyber Security, the Hon. Dan Tehan MP," January 24, 2017.

788 Turnbull, "Transcript 40308."

789 Turnbull.

790 Turnbull.

791 Malcolm Turnbull, "Transcript 40613: Address to Parliament - National Security Update on Counter Terrorism" (Department of the Prime Minister and Cabinet, November 23, 2016).

792 Malcolm Turnbull, "Transcript 41039: Media Release - Offensive Cyber Capability To Fight Cyber Criminals" (Department of the Prime Minister and Cabinet, June 30, 2017), https://pmtranscripts.pmc.gov.au/release/transcript-41039.

particular justification or imperative for the timing of the disclosure of ASD capability beyond the suggestion that it added “a level of deterrence,” it broadly evinced a rationale through references to growing cyber threats, so could be said to exhibit the first element of avowal. However, it not only did not include an articulation of the limits of the disclosure, as per the second element of avowal, but arguably gave the impression of general fluidity on information disclosure; the following sentence explicitly entreated senior business leaders to join the government in “building a national cyber partnership, setting the strategic agenda; co-designing national cyber security initiatives; and committing to annual Cyber Security forums.”[793] Finally, the statement did not include any reference to (much less a reaffirmation of) NCND or secrecy broadly, and so did not exhibit the third element of avowal.

The April 2016 disclosure of ASD capability therefore did not constitute an avowal as understood in this research. It is possible that this break with precedent was intentional, given the April 2016 statement had expressly emphasised a general intention towards greater openness. However, this interpretation seems less likely (or at least not enduring) when reading the April 2016 statement in conjunction with the November 2016 and June 2017 statements. These latter statements appeared to attempt to retrofit greater structure to the initial April 2016 disclosure; both explicitly articulated its unprecedented nature, where the initial disclosure itself had not, while the November 2016 statement briefly referred to the “obvious reasons” to not go into detail of the operations in Iraq.[794]

In addition to going further than previous Australian governments in discussing ASD’s capability and activities, these announcements raised the profile of ASD in the Australian public consciousness. Though the announcements related to the use of ASD capability to prevent cyber-attack, they were followed by increased public concerns about the possibility of mass surveillance on Australian citizens.[795]

2017 Independent Intelligence Review

On 7 November 2016, the Turnbull Government commissioned Michael L’Estrange AO and Stephen Merchant PSM to undertake an *Independent Intelligence Review of the Australian Intelligence Community* (the L’Estrange and Merchant Review).[796] The terms of reference directed the L’Estrange and Merchant Review to focus on the six agencies historically comprising Australian Intelligence Community (AIC); ONA, ASIS, ASIO, ASD, DIO and AGIO. It was

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[793] Turnbull, “Transcript 40308.”

[794] Turnbull, “Transcript 40613”; Turnbull, “Transcript 40705.”

[795] Richardson, “Volume 1,” 143.

[796] L’Estrange and Merchant, “Report of the Independent Intelligence Review.”

also to examine “the relationship and engagement between those agencies and the members of the broader National Intelligence Community,”[797] being the intelligence functions of AFP, the Department of Immigration and Border Protection, Australian Criminal Intelligence Commission (ACIC), and the Australian Transaction Reports and Analysis Centre (AUSTRAC). Of particular note, the terms of reference directed the review to consider the “Effectiveness of current oversight and evaluation arrangements,”[798] but did not specifically include an appraisal of transparency measures or the appropriateness of official secrecy relating to the AIC.

The L’Estrange and Merchant Review reported in June 2017 in two classified volumes, large sections of which were made public. It made 23 recommendations. Key among these were recommendations to establish ONI as a “statutory authority within the Prime Minister’s portfolio.”[799] ONI would subsume the existing ONA, and be led by a Director-General (appointed at the level of a Secretary), who would also serve as head of the broader NIC.[800] The L’Estrange and Merchant Review also spoke to the role of the IGIS in Australia’s liberal democracy, noting that its role was primarily one of ‘assurance’ (rather than a multiplier of transparency): “Through its functions of inquiry and reporting, the Office of the IGIS is designed to provide assurance to Parliament and the public that AIC operations are subject to thorough and independent oversight, while maintaining the operational requirement for secrecy.”[801]

NCND

Against heightened public concerns regarding the potential uses of ASD’s capabilities following the cyber capability disclosures, the L’Estrange and Merchant Review recommended that ASD be established in legislation. This would provide greater transparency and control over its “functions, power and authority.”[802] It recommended that:

> ASD’s priority role of supporting ADF capabilities be clearly reaffirmed and strengthened in new legislation … [and] that ASD’s legislative mandate be amended to explicitly recognise its national responsibilities for cyber security, including the provision of advice to the private sector.[803]

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[797] L’Estrange and Merchant, 11.

[798] L’Estrange and Merchant, 12.

[799] L’Estrange and Merchant, 13.

[800] L’Estrange and Merchant, 13.

[801] L’Estrange and Merchant, 114.

[802] Richardson, “Volume 1,” 143.

[803] L’Estrange and Merchant, “Report of the Independent Intelligence Review,” 8.

The Turnbull Government accepted this recommendation , and acquitted it through the passage of the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018* (Cth). The legislation outlined the role, functions, and organisational structure of ASD.[804] Unlike the 2016 cyber capability disclosures, the enactment of a legislative basis was a well-established precedent for the formalisation of transparency regarding an intelligence agency, particularly so where endorsed via the recommendation of an independent review. As had been the case with ASIO and ASIS (and indeed DSD) before it, this legislation shifted the kinds of information to which NCND applied. No longer was the Australian Government refusing to comment on offensive cybersecurity capability. Rather, it not only avowed the capability, but in fact articulated general circumstances under which it would be used. The mechanism of legislation, however, represented a return to precedented forms of national security information disclosure.

As explored above, the effect of the 2016 disclosures was not necessarily immediately positive, and in fact contributed to increased public concern about the powers of the executive, and arguably led to policy changes to clarify the limits of and controls on this power.[805] While the establishment of ASD in legislation had provided greater transparency about its functions and activities, public concerns about the use of ASD capability to infringe on the rights of Australians were not completely satisfied, and speculation continued until 2019 (to be discussed further in Chapter 9). This revived many of the concerns held about the surveillance activities of ASIO during the Cold War.

Conclusion

The 2005–2017 period was characterised by changes not primarily in the security environment, but in the information and technology environment. The step-change in the ability of governments globally to ensure information security prompted widespread international criticism of the approaches to official secrecy policy of liberal democratic governments, including Australia, and calls to abandon NCND specifically.[806] These pressures saw the further evolution of Australian official secrecy policy under successive governments from both sides of politics.

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[804] Part 1 of the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018* (Cth) amended the IS Act by inserting new Parts 3A and 5A providing for the establishment and control of ASD (including engagement of the Director-General and staff), and amending the functions of ASD at section 7.

[805] Richardson, "Volume 1," 261; Greg Moriarty, Michael Pezzullo, and Mike Burgess, "Joint Statement in Response to Media Reports Regarding ASD's Powers" (Defence, April 29, 2018), https://www.defence.gov.au/news-events/releases/2018-04-29/joint-statement-response-media-reports-regarding-asds-powers; L'Estrange and Merchant, "Report of the Independent Intelligence Review," 8; Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018 (Cth).

[806] Norton-Taylor, "Why 'Neither Confirm Nor Deny' Has Become Untenable for British Spies"; Kevin, "Abbott's Spy Games."

Notably, however, while the information age constituted a 'revolution' for context in which Australian governments approached official secrecy policy, and did result in a brief break with precedent in the Turnbull cyber capability disclosures, Australian official secrecy policy ultimately saw more continuity than lasting change in this period.

Arguably the most significant developments in terms of official secrecy policy were the mass unauthorised disclosure events associated with WikiLeaks and Edward Snowden. While these events raised specific and immediate issues for governments (such as the revelations of an alleged intelligence operation targeting Indonesian officials), the primary consequence was far broader. No longer was large-scale intelligence and intelligence analysis the sole preserve of governments (or highly resourced and coordinated extra-governmental bodies).[807] Instead, advances in technology were equipping the public with the capability not only to collect and communicate vast amounts of information, but with increasingly sophisticated tools to analyse information once acquired. The WikiLeaks and Snowden disclosures acutely demonstrated the new scale of the threat to information security that had accompanied all the advantages of technology, and had brought into great relief the quandary that governments around the world now faced; the decision of whether to abrogate NCND in the face of a significantly expanded public capacity to both make unauthorised disclosures at scale and effectively aggregate information once it was in the public domain.

Shaped by this step-change in the information environment, successive Australian governments on both sides of politics took steps towards increasing transparency, though they did not abandon NCND in practice or policy. The Rudd and Gillard Labor Governments took steps towards formalising Australia's commitment to open government, and commissioned the first of the 'regularised' independent intelligence reviews in accordance with the Flood's 2004 recommendation. The Abbott Coalition Government then declined to abrogate NCND in response to criticism of the previous Gillard Government, instead reaffirming convention and emphasising bipartisanship on national security. The Turnbull Coalition Government then oversaw the release of *Australia's First Open Government National Action Plan*. The Turnbull Government's disclosures of ASD's offensive cyber capability initially appeared to discard precedented elements of avowal, implying the need for different approaches to secrecy and transparency in the context of the step-change of the internet. However, its apparent attempts to retrofit the structure of avowal to the disclosures, coupled with subsequent governments' reversion to the conventions of NCND and avowal (examined in the next chapter), demonstrate overall more an evolution of established precedent than a lasting revolution of approach. This chapter finds

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807 Blaxland and Birgin, *Revealing Secrets*, 341.

that the information age constituted a paradigm shift which would continue to shape, but not ultimately displace, the use of NCND. The events of this period laid the groundwork for intensified debate over official secrecy policy in the contemporary security environment, which is discussed in the following chapter.

Chapter 8: The Contemporary Security Environment (2017–2022)

The last chronological chapter in this thesis analyses the use (and evolution thereof) by Australian governments of NCND during the contemporary security environment, from 2018 to 2022. While it has not seen the pronounced step-change in information technology of the early millennium, this period featured several key developments in official secrecy policy relevant to NCND. Notably, these include unprecedented and specific judicial analysis of the standing of NCND policy, as part of the (now discontinued) *R v Collaery* legal proceedings.

This chapter proceeds in two parts. The first part examines three recent inquiries with respect to official secrecy, including their establishment, reports and relevant recommendations, and the responses to these reports by government. These inquiries are two parliamentary inquiries into aspects of press freedom, reporting in 2020 and 2021 respectively, and the independent *Comprehensive Review of the Legal Framework of the National Intelligence Community*, led by Dennis Richardson AC (the Richardson Review), reporting 2019. This part concludes that, while recent inquiries have not fully disentangled or resolved the challenges of the contemporary security environment, independent inquiries continue to play a critical role in the evolution of official secrecy policy. The second part examines the involvement of NCND in the circumstances surrounding the *Collaery* proceedings, and its interaction with the operation of the *NSI Act*. This part also examines how successive governments spoke publicly about the proceedings, and their ongoing use of NCND policy. This part concludes that Australian governments continue a bipartisan commitment to NCND, though the changed information environment (as examined in the previous chapter) has influenced the surrounding decisions about national security policy.

Notably, the analysis in this chapter (similarly with Chapter 5) is substantially based on contemporaneous open-source primary material, rather than declassified primary material. This necessarily means that, unlike earlier chapters, the analysis in this chapter does not benefit from the ability to compare official public statements with subsequently-declassified official deliberations. This limitation is noted throughout the analysis, which points to additional possible avenues of analysis once the classified historical record begins to be available in archival form. However, given the abundance of official data generated through a rich information-age public discourse (as will be explored), strong conclusions are still available to be drawn in the interim regarding the use of NCND and the evolving approach to official secrecy more broadly.

This chapter finds that there has been more continuity than change in Australian governments' use of NCND. Successive governments have continued to espouse public commitment to NCND in a bipartisan manner, though they have diverged on other related elements of official secrecy policy and national security policy more broadly. This thesis argues that this demonstrates not the obsolescence of NCND, but rather indicates the underlying role NCND has played in Australian liberal democratic governance as a mediator of the tension between secrecy and transparency.

Part 8.1: Inquiries and Reviews

The Turnbull Government's unprecedented disclosures regarding Australia's cyber capability, including surrounding the release of the *Cyber Security Strategy 2016* and 2017 Report of the *Independent Intelligence Review*, had raised ASD's profile in the public consciousness. Rather than the official disclosures cementing confidence and trust, public concerns about ASD's activities continued to grow. As Blaxland and Birgin note, "Notwithstanding the need for ASD's capabilities to counter cyber threats, there were and are fears in some quarters of 'mass surveillance' of Australians."[808] By 2018, a number of media stories which appeared to involve unauthorised disclosures (some of which related to the role of ASD in Australia's intelligence and security landscape) triggered a protracted public discourse regarding the use of the powers of law enforcement and intelligence agencies in respect of journalists. This increased public debate ultimately triggered two high-profile Parliamentary inquiries into aspects of press freedom, and was also addressed in the reports of the Richardson Review.[809] While these inquiries dedicated significant attention to the 'balance' of secrecy and transparency in Australia's contemporary liberal democracy, they have been followed by greater complexity rather than a broad consensus in public debate on the contours of official secrecy policy.

While all three inquiries heard detailed consideration of various legislative provisions, it is outside the scope of this thesis to undertake specific legal analysis. Instead, the next sections examine the concepts, arguments, and analysis that arose in relation to official secrecy in the course of these inquiries, with particular regard to policy positions articulated or implemented by government.

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[808] Blaxland and Birgin, 315.

[809] Blaxland and Birgin, 321; Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press"; Senate Environment and Communications References Committee, "Report: Freedom of the Press"; Richardson, "Volume 1."

Section 8.1.1: Parliamentary Inquiries into press freedom

In 2019, two parliamentary inquiries in relation to press freedom were established following the AFP's execution of separate search warrants on the offices of the Australian Broadcasting Corporation (ABC) and the residence of a News Corporation journalist.[810] The search warrants had been executed in connection with the publication of news media stories the previous year relating to the role of ASD, which were alleged to have involved possible unauthorised disclosure of classified information. The inquiries drew extensive public attention and engagement. Reporting in 2020 and 2021 respectively, both inquiries addressed the 'balance' of secrecy and transparency, and made a number of recommendations in relation to official secrecy.

2017 and 2018 media stories

On 11 July 2017, the ABC published the first in a series of news media stories reporting on allegations of potential war crimes by Australian Defence Force personnel in Afghanistan.[811] While the story did not directly publish substantive classified material, it referred to "Hundreds of pages of secret defence force documents leaked to the ABC"[812] and specified the security marking on the documents.

The following year, on 29 April 2018, newspaper the *Sunday Telegraph* published a story relating to the role of ASD. The story included a photograph of an official-appearing document marked with a security classification, and reported that:

> TWO powerful government agencies are discussing radical new espionage powers that would see Australia's cyber spy agency monitor Australian citizens for the first time. Under the plan, emails, bank records and text messages of Australians could be secretly accessed by digital spies without a trace, provided the Defence and Home Affairs ministers approved.
>
> The power grab is detailed in top secret letters between the heads of the Department of Home Affairs and Defence, seen by The Sunday Telegraph, which outline proposed new powers for Australia's electronic spy agency — the Australian Signals Directorate (ASD).
>
> The Sunday Telegraph can reveal the Secretary of the Department of Home Affairs Mike Pezzullo first wrote to the Defence Secretary Greg Moriarty in February outlining

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810 Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," 1.

811 Parliamentary Joint Committee on Intelligence and Security, 2.

812 Dan Oakes and Sam Clark, "Afghan Files Expose Deadly Secrets of Australia's Special Forces," *ABC News*, July 10, 2017, https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642.

> a plan to potentially allow government hackers to "proactively disrupt and covertly remove" onshore cyber threats by "hacking into critical infrastructure.[813]

While the story appeared, in a general sense, consistent with comments made by the then-Minister for Home Affairs, Peter Dutton in December 2017 expressing support for ASD to have a "greater domestic focus than they've had in the past," officials were reported as "adamant" that a proposal to spy on Australians had never existed.[814] Consistent with this reporting, the same day as the publication of the *Sunday Telegraph* story, the heads of the Department of Home Affairs, Department of Defence, and ASD issued a joint public statement addressing the material in the story. The statement categorically denied a number of matters raised in the article, and referenced legislation arising from the L'Estrange and Merchant Review:

> In relation to today's media claim, there is no proposal to increase the ASD's powers to collect intelligence on Australians or to covertly access their private data.
>
> ASD's cyber security function is being enhanced under reforms agreed by the Government last year in response to the 2017 Independent Intelligence Review. The Parliament has already passed legislation establishing ASD as an independent statutory agency within the Defence portfolio on 28 March 2018 in response to this recommendation.[815]

In a notable move, the statement also went as far as to rule out the possibility of the agencies (framed as 'we') ever providing certain kinds of advice to government: "We would never provide advice to Government suggesting that ASD be allowed to have unchecked data collection on Australians – this can only ever occur within the law, and under very limited and controlled circumstances."[816] Then-Secretary of the Department of Home Affairs Michael Pezzullo echoed the statement and invoked NCND at an Estimates hearing the following month, commenting that:

> Without confirming or denying the existence or content of the specific documents which the correspondent claims to have seen, I can inform this committee that I have not proposed and nor would I ever propose that ASD's powers be expanded in the way described in this false reporting.[817]

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[813] Annika Smethurst, "Spying Shock: Shades of Big Brother as Cyber-Security Vision Comes to Light," *Daily Telegraph*, April 29, 2018, https://www.dailytelegraph.com.au/news/nsw/spying-shock-shades-of-big-brother-as-cybersecurity-vision-comes-to-light/news-story/bc02f35f23fa104b139160906f2ae709.

[814] Michael Koziol and David Wroe, "Malcolm Turnbull Canned Any Idea of Allowing the ASD to Spy on Australians," The Sydney Morning Herald, June 5, 2019, https://www.smh.com.au/politics/federal/malcolm-turnbull-canned-any-idea-of-allowing-the-asd-to-spy-on-australians-20190605-p51urd.html.

[815] Moriarty, Pezzullo, and Burgess, "Joint Statement in Response to Media Reports Regarding ASD's Powers."

[816] Moriarty, Pezzullo, and Burgess.

[817] Michael Pezzullo (Secretary, Department of Home Affairs), quoted in "Estimates - Home Affairs Portfolio" (Senate Hansard: Commonwealth (Austl.), May 21, 2018), 15.

Shortly after the publication of the article Dutton publicly discussed the substance of the article. While describing the claim of a proposal to spy on Australian citizens as "complete nonsense," Dutton did discuss the "threat that we face in cyber" and referred to ASD capacity not officially acknowledged:

> Now, we need to look at the capacities within the Australian Federal Police, within the agencies within the Home Affairs portfolio, otherwise, including obviously a look at the capacity of ASD. ASD does a lot of great work in terms of some of the disruption capacity that they have. There's a lot of capacity obviously that they don't talk about and that they execute at a world-class standard and we recognise that.[818]

These comments were widely interpreted in further media coverage as not having ruled in or out the substance of the proposal. This again evoked the logic of NCND.

2019 execution of search warrants

On 4 and 5 June 2019, the AFP executed separate search warrants on the residence of journalist Annika Smethurst and the Ultimo offices of the Australian Broadcasting Corporation (ABC) in connection with the publication of the 2018 news media stories.[819] The execution of the warrants drew extensive public attention, and swiftly became the focus of public debate on press freedom in Australia.

Dutton, as minister responsible for the AFP, released a statement on 5 June 2019 emphasising the AFP's operational independence from government, which stated that he had had "no involvement" in the investigation and that his office had been informed following the execution of the warrants.[820] The statement both affirmed his support for press freedom in Australia, and alluded to the policy 'balance' between transparency and secrecy: "We have clear rules and protections for that freedom of the press and we also have clear rules and laws protecting Australia's national security."[821] Dutton further elaborated on this implicit theme of 'balance' in a radio interview the following day, commenting that:

> If you receive a tip off about a business doing something, or a government not doing something, or a health department ramping whatever it is, the media of course has a right and an obligation to report on that, but the circumstances here involved highly classified documents.[822]

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818 Peter Dutton, "Joint Press Conference with Minister Taylor, Commissioner Colvin and Deputy Commissioner Kent, Parliament House," May 1, 2018, https://minister.homeaffairs.gov.Departmentau/.

819 Ananian-Welsh, Cronin, and Greste, "In the Public Interest," 1243; Senate Environment and Communications References Committee, "Report: Freedom of the Press," 2–3.

820 Peter Dutton, "Press Release: Australian Federal Police Search Warrants," June 5, 2019, https://minister.homeaffairs.gov.Departmentau/.

821 Dutton.

822 Peter Dutton, "Interview with Ray Hadley, Radio 2GB-4BC," June 6, 2019, https://minister.homeaffairs.gov.Departmentau/.

Dutton also referred to 'long existing laws' in Western democracies covering the unauthorised disclosure of classified information, again implicitly as a limitation on press freedom, stating that:

> all of us support freedom of the press. As I say, if there's a problem with the law, then people can make that argument, but from what I understand of the facts, we're talking about highly classified national security documents... It's a case in the United Kingdom or in any Western democracy where you have documents that are sensitive enough to be classified – not open source documents – and where those documents have been leaked, that is against long existing laws. There's no new law that covers that. [823]

Dutton's reference to the possible argument that there was a 'problem with the law' was prescient – the following month, this would become the focus of two parliamentary inquiries.

Parliamentary inquiries

Public outcry had not been eased by the Turnbull Government's statements addressing the execution of the search warrants. In response, Parliament commenced two separate inquiries relating to the issue of press freedom: the PJCIS commenced its *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press* (the PJCIS Inquiry), and the Senate Environment and Communications References Committee *Inquiry into press freedom* (the Senate Committee Inquiry).

On 4 July 2019, the Attorney-General wrote to the PJCIS referring the matter of press freedom for inquiry. The terms of reference requested that the PJCIS report on several aspects of the interaction between the powers of law enforcement and intelligence agencies and the journalists and media organisations. Of note, term of reference (c) requested that the PJCIS inquire into and report on changes to 'better balance' press freedom and the need to address offending and national security:

> (c) Whether any and if so, what changes could be made to procedures and thresholds for the exercise of those powers in relation to journalists and media organisations to better balance the need for press freedom with the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats.[824]

Further, the letter from the Attorney-General to the PJCIS referring the matter for inquiry stated:

> The Government is committed to ensuring our democracy strikes the right balance between a free press and keeping Australians safe - two fundamental tenets of our de-

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[823] Dutton.

[824] Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press."

> mocracy. As such, the Government will consider proposals that aim to ensure that balance. This includes carefully reviewing all materials and proposals that media organisations and interested bodies provide to the Government.
>
> …
>
> The Morrison Government is committed to ensuring press freedoms are preserved as a key part of our democracy, while also keeping Australians safe and recognising that nobody is above the law.[825]

The Senate referred the matter of press freedom to the Environment and Communications References Committee on 23 July 2019.[826] The terms of reference for the Senate Committee Inquiry were broader than those of the PJCIS Inquiry, and specifically included a number of additional policy areas, including whistleblower protections and government culture with respect to transparency:

> (b) the whistleblower protection regime and protections for public sector employees;
> (c) the adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information;
> (d) appropriate culture, practice and leadership for Government and senior public employees.[827]

The PJCIS Inquiry drew 61 submissions from members of the public, media, academia, industry, and several government agencies (and an additional 41 supplementary submissions and responses to questions on notice), and held four days of hearings in August and September 2019. It reported in August 2020 with 16 recommendations, which generally related to changes to existing journalist protections, and further areas for policy development. Likewise, the Senate Committee Inquiry drew 48 submissions from similar sectors and held five days of hearings across 2019 and 2020. It reported in May 2021 with 17 recommendations across a wide range of policy areas, including in relation to the review of secrecy offences in Commonwealth legislation (ultimately delivered by the Attorney-General's Department in November 2023[828]); amendments to the *PID Act*; the definition of 'national security' across Commonwealth legislation; the prosecution of David McBride in relation to alleged unauthorised disclosures; and its endorsement of some recommendations of the PJCIS Inquiry.

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825 Attorney-General, "Letter of Referral to Chair of the Parliamentary Joint Committee on Intelligence and Security: Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press" (Commonwealth (Austl.), July 4, 2019), 2.

826 Senate Environment and Communications References Committee, "Report: Freedom of the Press," 1.

827 Senate Environment and Communications References Committee, "Report: Freedom of the Press."

828 Attorney-General's Department, "Review of Secrecy Provisions: Final Report."

'Balance'

Both inquiries strongly took up the 'balance' language which had consistently shaped both scholarship and Australian public discourse.[829] Two of the few articles of broad consensus among submitters to the inquiries were both the importance of a free media to Australia's liberal democracy, and the genuine need for government to keep certain information secret. The PJCIS Inquiry Report noted that the importance of a free media was acknowledged both in the Attorney-General's referral letter, and in the contributions of almost all government agencies, including ASD, AFP, ASIO, the Attorney-General's Department, the Department of Home Affairs, and ONI.[830] The Report also noted that Ministers and agencies had taken a number of steps since the commencement of the PJCIS Inquiry to address the concerns of the public, media, and other organisations regarding press freedom in Australia, including the issuing of Ministerial Directions to the CDPP and AFP relating to prosecutions and investigations involving the media; the AFP's commencement of a review into the conduct of sensitive investigations; and the announcement by incoming AFP Commissioner Reece Kershaw of a reform agenda within the AFP.[831] Equally, the Senate Committee Inquiry Report emphasised evidence from members of the media and other non-government sectors recognising the essential role of Australia's law enforcement and intelligence agencies, and "the need to keep certain government information secret in the interests of national security," including representatives from the Association for International Broadcasting, Professor Peter Greste from the Alliance for Journalists' Freedom, and academic law and media experts.[832]

That transparency and national security (the distilled form) were both critical to Australia's liberal democracy was put beyond doubt in the course of both inquiries. Submissions received by the inquiries would question the use of the 'balance' concept as a framing device. As examined in the Literature Review of this thesis, this reflected increasing scholarly analysis internationally which challenged the rhetoric of security and liberal democratic imperatives as competing factors to be balanced against one another.[833] In particular, submission 9 to the

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[829] Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press", in particular chapter 3. Senate Environment and Communications References Committee, "Report: Freedom of the Press" in particular chapter 2. Waldron, "Security and Liberty"; Golder and Williams, "Balancing National Security and Human Rights"; Hardy and Williams, "Terrorist, Traitor, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information"; Ireland-Piper and Crowe, "Whistleblowing, National Security and the Constitutional Freedom of Political Communication," September 1, 2018.

[830] Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," 14–15.

[831] Senate Environment and Communications References Committee, "Report: Freedom of the Press," 19–21.

[832] Senate Environment and Communications References Committee, 11–12.

[833] See Mokrosinska, *State Secrecy and Democracy*; Birchall, "Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness"; Horn, "Logics of Political Secrecy"; Waldron, "Security and Liberty."

PJCIS Inquiry, provided by Katherine Mansted and Rory Medcalf of the National Security College (ANU), localised this analysis to the contemporary Australian context. Mansted and Medcalf challenged the rhetoric of balance, submitting that media freedom contributed to Australia's international credibility, and in turn ability to address security challenges:

> Contrary to the implication in term of reference (c), that 'security' and media 'freedom' are competing interests to be balanced, a media sector that is in fact – and is perceived to be – free and independent can be a national security asset.[834]

Mansted and Medcalf argued that even an erroneous perception of reduced press freedom in Australia "risks diluting" Australia's credibility in advocating for liberal values internationally, invoking as example the need for trusted media sources to counter-balance increasingly authoritarian and state-controlled media internationally.[835] Mansted and Medcalf also referenced other government policy and statements which drew the connection between Australia's liberal democracy (and, crucially, domestic and international perception as a liberal democracy) and its national security. One of these policy reforms was the new counter foreign interference strategy, legislation for which had been passed by government that year and was premised on shining 'sunlight' on corruption, interference, and coercion. Mansted and Medcalf also referenced the 2017 Foreign Policy White Paper, which referred to Australia's values (including liberal democracy) as "underpin[ning] a strong, fair and cohesive society at home and are a source of influence for Australia internationally."[836] The White Paper also stated that "National security is the foundation on which our freedoms have been built and maintained."[837] These statements reinforced the growing analysis that transparency (in this case, support for and protection of press freedom) is interwoven with national security rather than balanced against it.

Mansted and Medcalf concluded their submission by urging the members of the PJCIS to "ensure that enforcement and intelligence powers are appropriately calibrated – given that maintaining a free and independent media, in fact and perception, is critical to Australia's national interest."[838] While usefully making explicit the connection between transparency and national security and advocating that national security policy be made with this in mind, Submission 9 did not advance a substantive view on what this 'calibration' might involve. In considering

[834] Medcalf and Mansted, "Submission to the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," 2.

[835] Medcalf and Mansted, 2.

[836] Department of Foreign Affairs and Trade, "2017 Foreign Policy White Paper" (Australian Government, 2017), 1.

[837] Department of Foreign Affairs and Trade, 1.

[838] Medcalf and Mansted, "Submission to the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press."

the issue of 'balance' between transparency and national security imperatives, the PJCIS Inquiry Report considered the relationship between the two in a liberal democracy. The PJCIS Inquiry Report quoted testimony from Director of Defence Strategy and National Security at the Australian Strategic Policy Institute (ASPI) Michael Shoebridge that "national security enables democracy… The purpose is to have a free and open society, though, not to have national security for itself."[839] Echoing this logic, the Senate Committee Inquiry Report referred to evidence received from legal expert Dr Lawrence McNamara that press freedom equally should also not be considered an end in itself:

> protections for the press are a means to an end, so protection is not received because people are journalists or because they are sources; it is about the wider public interests at stake here and those public interests— the right to know about what the state is doing to combat threats, what those threats are and to know that the state is complying with the rule of law. These are the types of public interests and protections that underlie democratic, credible transparency and accountability.[840]

While dedicating significant attention to the question of balancing transparency and national security imperatives the reports of both inquiries demonstrated that a consensus on an appropriate balance had not emerged from the submissions and hearings. The PJCIS Inquiry Report noted that the PJCIS was "challenged in being able to come to a consensus position"[841] by the original specified reporting period, and articulated the PJCIS' focus on "reaching bipartisan agreement on a set of achievable and concrete recommendations in the time available," noting that some issues and proposals for reform raised by submitters would not be discussed in the report.[842] The PJCIS Inquiry Report also explicitly noted the difficulty involved in finding any level of balance, let alone an appropriately calibrated one: "attempting to find a balance between the free operation of the media and national security priorities, distilled into the concepts of transparency versus secrecy, will only eventuate if affected parties are willing to collaborate."[843] The PJCIS Inquiry Report went as far as commenting (in relation to the submission of a number of conflicting policy proposals) that "[t]he PJCIS is not a general purpose policy committee…nor is it a legislation drafting body" and that "[a]nalysis of any

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839 Michael Shoebridge (Director, Defence, Strategy and National Security, Australian Strategic Policy Institute) (19 September 2019), quoted in Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press."

840 Lawrence McNamara (personal capacity) (10 February 2020), quoted in Parliamentary Joint Committee on Intelligence and Security, 21. See also: Julie Posetti (personal capacity) (10 February 2020), 22.

841 Parliamentary Joint Committee on Intelligence and Security, 3.

842 Parliamentary Joint Committee on Intelligence and Security, 4–5.

843 Parliamentary Joint Committee on Intelligence and Security, 13.

meaningful reform in this space required collaboration," but that it was "not minded to make a specific recommendation" on how this collaboration between stakeholders could take place.[844]

The PJCIS ultimately recommended a number of reforms relating to the extension of already-existing legislative protections for journalists and increased recordkeeping (the major of which were accepted by the Morrison Government in December 2020[845]), and otherwise referred the substantive issues back to executive government to conduct further legislative reviews and develop policy proposals.[846] Policy debate remains ongoing at time of writing.[847]

The definition of 'national security'

Notably for this thesis, the PJCIS Inquiry Report considered critical to its deliberations "the concept of national security," and the question of how intelligence capability can be protected. It accepted that "Information regarding defence, domestic and foreign intelligence and security must, out of necessity, often be covert,"[848] but also noted that submissions argued that the "broad nature of the definition of national security" and its evolution as part of recent espionage and foreign interference reforms had created confusion.[849] The PJCIS Inquiry Report, however, did not appear to come to its own view on the appropriate definition of national security. Instead, it turned back to logistical changes that would mitigate the impact of the status quo, including recommending that investigatory agencies advise journalists and media organisations when they are no longer persons of interest to an investigation.

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844 Parliamentary Joint Committee on Intelligence and Security, 57.

845 "Australian Government Response to the Parliamentary Joint Committee on Intelligence and Security Report" (Australian Government, December 2020).

846 Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," xv–xix, 57.

847 The PJCIS Inquiry and its report drew scholarly and policy commentary, including calls for specific legislative reforms: see Keiran Hardy and George Williams, "Press Freedom in Australia's Constitutional System," *Canadian Law Journal of Comparative and Contemporary Law* 7 (2021): 222–55; Rebecca Ananian-Welsh, Sarah Kendall, and Richard Murray, "Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom," *Melbourne University Law Review* 44, no. 3 (2021): 764–811, https://doi.org/10.3316/informit.113450494427498; Jason Bosland and Rebecca Ananian-Welsh, "Journalists Must Be Protected in Police Investigations. Here's Our Five Point Plan for Reform," *The Conversation*, October 27, 2022; and; Daanyal Saeed, "Proposed Media Freedom Legislation Gets 'very Enthusiastic' Response from MPs," *Crikey*, April 11, 2024. Outside the scope of the period studied in this thesis, the subsequent Albanese Labor Government sought discussions with media representatives in January 2023, and commissioned further reviews of secrecy provisions in Commonwealth legislation (see Mark Dreyfus, "Media Release: Attorney-General to Hold Media Roundtable," January 19, 2023; Attorney-General's Department, "Review of Secrecy Provisions: Final Report"; Mark Dreyfus, "Media Release: Tabling of the INSLM's Review into the Operation and Effectiveness of the National Security Information Act," December 1, 2023, https://markdreyfus.com/media/media-releases/tabling-of-the-inslm-s-review-into-the-operation-and-effectiveness-of-the-national-security-information-act-mark-dreyfus-kc-mp/; and Mark Dreyfus, "Media Release: Government Response to the Independent National Security Legislation Monitor's Secrecy Review," November 27, 2024). Reforms arising from these reviews have yet to be implemented in legislation.

848 Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," 24.

849 Parliamentary Joint Committee on Intelligence and Security, 24.

Section 8.1.2: Richardson Review

Recommendation 15 of the 2017 Report of the L'Estrange and Merchant Review recommended that "a comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure agencies operate under a legislative framework which is clear, coherent, and contains consistent protections for Australians."[850] On 30 May 2018, the Turnbull Government announced the commissioning of Mr Dennis Richardson (AC) to undertake such a review. The terms of reference of the Richardson Review were broad, and included both the legislation governing the six AIC agencies, and that governing the intelligence activities of the additional four National Intelligence Community (NIC) agencies (ACIC, AFP, AUSTRAC, and the Department of Home Affairs). Of note, the Richardson Review specifically observed that "Unlike seminal reviews of the past, dramatic circumstances have not given rise to this Review."[851]

The terms of reference directed the Richardson Review to consider whether improvements could be made to ensure the legislation governing the NIC "provides for accountability and oversight that is transparent and as consistent across the NIC agencies as is practicably feasible."[852] The terms of reference also directed the Richardson Review to consider:

> the adequacy of national security information handling provisions under the National Security Information Act 2004, including the protection of information relating to counter terrorism and foreign interference prosecutions; [and]
>
> oversight-related legislation, such as the Inspector-General of Intelligence and Security Act 1986 and Independent National Security Legislation Monitor Act 2010.[853]

The Richardson Review reported in four volumes, a number of which were partly or wholly classified. The reports dedicated significant attention to official secrecy policy, in particular Chapter 35 (contained in Volume 3) which specifically addressed key principles relating to secrecy,[854] and Chapters 43 and 45 (contained in Volume 4) which addressed respectively the balance between secrecy and transparency and protection of national security information.[855]

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[850] L'Estrange and Merchant, "Report of the Independent Intelligence Review," 92.

[851] Richardson, "Volume 1," 21.

[852] Richardson, 30–31.

[853] Richardson, 30–31.

[854] Dennis Richardson, "Volume 3: Information, Technology, Powers and Oversight" (Comprehensive Review of the Legal Framework of the National Intelligence Community, December 2019), 3.

[855] Richardson, "Volume 4," 3.

'Balance' and harm

At the outset of the Executive Summary, the Richardson Review observed that the NIC's legislation broadly achieved a 'balance' of competing interests. In the view of the Richardson Review, this legislation preserved liberal democratic values:

> The legal frameworks governing the National Intelligence Community (NIC) are carefully considered, balancing competing interests—individual liberties and collective security. They preserve the values and principles that underpin the NIC, and indeed our democratic society.[856]

It also acknowledged the complexity of the legislative framework and referenced the "inherent tension in a liberal democracy between protecting and promoting the rights of the individual and broader, collective interests—in particular, national security and public safety."[857] The Richardson Review elaborated on this dichotomy in Volume 3 of its report, referring to the tension between the essential oversight and accountability mechanisms and the operational secrecy imperatives of intelligence agencies as "permanent."[858]

This language not only indicates that the Richardson Review accepted the 'balance' model of transparency and secrecy, but considered that the existing legislative framework was broadly successful in achieving such a balance. The Richardson Review framed its findings in the context of the many reviews which had preceded it, and made extensive reference to these reviews in its deliberations. In Chapter 43, the Richardson Review referred to the ALRC's observation as part of its the 2009 *Secrecy Laws and Open Government in Australia* report that "official secrecy was the norm for most of Australia's history,"[859] and that the balance began to shift with the passage of the 'new administrative law' as part of the open government agenda (including legislation establishing bodies such as the AAT and Ombudsman, and processes for judicial review, freedom of information, and archival release, as examined in Chapters 3 and 4 of this thesis). The Richardson Review further affirmed that "Legislation is a key mechanism for achieving transparency."[860]

In its Chapter 35, the Richardson Review outlined key principles in relation to secrecy offences, alongside an overview of the existing "legislative framework for secrecy."[861] In its summary, the Richardson Review referred to the three basic principles of advanced by the

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[856] Richardson, "Volume 1," 21.

[857] Richardson, 33.

[858] Richardson, "Volume 3," 122.

[859] Para 2.4, Review of Secrecy Laws Discussion Paper (Discussion Paper No 74, June 2009), Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia."

[860] Richardson, "Volume 4," 21.

[861] Richardson, "Volume 3," 88.

Final Report of the Gibbs Review in relation to laws regarding unauthorised disclosures of information, examined in Chapter 6 of this thesis. In relation to the categories of information to which disclosure offences should apply, the Richardson Review noted that:

> According to the Gibbs Committee, these descriptions of information should be 'no more widely stated than is strictly required for the effective functioning of Government' and should include, for example, information relating to intelligence and security services, information relating to defence and foreign relations, and information the disclosure of which impedes the prevention or detection of offences, or the apprehension or prosecution of suspected offenders.[862]

As also explored in Chapter 6, the Gibbs Review, in turn, had developed its analysis with reference to the conclusions of the Hope Royal Commissions. In particular, the Gibbs Review had cited Hope's view that unauthorised disclosures could be as damaging to the national interest as espionage, and that information appropriately subject to protection included not only matters relating to defence, but economic and other matters.[863] The ALRC proposed that the appropriate balance existed where the information disclosure was likely or intended to cause, or causes, harm to 'essential public interests', which the ARLC viewed as including the "security, defence or international relations of the Commonwealth… the prevention, detection, investigation, prosecution or punishment of criminal offences… the life or the physical safety of any person; or… the protection of public safety."[864] Both the Gibbs Review and ALRC had been in favour of replacing the 'catch-all' secrecy offences in sections 70 and 79 of the *Crimes Act*, described by the Gibbs review as "wrong in principle,"[865] with new offences "limited to the disclosure of information that causes harm to essential public interests."[866]

Also relevant to this thesis are the themes which had emerged as part of the long-standing debate on the merit of a 'public interest' exception to secrecy offences in addition to (or instead of) the public interest disclosure scheme contained in the *PID Act*. In its survey of the various contributions, the Richardson Review noted that while the Samuels and Codd Review and several non-government representatives had historically considered an additional exception or defence meritorious, the Gibbs Review, ALRC, PJCIS, former INSLM Roger Gyles AO QC had expressed the view that such an exception was inappropriate. These latter objections, with which the Richardson Review concurred, cited the inappropriateness of delegating

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862 Richardson, 88.

863 Robert Marsden Hope (1976), cited in Gibbs, Watson, and Menzies, "Final Report."

864 Australian Law Reform Commission, "Secrecy Laws and Open Government in Australia," 23–24.

865 Gibbs, Watson, and Menzies, "Final Report", 316, para. 31.4.

866 Richardson, "Volume 3," 94.

judgements about the disclosure of information to individuals, or effectively to the judicial system. Of note, the 2009 ALRC Report quoted an AIC submission that individuals “should not be arbiters of which disclosures constitute damage to the public interest,”[867] while the Report of the Second Hope Royal Commission drew on the reasoning of the judgement in 1984 UK case *Secretary of State for Defence v Guardian Newspapers Limited*:

> The responsibility for deciding what information shall be treated as classified and what shall be released into the public domain is not his or that of an individual civil servant applying his own criteria. It is that of ministers who are answerable to the nation through Parliament. The maintenance of national security requires that untrustworthy servants… shall be identified at the earliest possible moment and removed from their positions. This is blindingly obvious and would not become any less obvious at any trial.[868]

The material on which the Richardson Review drew in concurring that the existing legislative framework appropriately ‘balanced’ secrecy and transparency implicitly endorsed the ongoing appropriateness of executive discretion in relation to national security information. However, while the Richardson Review had broadly affirmed the existing legislative expression of official secrecy, the broad range of views it traversed in coming to this view was largely at a remove from executive government. This thesis finds that the deliberations of the Richardson Review indicate the extent to which discourse and policy on official secrecy had been shaped, and arguably dominated, by the cumulative historical output of mechanisms of oversight and independent review. This output had in turn informed the crystallisation of official secrecy in legislation, which was by 2019 arguably as indivisible from this output as much as it was an aggregate policy position of successive governments. While lawmaking on official secrecy may have become increasingly decentralised and contested, however, there remained significant circumstances under which executive discretion remained the overriding factor.

Part 8.2: NCND in the courts

These circumstances included the prosecution of secrecy offences. Between 2018 and 2022, successive Australian governments had pursued a number of legal proceedings against individuals in relation to unauthorised disclosures. The most significant of these was the *R v Collaery* case, in which NCND became a prominent point of contention. The Morrison Government had argued it should be allowed to adduce sensitive evidence in secret in order to preserve NCND. While accepted by the primary judge, this rationale was overturned by the Court

[867] Australian Intelligence Community, Submission No SR 37 (6 March 2009), quoted in Australian Law Reform Commission, “Secrecy Laws and Open Government in Australia,” para. 8.54.

[868] John Donaldson (1984), cited in Hope, “General Report.”

of Appeal, which pointed to the "very real risk of damage to public confidence in the administration of justice."[869] The proceedings were ended on 7 July 2022 by the incoming Albanese Government, which cited Australia's "national security, our national interest and the proper administration of justice."[870] Despite taking different view of Australia's national interest and security lay, the incoming Attorney-General, Mark Dreyfus KC decisively reaffirmed the new Government's commitment to NCND.

The next sections examine the role of NCND in the *Collaery* legal proceedings, including its unprecedented invocation by the Morrison Government in connection with the *NSI Act*, and its status following the discontinuation of the proceedings by the Albanese Government. While this thesis is not engaged in legal analysis, the extraordinary centrality of NCND to the developments of the proceedings both demands historical scrutiny and provides critical data on the role of NCND in Australian liberal democratic governance.

Section 8.2.1: Circumstances and Allegations

The *R v Collaery* case had been preceded by a complex set of earlier circumstances and legal proceedings. Bernard Collaery, a barrister and former Attorney-General and Deputy Chief Minister of the ACT, had first become involved in the circumstances surrounding the case as the legal representative in a case brought against the Australian Government by the Timor-Leste Government in the Permanent Court of Arbitration in The Hague.[871] The Timor-Leste Government had alleged that the Australian Government had conducted covert surveillance of its offices during treaty negotiations between the two parties in 2004. A former ASIS officer, who became known as Witness K, was slated to give evidence in the case.

In 2013, shortly before the commencement of the proceedings, ASIO had executed search warrants on the Canberra offices of Collaery and residence of Witness K. In March 2014, following media coverage of the search warrants and the allegations of an intelligence operation targeting Timor-Leste, the then-Attorney-General and then-Foreign Affairs Minister made public statements neither confirming nor denying the substance of the allegations.[872] After obtaining consent to prosecute from the Morrison Government in 2018, the Commonwealth Director of Public Prosecutions (CDPP) charged Collaery and Witness K with a range

869 Judgment Summary, *Collaery v The Queen* (No 2) [2021] (ACTCA 28) at 1.

870 Karp, "Prosecution of Whistleblower Lawyer Bernard Collaery Dropped after Decision by Attorney General."

871 Richard Ackland, "George Brandis' Security Clean-up Leaves out Messy Questions," *Sydney Morning Herald*, January 3, 2014.

872 "Drawing the Line," *Four Corners* (ABC, March 18, 2014), https://www.abc.net.au/news/2014-03-18/drawing-the-line/5328634; Mossop J, *R v Collaery* (No 7) [2020].

of secrecy offences, including breaches of the *IS Act*.[873] While in 2019 Witness K pleaded guilty (receiving a suspended sentence of imprisonment and good behaviour order in 2021), Collaery pleaded not guilty and was committed to trial.[874]

Section 8.2.2: *NSI Act* and use of NCND

Proceedings commenced in May 2020 in the ACT Supreme Court. In late 2019, the Commonwealth Attorney-General had applied under section 31 of the *NSI Act* for orders which would "have the effect of requiring that significant parts of the trial… not be conducted in public and that persons involved in the trial, including the jurors, not disclose the information given during those closed portions of the hearing," including after the conclusion of the trial.[875] As such, the proceedings commenced with a week-long closed hearing to determine which the material that would be treated as classified. The Australian Government invoked the *NSI Act* in proceedings in relation to both Witness K and Collaery. However, it was in the *R v Collaery* proceedings that the issue of NCND came to a head.

National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

As explored in Chapter 6, the *NSI Act* was first passed in 2004 to protect sensitive information with national security implications in the context of federal criminal proceedings (its scope later expanded to cover civil proceedings). The *NSI Act* had been invoked in a number of cases before the commencement of the *Collaery* proceedings and had survived a challenge to its Constitutional validity in 2006.[876] However, its provisions had also been subject to ongoing criticism and scrutiny, including by the INSLM.[877] As examined in Chapter 6, section 31 of the *NSI Act* states that the Court must give "greatest weight" to the risk of compromising national security over any other matter, including a "substantial adverse effect" on the right to a fair hearing. This exercise would become the fulcrum of the proceedings.[878]

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[873] Weston-Scheuber, "Hear No Evil, See No Evil, Speak No Evil," 46.

[874] "Ex-Spy to Plead Guilty to Breaching Intelligence Act as His Lawyer Is Committed to Trial," *ABC News*, August 6, 2019, https://www.abc.net.au/news/2019-08-06/witness-k-to-plead-guilty-lawyer-bernard-collaery-face-trial/11387046.

[875] Mossop J, *R v Collaery* (No 7) [2020], para. 2.

[876] Kieran Pender, "The High Cost of Speaking Up," *LSJ: Law Society Journal*, no. 1 (July 2022): 64, https://doi.org/10.3316/informit.568150892041352; See also Donaldson, "Report into the Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004", particularly p. 187-188.

[877] Bret Walker, "2013 Annual Report" (Independent Security Legislation Monitor, November 7, 2013), particularly Chapter 7 (p. 124-155); The NSI Act would later be specifically scrutinised by future INSLM Grant Donaldson: "Report into the Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004."

[878] Beck, "Fair Enough?," 421; Weston-Scheuber, "Hear No Evil, See No Evil, Speak No Evil," 39.

NCND

It soon became clear that NCND was central to the direction of the case. Following the closed hearings, Mossop J issued a decision on 26 June 2020 on the arguments relating to the *NSI Act*. In summarising the positions of the parties, the Court noted the Attorney-General had submitted that in relation to the charged of alleged unlawful disclosures, "the central question is whether the truth or otherwise of particular aspects of the statements made by Mr Collaery should be publicly confirmed or denied."[879] The Court further noted that the Attorney-General had submitted:

> notwithstanding the widespread reporting of Mr Collaery's statements, the NCND principle still has work to do in this case both generally and because of the risk of harm arising from disclosure in the particular circumstances of this case.[880]

In so doing, the Australian Government had introduced NCND for judicial deliberation as the cornerstone of its arguments against public disclosure. This opened NCND up to the possibility of challenge, which was indeed taken up by the defence. The Court noted that the defendant "directly challenged, with significant evidence from experienced and respected former senior government officials, the assertions made in the Attorney-General's evidence about the ongoing applicability of the NCND principle."[881]

Parties to the case provided in evidence a combined total of 17 affidavits from experienced witnesses who could speak to the implications of making the material public. Several of these individuals also provided oral evidence and were described by the Court as "distinguished, honourable and intelligent people, expressing nuanced opinions based upon significant experience."[882] The Court noted the distinct contrast between the serving (or very recently retired) senior government officers called as witnesses by the Attorney-General, with the long-retired officers called as witnesses by the defendant. The Court observed as "unsurprising" that former appeared acutely conscious of current risks to national security, while the latter tended towards a "broader perspective" of those risks "in the context of Australia's place in the

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[879] Mossop J, *R v Collaery* (No 7) [2020], para. 52; Kieran Pender, "Witnesses J, K – and L? Open Justice, the NSI Act and the Constitution," *Australian Public Law* (blog), October 12, 2021, https://www.auspublaw.org/blog/2021/10/witnesses-j-k-and-l-open-justice-the-nsi-act-and-the-constitution.

[880] Mossop J, *R v Collaery* (No 7) [2020], para. 52.

[881] Mossop J, para. 66.

[882] Mossop J, para. 63. The oral evidence was reported in the media; see Christopher Knaus, "Court Rules Key Parts of Bernard Collaery Trial to Be Held in Secret," *The Guardian*, June 26, 2020, https://www.theguardian.com/australia-news/2020/jun/26/court-rules-key-parts-of-bernard-collaery-trial-to-be-held-in-secret; and Elizabeth Byrne and Matthew Doran, "Part of Witness K Lawyer Bernard Collaery's Trial Will Be Heard in Secret," *ABC News*, June 26, 2020, https://www.abc.net.au/news/2020-06-26/part-of-witness-k-lawyer-bernard-collaery-trial-heard-in-secret/12397584; Hamish McDonald, "Bernard Collaery's Bombshell," Inside Story, March 19, 2020, https://insidestory.org.au/bernard-collaerys-bombshell/.

world."[883] The Court considered that the evidence of currently serving officers should be given additional weight not in connection with the *NSI Act*, but because the "currency and immediacy of their experience" was relevant to the significance of their evidence.[884] While recognising the risk of the witnesses conforming to the government's position, the Court noted that "Each of them impressed me as fairly and earnestly calibrating their evidence in relation to the value of the NCND principle."[885] This included the specific risk of the material in question being used for mosaic analysis by countries "which have sophisticated intelligence capabilities and persistently target Australia" were it to be publicly disclosed.[886]

In its summary of the evidence (much of which was itself redacted), the Court considered that it supported the propositions that NCND was a significant and long-standing policy of the Australian Government, but that the question was whether its application to the circumstances of the case should continue. The Court considered NCND an important tool "[a]t an appropriate level of generality," and referred to the evidence of a witness called by the defendant that:

> while the NCND response had long been acknowledged by politicians and their spokespersons as the most prudent response to alleged revelations on intelligence matters, that approach was no longer effective.[887]

The Court also noted that while the witness provided examples of departures from NCND, "that does not… detract from the ongoing significance of the principle."[888] The Court also considered that the evidence supported both the propositions that Australia's foreign intelligence relationships would be undermined by a failure to protect ASIS information, and that Australia's international reputation would be harmed by the conduct of any part of the prosecution in secret.[889] Ultimately, the Court considered that while the defendant had a "desire to compel the prosecution to disclose" and "contended that there would be benefits of disclosure," any benefits would be outweighed substantially by adverse consequences of disclosure.[890]

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883 Mossop J, *R v Collaery* (No 7) [2020], para. 65.

884 Mossop J, para. 68; The involvement of serving government officers in the proceedings also received media coverage; see Tom McIlroy, "Bernard Collaery: A Warrior for Democracy," *Australian Financial Review*, August 7, 2020, https://www.afr.com/politics/federal/bernard-collaery-a-warrior-for-democracy-20200805-p55iwj.

885 Mossop J, *R v Collaery* (No 7) [2020], para. 68.

886 Mossop J, para. 108; Spencer Zifcak, "The Unconscionable Prosecution of Bernard Collaery Was an Assault on the Values Australia Holds Dear," *The Conversation*, July 12, 2022, http://theconversation.com/the-unconscionable-prosecution-of-bernard-collaery-was-an-assault-on-the-values-australia-holds-dear-186560.

887 Mossop J, *R v Collaery* (No 7) [2020], para. 100.

888 Mossop J, para. 100.

889 Mossop J, paras. 92, 93, 106, 115-118, 149.

890 Mossop J, paras. 128, 149; The decision to make orders under the NSI Act received ongoing media coverage; see Knaus, "Court Rules Key Parts of Bernard Collaery Trial to Be Held in Secret"; Blake Foden, "Justice David

In light of these deliberations, the Court made orders for the nondisclosure of information consistent with the application of the Attorney-General under the *NSI Act*. Even with the benefit of procedures outlined in the *NSI Act*, the Court noted that:

> there is no cost-free approach to prosecution of charges in a case like this, where what is alleged is that there have been serious breaches of secrecy laws and the alleged disclosures have been widely reported and had international consequences.[891]

The decision was set aside by the ACT Court of Appeal, the 6 October 2021 judgment summary of which cited the "very real risk of damage to public confidence in the administration of justice" were evidence not publicly disclosed,[892] and the matter remitted to the primary judge, Mossop J. Following the remittal, the Australian Government sought to update its evidence, on the basis that the national security sensitivities may have changed in the time elapsed since the original decision.[893] While several further hearings were held in relation to the remittal and further direction of the proceedings, the case made little substantive progress in the following year.[894]

Mossop to Allow Secret Evidence in ACT Supreme Court Case of Bernard Collaery," *Canberra Times*, March 15, 2022, https://www.canberratimes.com.au/story/7659819/secret-evidence-to-be-allowed-in-collaery-case/.

891 Mossop J, *R v Collaery* (No 7) [2020], para. 116.

892 Judgment Summary, *Collaery v The Queen* (No 2) [2021] (ACTCA 28); Elizabeth Byrne, "Witness K Lawyer Bernard Collaery's Appeal against Secret Trial Upheld," *ABC News*, October 6, 2021, https://www.abc.net.au/news/2021-10-06/witness-k-lawyer-bernard-collaery-has-win-in-bid-for-open-trial/100517818; Christopher Knaus, "Witness K's Lawyer Wins Transparency Ruling as Court Cites Need to Deter 'Political Prosecutions,'" *The Guardian*, October 6, 2021, https://www.theguardian.com/australia-news/2021/oct/06/witness-ks-lawyer-wins-transparency-ruling-as-court-cites-need-to-deter-political-prosecutions; Sarah Basford Canales, "Secrecy of Bernard Collaery Trial Risked Damaging Public's Faith in Administration of Justice, Court Rules," *The Guardian*, January 9, 2024, https://www.theguardian.com/australia-news/2024/jan/09/secrecy-of-bernard-collaery-trial-risked-damaging-publics-faith-in-administration-of-justice-court-rules.

893 Christopher Knaus, "'Absurd': Lawyers Criticise Government's High Court Bid to Keep Collaery Decision Secret," *The Guardian*, December 3, 2021, https://www.theguardian.com/australia-news/2021/dec/03/bernard-collaerys-lawyers-say-governments-secret-evidence-would-cause-irreparable-prejudice; Christopher Knaus, "Open Justice v Secrecy: What Is the Case against Witness K Lawyer Bernard Collaery All About?," *The Guardian*, January 30, 2022, sec. Australia news, https://www.theguardian.com/australia-news/2022/jan/31/open-justice-v-secrecy-what-is-the-case-against-witness-k-lawyer-bernard-collaery-all-about; "Collaery Charges Must Be Dropped and Whistleblowing Laws Overhauled," Human Rights Law Centre, February 8, 2022, https://www.hrlc.org.au/news/2022/2/8/collaery-charges-must-be-dropped-and-whistleblowing-laws-overhauled.

894 "Explainer: The Unjust Prosecution of Bernard Collaery," Human Rights Law Centre, accessed April 1, 2022, https://www.hrlc.org.au/explainer-the-unjust-prosecution-of-bernard-collaery; Elizabeth Byrne, "High Court Delays Decision on Release of Secret Evidence in Timor-Leste Spy Trial," *ABC News*, April 13, 2022, https://www.abc.net.au/news/2022-04-13/high-court-judges-delay-decision-collaery-evidence/100988648; Binoy Kampmark, "Bernard Collaery's War Against Secret Trials," *CounterPunch.Org*, April 25, 2022, https://www.counterpunch.org/2022/04/25/bernard-collaerys-war-against-secret-trials/.

Section 8.2.3: Discontinuation of proceedings and reaffirmation of NCND

The Albanese Labor Government was elected on 21 May 2022, after nine years of successive Coalition governments. On 7 July 2022, pursuant to a discretionary power contained in the *Judiciary Act 1903* (Cth), incoming Attorney-General Mark Dreyfus KC discontinued the prosecution of Collaery.[895]

As part of the announcement of the discontinuation of proceedings, Dreyfus specifically declared an ongoing commitment to NCND: “The long-standing practice of government has been to neither confirm nor deny claims made about intelligence matters and I will strictly adhere to that practice.”[896] Dreyfus also referred to the proceedings as an “exceptional case,” and affirmed that “governments must protect secrets, and this government remains steadfast in our commitment to keep Australians safe by keeping secrets out of the wrong hands.”[897] Dreyfus affirmed that the decision to end the prosecution was “informed by the Government’s commitment to Australia’s national security and our relations with our neighbours,” noting that “the balance of interests can change over time” and that they had done so in this case.[898]

Where the findings of earlier chapters were limited to inference on this last point, Dreyfus’ declaration provides clear evidence that governments’ use of NCND, and official secrecy policy broadly, does not occur in a vacuum. Rather, official secrecy operates in relation to substantive national security policy, including specific matters requiring protection and the broader policy context. While remaining committed to NCND, the Albanese Government nevertheless took a different approach to its use. Its discontinuation of the prosecution simultaneously maintained NCND over the core substance of the allegations of an intelligence operation, and removed the urgency of the need to invoke NCND and the circumstances of direct opposition between NCND and open justice. This reduced the circumstances under which the need to invoke NCND arose.

In the same appearance, Dreyfus was questioned about increasing protections for whistleblowers and the possibility of his intervening to discontinue other cases, such as the prosecution of David McBride and Richard Boyle. Dreyfus reiterated that the *Collaery* case was exceptional, and did not make further comment on the prosecutions of McBride and Boyle.

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895 Dreyfus, “Transcript: Press Conference on Bernard Collaery.”

896 Dreyfus.

897 Dreyfus.

898 Dreyfus.

David McBride received a sentence of imprisonment on 14 May 2024; at time of writing, Richard Boyle's trial is expected to commence in November 2025.[899]

Scrutiny of the *NSI Act* continues. Shortly after discontinuing the prosecution of Collaery, on 27 July 2022 Dreyfus referred a review of the operation and effectiveness of the legislation to the INSLM.[900] In its 2023 submission to the INSLM review, the NIC observed that the legislation had been used in over 40 prosecutions and a number of civil proceedings, and argued that it has "never been more important" to have a framework like the *NSI Act*.[901] It noted the unprecedented threat environment from sophisticated espionage and foreign interference in particular, much deteriorated since the 2004 ALRC Report and initial introduction of the legislation. The NIC considered that foreign agents seek "to use litigation as an intelligence collection tool," and that Australia's open and transparent judicial processes could be exploited by adversaries to try to "'look behind the curtain' of classified capabilities and information."[902] While recommending a range of significant amendments to the *NSI Act* to ensure "the public can scrutinise decisions of Attorneys-General seeking to impose secrecy and understand the reasons of courts for ordering or rejecting secrecy that executive government seeks," the INSLM nevertheless considered that, in its broad concept, the *NSI Act* continued to do important work.[903]

Conclusion

The 2017–2022 period continued to be characterised by significant developments affecting official secrecy policy. The early years of this period saw public controversy surround press freedom, generating two Parliamentary inquiries, and the attention of the Richardson Review. Simultaneously, the Australian Government was progressing several high-profile legal proceedings relating to unauthorised disclosures (notably against Bernard Collaery, in the course of which NCND became central). As examined in this chapter, even a mild consensus

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[899] Michael Head, "The Imprisonment of David McBride: Issues of Concern," *Australian Law Journal* 98, no. 8 (July 2024): 564, https://doi.org/10.3316/informit.T2024072300005692069208703; Kieran Pender and Madeleine Howle, "On Truth and Transparency," *Law Society Journal*, no. 10 (January 2024): 73, https://doi.org/10.3316/informit.T2024122200003891497918366; Bethanie Alderson, "Tax Office Whistleblower Richard Boyle Tells Court He Will Take the Stand to Testify in His Own Defence during Trial," *ABC News*, November 11, 2024, https://www.abc.net.au/news/2024-11-11/tax-office-whistleblower-richard-boyle-to-testify-during-trial/104585258.

[900] Donaldson, "Report into the Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004," 4.

[901] National Intelligence Community, "Submission to the INSLM Review into the Operation and Effectiveness of the NSI Act," June 9, 2023, 9, 11.

[902] National Intelligence Community, 9–10.

[903] Donaldson, "Report into the Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004," 4–6.

on the proper ‘balance’ between transparency and national security imperatives has remained elusive.

The prosecution, and particularly discontinuation thereof, of Bernard Collaery demonstrates that, even if the principle of NCND remains static, its use is always pursuant to a context. As this thesis has demonstrated, NCND has largely operated as a creature of executive discretion in Australian liberal democratic governance. While the long-held nature and ongoing logic of NCND may be beyond doubt, seeking to establish this as the cornerstone of a legal argument in criminal proceedings introduced NCND to an environment which was not organised by executive discretion. The *Collaery* case also demonstrates even the appropriateness of its application to the same set of material will evolve over time, in connection with the evolution of the relative sensitivity of the material. In *Collaery*, the government’s decision to prosecute created a set of circumstances which subjected NCND to both increased public scrutiny, and judicial examination. The incoming government implicitly took a different view of the appropriate use of NCND, while refraining from any critique of its use by the previous government.

Since 2018, Australia’s official secrecy policy and use of NCND specifically have only become more complex. While both sides of politics have recently reaffirmed commitments to NCND in general, the finer details of secrecy policy are being increasingly referred to inquiries and even the judiciary for resolution. Of these reviews into the operation of official secrecy in legislation, several are yet to be implemented (or even remain ongoing), leaving a substantive policy position unresolved. While this historical study concluded with the discontinuation of the *Collaery* proceedings, a number of further reviews have already been undertaken in the context of these unresolved tensions. In December 2022, the Albanese Government asked the Attorney-General’s Department to undertake a review of Commonwealth secrecy provisions, including to report on any amendments necessary to “adequately protect public interest journalism balanced against other essential public interests.”[904] The *Commonwealth Review of Secrecy Provisions* reported in November 2023 and made 11 recommendations, including for a harms-based approach to the framing of secrecy offences.[905] In addition to its 2023 report on the operation and effectiveness of the legislation providing for the use of secret evidence in cases like *Collaery*, in 2024 the INSLM conducted its own review into certain Commonwealth secrecy offences.[906] The INSLM secrecy review made 15 recommendations for the refinement of the secrecy offences at Part 5.6 of the Commonwealth Criminal Code. While the Albanese

[904] Attorney-General’s Department, “Review of Secrecy Provisions: Final Report,” 89–90.

[905] Attorney-General’s Department, 8.

[906] Blight, “Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995.”

Government has indicated support for a number of recommendations arising from these reviews, they have not (at time of writing) yet been implemented in legislation.[907] By all indications, the foreseeable future of Australia's approach to official secrecy will involve continuing evolution.

[907] The Albanese Labor Government has publicly responded to the 2023 Attorney-General's Department report and the 2024 INSLM report. The 2023 INSLM report remains under consideration at time of writing. See Mark Dreyfus, "Media Release: Reforms to Commonwealth Secrecy Offences," November 21, 2023, https://ministers.ag.gov.au/media-centre/reforms-commonwealth-secrecy-offences-21-11-2023; Australian Government, "Australian Government Response to the Independent National Security Legislation Monitor Report," November 2024; Dreyfus, "Media Release: Tabling of the INSLM's Review into the Operation and Effectiveness of the National Security Information Act."

Chapter 9: Discussion

This chapter synthesises and discusses the findings of the preceding chronological chapters. In so doing, this chapter addresses in turn the research questions posed in the Introduction to this thesis, as follows:

- First, whether and (if so) why and how Australian governments' relationship with and use of NCND has evolved over time
- Second, whether and (if so) to what extent Australian governments' relationship with and use of NCND been politically partisan; and
- Third, what role NCND has played in Australian liberal democratic governance.

Part 9.1: Have Australian governments' relationship with and use of NCND evolved over time? Why and how?

This thesis finds that, historically, Australian governments' relationship with NCND and use of NCND has continually evolved. This part begins by examining why this has occurred, before turning to how it occurred in practice. While successive governments historically expressed commitment to NCND, the precise manifestation of this commitment in policy and practice was not static over time. This has been the case both in terms of the use of NCND by Australian governments, and approach to other countries' NCND policies, particularly within Australia's security alliances with the US and UK. Using the findings of the chronological chapters, the next two sections draw conclusions regarding why and how evolution occurred.

While the precise causes of this evolution were many and varied, two broad themes are confirmed in the historical analysis. The first is the changing dynamic between security and liberal democratic imperatives, and the second is the changing information technology environment. There were a number of aspects to this evolution, including the gradual institutionalisation of NCND as formal policy, the rescoping of its use by Australian governments (including as demonstrated through the development of avowal), and the imposition of conditions under which Australian governments would accept the NCND policies of other nations.

Section 9.1.1: Why?

There are many possible discrete reasons for this continuous evolution of Australian governments' relationship with and use of NCND. However, this thesis substantiates that evolution was influenced by two primary factors and, to some extent, the relationship between them. These two factors are changes in the dynamic between security and liberal democratic imperatives, including as perceived by Australia and its allies, and the ability of governments to maintain information security, as informed by the information technology environment. This study found that the overall trajectory of evolution has trended towards greater structural transparency over time, including through significant periods of government-led 'turns' towards openness, but that changes in both the security and information technology environments were associated with the timing and nature of key changes in policy and practice.

The first and primary factor which influenced the evolution of NCND in Australia historically was the changing dynamic between security and liberal democratic imperatives. This factor frequently prompted substantive and enduring changes in NCND and official secrecy policy. It is potentially unsurprising to conclude that the evolution of NCND, as studied in the context of national security, was associated with changes in the dynamic between security and liberal democratic imperatives.[908] However, this thesis argues that this is no truism. There are two ways in which this finding is analytically substantive. Firstly, while the dynamic between these imperatives has been extensively referenced in public policy and commentary (and jurisprudence) as one of 'balance,' this thesis finds that the dynamic has not fundamentally been one of two mutually exclusive, competing factors.[909] This is further borne out in the reflection of these imperatives in policy and practice, as examined in the discussion of how evolution occurred. Secondly, and to be examined more closely below in the discussion of NCND's role in liberal democracy, there is a strong argument that the very notion of the 'changing' use of NCND is paradoxical, given that it is premised on unchanging and unbroken application. Indeed, Australia's changing use of NCND is in stark contrast to the adamantly unchanging US and UK use of NCND in respect of nuclear deterrence, both in the context of a rapidly changing security environment. While it is conceivable that Australia's use may have varied had it possessed nuclear armaments, such speculative analysis is outside the scope of this historical study. Therefore, even if intuitive, it is a substantial finding that Australia's relationship with NCND evolved in relation to security and liberal democratic imperatives.

The dynamic between security and liberal democratic imperatives evolved as the expression of the imperatives themselves changed over time. One of the suppositions of this thesis, stated at the outset, is that Australia operated continuously as a liberal democracy during the studied period. This thesis does not argue therefore that the imperative of Australian governments to uphold liberal democratic values has changed during this period. Likewise, it

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[908] As examined throughout this thesis, national security has long been discussed as a legitimate ground for official secrecy within liberal democracy: see Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security*, 42. For a detailed consideration in the Australian context, see Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information", particularly chapters 7 and 8.

[909] See Mokrosinska, *State Secrecy and Democracy*; Birchall, "Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness"; Horn, "Logics of Political Secrecy"; Waldron, "Security and Liberty."

does not argue that the imperative of Australian governments to maintain security has changed. Rather, it finds that their expression in policy and practice has continually changed, contributing to an evolution in the overall dynamic between the two.

Changes in Australia's security environment included both changes in the threats constituting the security environment itself, and their reflection in the changing of scope of the concept of 'national security;' these changes influenced the timing and substance of governments' national security policy and practice, and therefore the material to which NCND and official secrecy applied. Environmental changes included the end of the World Wars; the waxing and waning tensions of the Cold War; the varying threat of espionage and foreign interference; instances of domestic and global terrorism; the advent of the threat of cyberattack; and the relative strength or weakness of Australia's ties with security partners. These events influenced the relative 'sensitivity' of information, resulting in both micro changes in the use of NCND (such as temporary publication embargos on strategic information, or the request to reassess the sensitivity of evidence in *Collaery*), and macro reforms to the context in which NCND operated (such as the establishment of ASIO as a concession to preserve security partnerships). Concurrently, scope of 'national security' evolved from a primarily defence-oriented concept premised on existential threat, to a more formalised and comprehensive concept inclusive of international political, military and economic relations, as per the current definition in the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth). Directly linking with official secrecy policy, independent reviews such as the Hope Royal Commissions and the Gibbs Review expressed broader still views on the categories of information properly requiring protection on security grounds, referencing matters such as Australia's economic position, national resources and law enforcement interests.[910]

Similarly, public expectations of liberal democratic values such as transparency and accountability, and the expression of such values in policy and practice, were not static over time. Liberal democratic imperatives were historically both facilitated through and expressed by mechanisms such as competing partisan policies on national security and official secrecy; Parliamentary scrutiny of executive government's intelligence and security activities through question time, debate, and committee structures; independent review of these frameworks; and increasingly structured conventions, policy and legislation safeguarding the aforementioned mechanisms.[911] These expressions were responsive to changing public expectations of

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[910] Robert Marsden Hope (1976), cited in Gibbs, Watson, and Menzies, "Final Report."

[911] Examples examined throughout this thesis include Dedman, "United States Hugs Atom Secrets"; Whitlam, "Gough Whitlam, 'It's Time for Leadership,' 1972"; Senate Standing Committee on Constitutional and Legal Affairs, "Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill 1978"; Samuels and Codd, "Report on the Australian Secret Intelligence Service"; and Richardson, "Volume 1". For an overview of the evolution of Australia's historical attempts to reconcil

transparency and accountability, as imposed via electoral victory and loss; both Whitlam and Hawke, for example, sought public mandates for greater transparency on national security, while Fraser progressed the freedom of information legislation that had twice received implicit, if not explicit, electoral endorsement under Whitlam. In this sense, both the demands and expression of security and liberal democratic imperatives, and the dynamic between them, continually changed over time. This thesis finds that the evolution of Australian governments' relationship with and use of NCND was primarily (though not universally) driven by this first factor.

The secondary factor which influenced the evolution of NCND in Australia historically was the ability of governments to maintain information security, as informed by the information technology environment. Broadly, these changes in the information technology environment influenced the evolution of NCND and official secrecy policy at a practical level,. Examples included radio broadcasting of wartime developments as discussed in Chapter 2; the spread of photocopiers in the 1980s as discussed in Chapter 4; and the advent of the internet and development of 'offensive cyber' capability as discussed in Chapter 7. While this factor largely shaped use of NCND, which was primarily responsive to changing security and liberal democratic imperatives, there existed a small number of notable exceptions where the information technology environment was the primary driver of change. These are explored below.

Section 9.1.2: How?

This section examines how the historical evolution of Australian governments' relationship with and use of NCND occurred in practice. As concluded above, evolution was primarily associated with the changing dynamic between security and liberal democratic imperatives, but also with the ability of government to maintain information security as informed by the information technology environment. This section first examines the evolution of governments' use of NCND (including avowal) as Australian policy, and how it was influenced by these factors. It then turns to the evolution of Australian governments' approach to the NCND policies of the US and UK, also as influenced by these factors.

Use by Australian governments

This thesis finds that NCND as structured Australian policy evolved in a relatively linear manner. From an improvisation of Parliamentary debate, NCND went on to become a general principle accepted by successive governments, before being formalised in legislation in 1982 in the context of freedom of information reforms. The scope of its application followed a similar trajectory of refinement, though did not absolutely narrow or widen, but waxed and waned in

"the demands of intelligence and security with democracy," see Kirby, "The Changing Legal Framework of the Australian Intelligence Community: From Hope to Richardson."

different respects. Its scope organically captured more information as the scale of the intelligence and security activities of government grew, though was simultaneously narrowed, via policy decisions such as avowals and legislation, to focus primarily on operations, sources and methods. At time of writing, NCND remains an institutionalised policy as part of Australia's approach to official secrecy.[912] It also finds that, NCND has demonstrated an overall trend towards greater structural openness as its use (and official secrecy policy more broadly) became more structured over time, matching the greater structural clarity in intelligence and security-related legislation, notably via the enactment of the *IS Act* in 2001.

Adoption and institutionalisation of NCND

This section discusses findings which trace Australian governments' adoption and gradual institutionalisation of NCND. NCND and its 'logical core' were first recognisably articulated in the Australian context by the Chifley Government in the circumstances surrounding the establishment of ASIO, as examined in Chapter 2. Speaking on 4 November 1948 against a Motion of Censure relating to the Government's refusal to 'affirm or deny' allegations relating to the state of intelligence sharing with the US and UK, the then-Minister for Defence outlined the fundamental logic of NCND, arguing that the Government should not be "put in the position of having either to deny or to affirm the truth of any allegation that may be made in regard to confidential matters" lest comment in either direction divulge sensitive information to adversaries.[913] Further, the Minister for Defence argued that while national security prevented the Government from disclosing it, the information in its possession could "dispose of all the arguments of the Opposition in a fraction of a second."[914] This demonstrated that early uses of NCND were not only concerned with the restriction of information from public disclosure, but from disclosure to the Parliamentary Opposition.

Assuming office in December 1949, Menzies was the first of five successive Coalition Prime Ministers spanning 23 years. As explored in Chapter 3, while these governments enacted a range of securitising reforms and attracted critique for the politicisation of the intelligence and security framework, the evolution of official secrecy during this period was not unidirectional. Rather, many of the measures taken in the name of national security involved incremental disclosures of Australia's intelligence and security framework. Continuing to grapple with both the threat of espionage domestically and pressure from the US and UK, in 1952 the

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912 As examined in this thesis, the current (at time of writing) Albanese Labor Government has expressed ongoing commitment to the NCND principle: see Dreyfus, "Transcript: Press Conference on Bernard Collaery"; and Greene, "Officials Can Neither 'Confirm nor Deny' US Bombers in Australia Carry Nuclear Weapons."

913 Dedman, "United States Hugs Atom Secrets."

914 Dedman.

Menzies Government introduced the D-Notice system which, while secret, invited voluntary collaboration with the media on matters of national security. The defection of the Petrovs and commencement of the Royal Commission on Espionage in 1954 catapulted the nascent intelligence and security framework back into the public consciousness. In accordance with the recommendations of the Royal Commission, the Menzies Government tabled a number of its reports publicly in Parliament, further increasing public awareness of Australia's intelligence and security framework. While the establishment of ASIO in legislation in 1956 strengthened its security mandate, it also publicly confirmed the general principles of its counter-subversion and counter-espionage functions. This thesis finds that despite their overall effect of strengthening secrecy, the national security reforms of this era also involved official disclosures, though minor. Nevertheless, the extended period of Coalition government resulted in a significant information asymmetry between the major political parties; given the rapid expansion of Australia's intelligence and security framework, including the establishment of ASIS in 1952, this restriction of information from the Labor Opposition extended to the very existence of ASIS. In this context, NCND remained a tool of information restriction between the major political parties.

The Whitlam Labor Government was elected in 1972 on a platform which included a commitment to 'open government.' While this commitment was not limited to national security, Labor argued that the preceding two decades of Coalition government had engendered excessive secrecy which required rebalancing. Both in line with its commitment to reduced secrecy, and practically unable to withhold details of Australia's intelligence and security framework from the Coalition Opposition (which had presided over its expansion while in government), the Whitlam Government established the practice of briefing the Leader of the Opposition on matters of national security. While Whitlam was dismissed as Prime Minister less than three years later, the turn towards a posture of 'default openness' had begun, with the Fraser and Hawke Governments continuing to progress legislative reform. In an inversion of the embedding of disclosure in the otherwise securitising reforms of the Menzies and successive Coalition governments, however, many of the 'open government' reforms included carveouts for national security matters. Epitomising this trend was the *FOI Act*, which upon passage in 1982 formalised NCND in legislation. This thesis finds that, in creating structures for official disclosure, the recalibration of official secrecy policy towards greater openness further entrenched NCND.

Whitlam left office with a parting gift for national security and official secrecy; the First Hope Royal Commission, as examined in Chapter 4. As is widely acknowledged, the Hope Royal Commissions advanced many of the enduring principles that still underpin Australia's intelligence and security framework today.[915] The aftermath of the 1973 'raids' on ASIO led by Attorney-General Lionel Murphy and the 1974 revelation of the ASIO Cairns Dossier, early in the first and second terms of the Whitlam Government respectively, cemented Labor's judgment on the need for comprehensive independent review. As discussed in Chapter 4, the First Hope Royal Commission was established in August 1974 and considered the broad sweep of Australia's intelligence and security framework. Of note, it advocated urgent public acknowledgement of the existence (but not operations) of ASIS and DSD, considering the continued use of NCND a "fig leaf" and "Emperor's new clothes" situation.[916] Hope's overarching view was that ASIS in particular be established in legislation, which he argued could enhance its security, more clearly enliven secrecy offences in respect of ASIS, and mitigate public unease about its purpose and functions (broadly construed, to avoid prejudicing NCND). While ASIS and DSD (now ASD) would not be established in legislation until 2001 and 2018 respectively, the Fraser Government acquitted Hope's recommendation to acknowledge their existence in 1977 (setting an enduring precedent for 'avowal,' as further discussed below). This thesis finds that the implicit acceptance of Hope's reasoning to reverse long-held NCND signalled a significant evolution of NCND in Australia; that NCND need not be absolute to be of value, and could be modified without prejudice (further discussed below).

Hope further developed his views through the reports of the 1979 Protective Security Review and 1983 Second Hope Royal Commission, established by the Fraser and Hawke Governments respectively. Having previously considered the relationship of official secrecy to the duties of government employment, Hope now made findings in the Protective Security Review in respect of the Commonwealth security classification system and the proper involvement of ASIO in the investigation of unauthorised disclosures by government employees, arguing that the latter be restricted to matters of security (effectively, the same matters to which NCND generally applied). The Second Hope Royal Commission observed that unauthorised disclosures had "become too common," and contended that the appropriate avenue for disclosure of classified information was through Ministers, who were accountable to the nation.[917] Hope explicitly considered the appropriateness of NCND, affirming the underlying logic of con-

[915] Richardson, "Volume 1," 39–43, 51, 86; Edwards, "The Intelligence Review: Our Hope for Years to Come"; Dobell, "Hope's Ghost Lingers in a Secret Security World"; Kate Grayson and Anthony Bergin, "Did the Richardson Intelligence Review Get It Right?," *The Strategist*, 2021, https://www.aspistrategist.org.au/did-the-richardson-intelligence-review-get-it-right/.

[916] Hope, "Fifth Report, Vol. 1," 153, 155.

[917] Hope, "General Report," 26.

sistent application, and concluding that its use should continue other than in exceptional circumstances.[918] Such circumstances, Hope considered, were those so serious that refraining from confirmation or denial would itself prejudice national security.

Hope also made recommendations for a more structured approach to oversight, contending that such mechanisms would afford public confidence in the intelligence and security framework and its integrity without compromising the imperative for secrecy.[919] Hope recommended that existing government and Parliamentary oversight addition be enhanced through the establishment of an independent IGIS, and considered additional Parliamentary oversight to be unnecessary. However, the Hawke Government established both in the wake of the Second Hope Royal Commission, in 1986 and 1988 respectively. The creation of the PJCASIO supported the growing bipartisanship on national security through further formalising information sharing between government and opposition. This recalled and in part mitigated the dilemma of the Chifley Government, which in 1948 had found itself 'not at liberty' to disclose information to the Opposition that would mitigate its misgivings in relation to national security.

This thesis finds that the Hope Royal Commissions were critical in the evolution of NCND and official secrecy in Australia. The independent scrutiny of judicial review had confirmed both the logic of NCND put forward by the Chifley Government decades earlier, and the appropriateness of NCND as continued policy in Australia's liberal democracy. It had also found that NCND could theoretically be amended without prejudice to the overall principle, put forward security-based circumstances under which this should occur. This thesis concludes that the Hope Royal Commissions both greatly informed the scope of Australian governments' use of NCND, and established a strong precedent of independent review by which future governments could (and would) continually test the appropriateness of Australia's official secrecy policy.

The second half of the decade saw an increased international focus for the Hawke Government in terms of NCND, as explored in Chapter 5. Seized of the increasing public unease surrounding the Australia-US JDFs at Pine Gap and Nurrungar (and flagging tolerance for secrecy, fuelled in part by the thorough and credible work of scholar Desmond Ball), the Hawke Government took a commitment to a public statement on the facilities to the 1984 election. Returned for a second term, the government successfully negotiated with the US for a limited public acknowledgment of their purpose and functions. Later that year, Hawke made a statement in Parliament confirming that the JDFs were not, in fact, military facilities or part of

[918] Hope, 7.

[919] Hope, 8.

a weapons system, but that they contributed to nuclear deterrence and arms verification. A further public statement in 1988, prompted by changes in the arrangements with the US and ongoing public speculation about the national security risks of hosting the facilities, further confirmed that the activities of the JDFs included intelligence functions. These statements, two decades after the 1966 establishment of the JDFs, and reversed a position of NCND held in deference to the US by four successive Australian governments (including the Whitlam Government). The development of 'avowal' as a practice is further explored below.

The Hawke Government did not universally pursue increased transparency within its key security partnerships, however. As hoped by the UK Thatcher Government, in 1986 it intervened in the UK's (ultimately unsuccessful) legal action to prevent the publication in Australia of *Spycatcher*, the memoir of a former MI5 officer which the UK viewed as containing sensitive national security information. While the Thatcher Government was unable to prevent publication of the material either internationally or, ultimately, in the UK itself, this series of events demonstrated that the Hawke Government felt keenly a need to maintain secrecy where possible in support of strong relationships with its security partners. This thesis finds that, having emerged from the scrutiny of the Hope Royal Commissions with a more structured and mature basis for official secrecy, Australia took bolder steps to pursue Australian priorities on matters of shared secrecy within its security partnerships. In stark contrast to the initial intransigence and ultimate capitulation of Chifley Government, the analysis of the historical record offered in this thesis suggests that Hawke Government was more successful in its moderated secrecy agenda with security partners.

The turn of the millennium saw global tensions whiplash between the abrupt end to the Cold War and relaxation of security postures and the renewed threat of terrorism following the September 11 attacks. As explored in Chapter 6, this thesis finds that both decreased and increased security resulted in greater disclosure of national security information. The Keating Labor Government rose to power in 1991 amid decreasing public tolerance for secrecy, and recommendations from the Gibbs Review to narrow the scope of Commonwealth secrecy offences and enact greater protections for whistleblowers. These were followed by a series of unauthorised disclosures regarding ASIS, prompting the Keating Government to commission Samuels and Codd to freshly review Australia's intelligence and security framework. While the Keating Government expressed strong support for maintaining NCND, it was ultimately responsive to the changed environment making two key avowals regarding the functions of ASIS. Global tensions rose again in the wake of the 2001 September 11 attacks, during which the Howard Coalition Government moved quickly to pass the *IS Act* in 2001, and the *NSI Act* later in 2004. A further major development was the scrutiny of the production and use of intelligence materials following the intelligence 'failures' of the US-led military action in Iraq. The public report of the Flood Inquiry, which quoted extensively from intelligence summaries, made a number of recommendations relevant to official secrecy; these included that Australia's intelligence and security framework be reviewed every five to seven years, formalising a practice of independent review which could be traced back to the Whitlam Government. The events of this period demonstrate that both Australian governments and independent reviews had come to see NCND as valuable policy with application beyond its original Cold War security context.

Building advances in information technology heralded the commencement of the 'Information Age' in the early millennium, which appeared to pose a fundamental challenge to the logic of NCND and traditional approaches to official secrecy broadly. As examined in Chapter 7, the WikiLeaks and Snowden disclosures substantiated the threat of mass unauthorised disclosure, prompting concerns not only about the disclosed material itself, but that the scale of the disclosures enlivened the threat of further extrapolation via mosaic analysis. Corners of public debate argued that this paradigm shift in information security rendered NCND obsolete.[920] While governments did not repudiate NCND, this period did see moves towards new approaches to official disclosure, including Rudd Government's 2010 establishment of the INSLM as a partially public-facing oversight mechanism, and the Gillard Government's 2013 reinvigoration of open government and enactment of a public interest disclosure framework. Describing the information age as a 'watershed', the Turnbull Government's launch of 2016 *Cyber Security Strategy* disclosed aspects of ASD's offensive cyber capability, diverging from existing precedents of avowal.[921] Cumulatively with the Snowden revelations of internationalised government surveillance programs, however, these disclosures heightened public unease about the reach of government cyber capability. This thesis finds that both the public and government viewed the information age as demanding different approaches to both substantive policy and official secrecy.

The challenges of the early millennium have largely continued into Australia's contemporary security environment, as canvassed in Chapter 8. Both Parliamentary and independent reviews freshly considered the appropriate balance between transparency and security imperatives, particularly in the context of press freedom. Debate had intensified following the 2019 execution of search warrants on members of the media in relation to apparent unauthorised disclosures of security classified material, including relating to ASD's cyber capability and role. While noting the significantly increased complexity of the scope of 'national security matters' and recommending some refinements to existing secrecy policy, these reviews largely referred

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920 Norton-Taylor, "Why 'Neither Confirm Nor Deny' Has Become Untenable for British Spies"; Kevin, "Abbott's Spy Games."

921 Turnbull, "Transcript 40308."

the development of substantive reform back to government and media stakeholders.[922] Simultaneously, NCND itself was undergoing unprecedented judicial scrutiny. Having commenced in 2018 the prosecution of lawyer Bernard Collaery for a number of secrecy offences, the Morrison Government invoked NCND as the cornerstone of its argument to present parts of its case in secret, under provisions of the Howard-era *NSI Act*. While the primary judge was persuaded that NCND should prevail over open justice in the circumstances, the Court of Appeal considered the risk to public confidence in the justice system too great.[923] Before the matter was resolved, the Albanese Government discontinued the prosecution. The incoming government limited its difference of view to the appropriateness of the 'exceptional' prosecution as informed by explicitly committing to strict adherence to NCND as a "long-standing" practice.[924] This period both confirmed that major parties remain committed to NCND as policy, and demonstrated a difference of view on its use in practice. Further, increasing (and overlapping) referral of details of official secrecy policy for independent review suggest continuing and complex evolution.

Development of 'avowal'

In parallel, governments gradually developed a complementary practice of 'avowal.' This practice enabled official disclosure without compromising NCND. As discussed in Chapter 4, a precedent for avowal was established by the Fraser Government in its 1977 official disclosures acknowledging the existence of ASIS and DSD, in accordance with the recommendations of the First Hope Royal Commission. In making the disclosures, Fraser reversed a long-held stance of NCND. However, their considered and principled form introduced a structure that would allow governments to make disclosures without implicitly rejecting NCND. First, Fraser articulated a pressing justification for the disclosures, making clear that Government was taking this step in the context of credible, independent recommendations. Second, Fraser clearly defined the scope of the disclosures, limiting them to the existence and purpose of ASIS and DSD and explicitly ruling out official comment on their operation and capability. Third, Fraser reaffirmed ongoing commitment to NCND outside the scope of the disclosures.

While still nascent, this structured approach to disclosure constituted a repeatable precedent on which future Australian governments could make disclosures without being perceived as surrendering the overall principle of NCND. This complementary practice, 'avowal,' would

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922 Parliamentary Joint Committee on Intelligence and Security, "Report of the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press," 57.

923 Judgment Summary, *Collaery v The Queen* (No 2) [2021] (ACTCA 28); Knaus, "Witness K's Lawyer Wins Transparency Ruling as Court Cites Need to Deter 'Political Prosecutions.'"

924 Dreyfus, "Transcript: Press Conference on Bernard Collaery."

be repeated and refined by the Hawke Government in its 1984 and 1988 disclosures in relation to the JDFs,[925] including acknowledging their nature as intelligence facilities (examined in Chapter 5), and again by the Keating Government in its 1994 disclosures regarding ASIS (examined in Chapter 6). Both the Hawke and Keating Governments conformed to the precedent of avowal by advancing a justification for the disclosures, clearly defining the scope of the disclosures, and reaffirming a commitment to NCND. While the majority of these avowals explicitly excluded any detail regarding intelligence and security capability and methods (with many extending that exclusion to the scope of future avowals), the precise scope of the avowals varied. This thesis argues that this variation in the scope of avowals (and therefore the inverse application of NCND), in the context of an otherwise repeating precedent, is an indication that specificity of scope has not been critical to the role of NCND in liberal democratic governance. This is further discussed in Part 9.3 below.

This thesis finds that the development of the complementary practice of avowal indicates that Australian governments historically recognised, and responded to, both the need for a level of flexibility in the discharge of executive discretion to disclose information, and the continued value of persevering the logic of NCND. Avowal, therefore, evidences a further aspect of the evolution of Australian governments' use of NCND.

Not all official disclosures constitute avowals, however. While adherence to NCND and avowal was generally continuous across successive governments, the twenty-first century has seen instances of official disclosure by Australian governments which did not conform to these principles, and therefore are not considered in this thesis to be avowals. Chapter 7 examines the disclosures by the Turnbull Government in relation to the capability of ASD in the context of the release of Australia's first *Cyber Security Strategy.* Though the Turnbull Government pointed to the changed security environment as a justification for the disclosures, acquitting the first limb of the form of 'avowal,' it did explicitly define the scope of the disclosures or reaffirm a commitment to NCND in their context. Further, while previous governments had, inherently, advanced the information in the public domain through avowal, the Turnbull disclosures also broke with the general approach of successive governments of refraining from commenting on intelligence and security capability or methods. The Turnbull cyber capability disclosures therefore were both divergent in form and content. While this thesis does not draw a normative conclusion on the appropriateness of the disclosures, it does note that they were followed by heightened public concern about the extent of the cyber functions of government, which saw

[925] Hawke, "Hawke, Ministerial Statement: Arms Control and Disarmament, Hansard (6 June 1984)"; Hawke, "Ministerial Statement: Joint Defence Facilities."

senior public servants issue an extraordinary repudiation of alleged surveillance proposals.[926] Further, later statements by the Turnbull Government appeared to partially retrofit elements of avowal to the original disclosures, suggesting possible post-hoc recognition of their ongoing value. As such, the cyber capability disclosures did not amount to an overall rejection of NCND and avowal. Together with the reversion to established precedent by subsequent Australian governments, these events indicated renewed commitment to NCND not only as convention, but as policy with contemporary merit in the public discussion of national security matters.

Approach to shared secrecy with security partners

In terms of US and UK NCND policy, this thesis finds that Australia has adopted generally 'constructive,' but varying, approaches. While the trajectory of these approaches arguably constitutes evolution, linearity is less clear. This is potentially due to the limitations of the domestic policy focus of this study, which does not have scope to first analyse the extensive scholarship and primary material concerning the wider evolution of Australia's relationships with the US and UK, in order to then exhaustively contextualise and examine the operation of NCND within these relationships. Linearity may indeed emerge from such a study. In addition, while the mechanics of these security relationships can be partially discerned and studied using contemporaneously public sources, they tend to be more readily apparent and detailed in contemporaneously classified sources. As the latter become declassified over time, therefore, they will enable richer analysis of Australia's historical approach to shared secrecy with security partners.

Nevertheless, findings do emerge from the present study in relation to two aspects of NCND in relation to matters of shared secrecy, being US and UK influence on Australian NCND policy, and Australian approaches to US and UK NCND policy. Across these findings, one of the more apparent threads of linearity relates to the ability of Australia to influence joint approaches to secrecy within its key security alliances. This increased during the studied period, as demonstrated through the analysis in Chapters 2 and 5 particularly.

US and UK influence on Australian NCND policy

This thesis finds that the Chifley Government's adoption of NCND was expressly connected to Australia's standing with its international security partners. Antecedent to this eventual adoption, Australia inherited much of its early official secrecy policy from the UK, including through the initial application in Australia of the UK *Official Secrets Act 1911*, and the strong involvement of the UK in the establishment of ASIO (through MI5) and the adoption of the D-Notice System. While the Chifley Government resented elements of the UK's involvement, as

[926] Moriarty, Pezzullo, and Burgess, "Joint Statement in Response to Media Reports Regarding ASD's Powers."

demonstrated in Chapter 2, it was unable to satisfy its key security allies of Australia's independent ability to maintain official secrecy. This led to a US and UK-imposed embargo on elements of security cooperation, including the provision of intelligence materials. Unbeknownst to Chifley, the US and UK had, through the VENONA intelligence operation, obtained but withheld evidence that Soviet interests had compromised information security in Australian government agencies (later uncovered by Australia following the defection of the Petrovs). Ultimately, the Chifley Government deemed the costs of noncooperation too great. It was in the course of establishing ASIO, as part of building Australia's counter-espionage and secrecy credentials with the US and UK, that the Chifley Government resolved to 'neither affirm nor deny' certain national security matters. This thesis finds that, in this sense, it was the lack of confidence of Australia's security partners in its inability to maintain secrecy that led to the adoption of NCND in Australia in 1948.

By the 1980s, however, Australia was on a very different national security footing. This thesis finds that, in turn, this produced a different outcome on shared secrecy with Australia's security partners. While not without attracting criticism and controversy, Australia's intelligence and security framework had matured significantly since its nascency. As examined in Chapter 2 and 4, its mandate had been substantiated domestically through the 1954-55 Royal Commission on Espionage, while the 1974 and 1983 Hope Royal Commissions comprehensively scrutinised and developed enduring principles for its operation. Australia had also become further enmeshed in the allied security apparatus, hosting a number of joint facilities critical to allied Cold War security strategy. As examined in Chapter 3, while geared towards disclosure, the turn towards 'open government' from the 1970s nevertheless instilled further structure into Australia's approach to official secrecy and formalised NCND in legislation.

The cumulative effect of this period of maturation was the development of a robust national agenda on secrecy policy, and of a domestic intelligence and security framework that was both uniquely Australian and valued by its security partners. When the Hawke Government came to power in 1983, it leveraged this increased footing to negotiate with the US for greater transparency in relation to the JDFs at Pine Gap and Nurrungar. Unlike the Chifley Government, the Hawke Government successfully brokered agreement with its security partner, enabling the 1984 and 1988 avowals of the purpose and functions of the JDFs as intelligence facilities. This thesis finds that, Australia's evolved security standing with its security allies facilitated the prosecution of its domestic agenda on official secrecy, notably including amendments to the use of NCND in Australia through two key avowals. In this sense, Australia's ability to exercise influence with its security partners on shared secrecy in relation to national security matters, including the use of NCND, evolved over time.

Australian approach to US and UK NCND policy

The other capacity in which Australia historically interacted with the official secrecy and specifically NCND policies of the US and UK was in relation to nuclear deterrence. While Australia (and, notably, New Zealand) was not itself a nuclear armed state, it was implicitly drawn into NCND policy in relation to nuclear-capable vessels through ship visits from its key security partners, as primarily discussed in Chapter 5. Where New Zealand ultimately declared its nuclear-free policy as incompatible with the strategic ambiguity of NCND as a matter of logic (leading to a breakdown in its alliance with the US), Australian governments maintained a more consistently ‘constructive,’ but nevertheless evolving, stance. Having witnessed the protracted impasse and eventual breakdown of alliance relationship between the nuclear-armed US and UK and nuclear-free New Zealand, the Hawke Government avoided challenging the NCND policy of its key security partners. While Australia maintained a policy of not allowing nuclear weapons on its soil, it did not insist on fundamental incompatibility of this position with the logic of UK and US NCND policy, but instead took steps to refine the circumstances under which it would accept the ambiguity it generated.

These steps were primarily geared towards public safety measures. Australia limited the port locations to which nuclear-capable vessels would be allowed to have access (including a blanket prohibition declared in December 1989 in relation to Hobart) and, following a Senate inquiry into visits of such vessels, sought safety guarantees in relation to nuclear-capable vessels in lieu of assurance of their nuclear armament status. As explored in Chapter 5, Australia neither substantively influenced the fundamental nature or strict application of US or UK NCND policy in relation to nuclear-capable vessels, nor sought to do so. Instead, it considered and refined the conditions under which Australian governments would accept NCND and associated ambiguity. This thesis finds that this rescoping constitutes an additional angle of the evolution of Australian governments’ relationship with NCND.

Part 9.2: Has Australian governments’ relationship with and use of NCND been politically partisan?

The first part of this chapter concluded that, in general, the evolution of Australian governments’ relationship with and use of NCND demonstrated an overall trend towards greater openness in policy and practice. This second part now turns to the question of whether governments’ relationship with and use of NCND has been politically partisan and, if so, to what extent. In answering this question, this part analyses findings on both governments’ use of NCND specifically and broader official secrecy policy. This thesis finds that commitment to the principle of NCND itself has historically been bipartisan, in two important senses. However, the broader context of official secrecy in which NCND has been used tended to exhibit partisanship, with historical 'turns' towards transparency associated with particular political persuasions (such as the Labor Party's recurrent 'open government' agenda).

NCND and avowal

NCND has often been referred to as the long-standing policy of Australian governments in relation to national security matters.[927] The findings of this thesis support such a conclusion. Since its adoption under Chifley, every Australian government has historically maintained or expressed support for the principle of NCND in some form.[928] Further, while the scope of exempt material has evolved over time, the enshrinement of the logic and language of NCND at s 25 of the *FOI Act* remains unchanged from its original form, indicating a consistent (if implied) bipartisan support for the principle of NCND in relation to national security matters since the passage of the legislation in 1982 (at time of writing).[929] While not engaged in by every government, avowal has also seen bipartisan use historically. In an early instance of avowal, Attorney-General under the Holt and Gorton Coalition Governments Sir Nigel Bowen took great care to define the scope of the denial of phone tapping of Parliamentarians to avoid "creat[ing] a precedent" for disclosure, citing the unbroken practice of NCND across Labor and Coalition governments.[930] Further, both the Fraser Coalition and Hawke Labor Governments made significant avowals in relation to Australia's intelligence and security frameworks in 1977 and 1984/88 respectively, establishing and building on a precedent for considered and principled

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[927] Barnard, "Discussion of Matter of Public Importance: Resignation of Mr GC Hoffmann"; Abbott, "Questions Without Notice: Indonesia"; Dreyfus, "Transcript: Press Conference on Bernard Collaery."

[928] With the exception of the 23-day McEwan Coalition Government (19 December 19967-10 January 1968), though this is not interpreted as a 'break,' as both the previous Holt and subsequent Gorton Coalition Governments expressed support for NCND - otherwise, as follows: Dedman, "United States Hugs Atom Secrets"; Robert Menzies, "Answers to Questions: Australian Security Intelligence Organization. (Question No. 89.)" (House of Representatives: Commonwealth (Austl.), August 11, 1964), 24; Bowen, "Bowen, Questions: Tapping of Telephones, Hansard (24 August 1967)"; Bowen, "Bowen, Questions: Australian Security Intelligence Organisation, Hansard (4 June 1968)"; Kenneth Anderson, "Question: Pine Gap" (Senate Hansard: Commonwealth (Austl.), October 12, 1971); John Leslie Carrick, "Answers to Questions: Mr Peter Rodgers (Question No. 860)" (Senate Hansard: Commonwealth (Austl.), October 18, 1978); Michael Tate, "Questions Without Notice: Telephone Tapping" (Senate Hansard: Commonwealth (Austl.), March 5, 1991); Gareth Evans, "Department of the Prime Minister and Cabinet: Program 7 - Public Administration and Accountability, Subprogram 7.4 - Office of the Inspector-General of Intelligence and Security" (Senate Hansard: Commonwealth (Austl.), February 22, 1994); Daryl Williams, "Questions Without Notice: Deportation of Mohamed Hassanien" (House of Representatives Hansard: Commonwealth (Austl.), June 19, 1996); Julia Gillard, "Transcript 15861: Doorstop Interview with the Acting PM, The Hon Julia Gillard, MP, Melbourne" (Department of the Prime Minister and Cabinet, April 11, 2008); Bob Carr, "Questions Without Notice: Zygier, Mr Ben" (Senate Hansard: Commonwealth (Austl.), March 12, 2013); Brandis, "Estimates - Attorney-General Portfolio - National Archives of Australia"; Malcolm Turnbull, George Brandis, and Mathias Cormann, "Transcript 41365: Press Conference with Senator the Hon. George Brandis QC, Attorney-General and Senator the Hon. Mathias Cormann, Minister for Finance" (Department of the Prime Minister and Cabinet, December 5, 2017); Scott Morrison, "Transcript 43155: Virtual Press Conference" (Department of the Prime Minister and Cabinet, November 26, 2020); Dreyfus, "Transcript: Press Conference on Bernard Collaery."

[929] *Freedom of Information Act 1982* (Cth), sec. 25.

[930] Bowen, "Bowen, Questions: Tapping of Telephones, Hansard (24 August 1967)"; Bowen, "Bowen, Questions: Australian Security Intelligence Organisation, Hansard (4 June 1968)"; Nigel Bowen, "Suspension of Standing Orders: Grievance Debate" (House of Representatives: Commonwealth (Austl.), June 6, 1968).

disclosure. This precedent was affirmed post-Cold War through the Keating Labor Government statements on ASIS in 1995. While the 2016 Turnbull cyber capability disclosures were the notable exception, they did not result in an overall rejection of the principles of NCND and avowal by either or both political parties.

In their use of NCND, many governments historically have not only expressed support for, but explicitly referred to the well-established nature of the principle. This demonstrates a second sense in which the use of NCND has been historically bipartisan: as a tool of bipartisanship on national security. It carved out a narrow path for confidence across governments regarding national security, without committing future governments to agreeing with or repeating the decisions of their predecessors, arguably acquitting Hope's entreaty that the security interests of the nation transcend party politics.[931] As explored throughout this thesis, various Australian governments have historically emphasised not only the use by successive governments (implying ongoing consistency), but bipartisanship in particular, as follows:

Holt Coalition Government (Attorney-General, Nigel Bowen), 24 August 1967: "I propose to follow the practice that has been adopted since as far back as the days of Mr Chifley and Sir Robert Menzies."[932]

Gorton Coalition Government (Attorney-General, Nigel Bowen), 4 June 1968:

> …well established practice of refusing to discuss the activities of the Security Service and of refusing to deal with particular allegations either by affirming or denying them. This practice has been followed by Mr Chifley, when he was Prime Minister, by Sir Robert Menzies, by Mr Harold Holt, and by our present Prime Minister.[933]

Gorton Coalition Government (Attorney-General, Nigel Bowen), 6 June 1968:

> ...the very long-standing rule that the activities of the security service of this country will not be discussed in the Parliament or elsewhere. I think the reasons for this rule are extremely well known. It is a rule which has been followed… by Mr Chifley and all succeeding Prime Ministers. In addition this principle has been adopted by my very distinguished predecessors in the office of Attorney-General, including Dr Evatt, who expressed himself quite forcibly on the subject.[934]

Fraser Coalition Government (Minister for Education, John Carrick), 18 October 1978:

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[931] Hope, "Report on the Australian Security Intelligence Organization", "Report on the Australian Security Intelligence Organization," 340, para. 17.17.

[932] Bowen, "Questions: Tapping of Telephones" (House of Representatives Hansard: Commonwealth (Austl.), August 24, 1967)."

[933] Bowen, "Questions: Australian Security Intelligence Organisation" (House of Representatives Hansard: Commonwealth (Austl.), June 4, 1968).

[934] Bowen, "Suspension of Standing Orders: Grievance Debate" (House of Representatives Hansard: Commonwealth (Austl.), June 6, 1968).

> …the Government is not prepared to enter into any discussion on the Australian Secret Intelligence Service… the Government as a matter of long standing practice will neither confirm nor deny speculation about the service.[935]

Hawke Labor Government (Minister for Justice and Consumer Affairs, Michael Tate), 5 March 1991: "…in accordance with long-established practice I will neither confirm nor deny that any particular person has been subject to telephone interception."[936]

Keating Labor Government (Minister for Foreign Affairs, Gareth Evans), 22 February 1994: "The policy of neither confirm nor deny has been strictly adhered to. I believe it is a wise policy and it is not one from which I propose to divert."[937]

Abbott Coalition Government (Attorney-General, George Brandis), 24 February 2014: "…you should know that governments of both sides of politics neither confirm nor deny nor comment on operational matters."[938]

Albanese Labor Government (Attorney-General, Mark Dreyfus), 7 July 2022: "The long-standing practice of government has been to neither confirm nor deny claims made about intelligence matters. And I will strictly adhere to that practice."[939]

Bipartisanship has not been limited to the Cold War security environment in which NCND emerged. Rather, it has arguably increased as the conventions of government matured, and as legislation became increasingly explicit on national security matters. Early uses of NCND, including its adoption by the Chifley Labor Government, were associated with preventing disclosures to the Parliamentary Opposition, particularly in response to questioning about national security matters. The rapid scaling of Australia's intelligence and security framework (including the establishment of ASIS) then occurred under 23 years of successive Coalition governments, and was accompanied by very little bipartisan information sharing. This left the Labor Opposition uninformed about Australia's intelligence and security framework, to the extent that Whitlam was not officially informed of the existence of ASIS until winning office in 1972 (a state of affairs roundly critiqued by the First Hope Royal Commission).[940] As changes in

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[935] Carrick, "Answers to Questions: Mr Peter Rodgers (Question No. 860)."

[936] Tate, "Questions Without Notice: Telephone Tapping" (Senate Hansard: Commonwealth (Austl.), March 5, 1991).

[937] Evans, "Estimates Committee A: Department of the Prime Minister and Cabinet" (Senate Hansard: Commonwealth (Austl.), February 22, 1994).

[938] Brandis, "Estimates - Attorney-General Portfolio - National Archives of Australia."

[939] Dreyfus, "Transcript: Press Conference on Bernard Collaery."

[940] Hope, "Third Report: Intelligence Co-Ordination Machinery", 48-49, paras. 87-88; Samuels and Codd, "Report on the Australian Secret Intelligence Service," 38.

government became more frequent, however, both major parties alternatingly had the opportunity to become familiar with and influence Australia's intelligence and security framework, reducing the practical ability of either party to withhold information from the other. The development of 'corporate knowledge' was further enhanced via increasing information sharing through policies and practices such as Opposition national security briefings and the inclusion of members of the Opposition in the PJCIS and its predecessors (as explored in Chapter 4 and further examined below), along with the establishment of other dedicated accountability and oversight mechanisms such as the *FOI Act* and the IGIS. This had three effects; generating greater incentive to maintain NCND in both government and Opposition as a stable precedent in the approach to disclosure of national security matters; reducing the cases in which Oppositions lacked information about national security; and providing sources of executive scrutiny outside Parliamentary questioning.

This evolution induced a strong precedent of national security bipartisanship over time. Consequently, while NCND has been used in Parliamentary proceedings more contemporarily, its use has been more strongly associated with the prevention of disclosure to minor political parties, the crossbench, or the public. Of recent example (as examined in Chapter 7), when challenged in 2013 by Bob Katter, Leader of the Katter's Australia Party, about allegations arising from the Snowden disclosures of Labor-era intelligence surveillance of friendly countries, then-Coalition Prime Minister Tony Abbott maintained an NCND stance, emphasising bipartisanship on national security and refusing to critique the former government's intelligence activities.[941] This is further demonstrated by then-Coalition Attorney-General George Brandis' reproof of Australian Greens Senator Scott Ludlam during Estimates in 2014, referenced above. Under questioning about the allegations of an intelligence operation against Timor Leste, Brandis responded that Ludlam "should know that governments of both sides of politics neither confirm nor deny nor comment on operational matters."[942] This position was subsequently publicly maintained by Labor Attorney-General Mark Dreyfus.[943]

This thesis therefore concludes that Australian governments' relationship with and use of NCND has historically been politically bipartisan, in two senses. NCND has had a long history of bipartisan support, as demonstrated through its use by successive governments since the Chifley Government. It also operated as an instrument of bipartisanship on national security matters, as demonstrated through the increasing emphasis on information sharing between

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[941] Abbott, "Questions Without Notice: Indonesia" (House of Representatives: Commonwealth (Austl.), November 19, 2013).

[942] Brandis, "Estimates - Attorney-General Portfolio - National Archives of Australia."

[943] Dreyfus, "Transcript: Press Conference on Bernard Collaery."

major political parties under the established precedent of NCND. An implication of this finding, and possible question for future research, is whether and how significantly increased minor party influence in Parliament may affect Australian NCND policy.

Partisanship in official secrecy policy

NCND has been used by Australian governments in the context of official secrecy policy more broadly. This thesis has demonstrated that increased secrecy (or conversely, transparency) was not exclusively associated with one side of politics during the studied period. For example, much of the 'open government' legislative agenda associated with Whitlam's 1972 election platform was ultimately taken forward and enacted under Fraser, including reforms establishing the Ombudsman and the freedom of information framework, in what has been recognised as a significant feat of bipartisanship.[944] The *ASIO Act*, also enacted under Fraser, contained provisions requiring that the Leader of the Opposition be briefed on security matters and establishing individual appeal rights in relation to security assessments;[945] measures which Labor had unsuccessfully sought to include in the original ASIO legislation enacted by the Menzies Government in 1956. The Hawke Government's 1988 establishment of the PJCASIO (forerunner to the contemporary PJCIS) entrenched a structured an ongoing approach to bipartisanship on national security matters, including the facilitation of secure information sharing with members of the Opposition. This further mitigated the possibility of protracted informational asymmetry and partisanship such as that of the 23 years of Coalition Governments shortly after the establishment of ASIO.[946] Simultaneously, however, the Hawke Government took part in three key civil proceedings to prevent the publication of national security material, as discussed in Chapter 5.

While both sides of politics demonstrably progressed both secrecy and transparency policies, however, this thesis has also found that the major historical 'turns' towards openness were associated with periods of Labor government. Taken together, Whitlam's vision of a government that was 'open by default,' and belief in the need for independent scrutiny of Australia's intelligence and security framework, generated forward momentum on transparency reforms

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[944] Perry, "Renaissance of the ADJR Act?"

[945] *Australian Security Intelligence Organisation Act 1979* (Cth) [As made], Part IV, Division 3.

[946] The PJCIS membership and activities are reported to Parliament annually: see Parliamentary Joint Committee on Intelligence and Security, "Annual Report of Committee Activities 2022-2023" (Parliament of Australia, February 2024). The operation of the PJCIS and its evolving role in Parliament's deliberations is the subject of scholarly critique: see Greg Carne, "Sharpening the Learning Curve: Lessons From the Commonwealth Parliamentary Joint Committee on Intelligence and Security Review Experience of Five Important Aspects of Terrorism Laws," *The University of Western Australia Law Review* 41, no. 1 (2017): 1-48; Carne, "Reviewing the Reviewer: The Role of the Parliamentary Joint Committee on Intelligence and Security - Constructing of Constricting Terrorism Law Review?"; and Dalla-Pozza, "The Parliamentary Joint Committee on Intelligence and Security."

and set enduring precedents for the appropriate calibration of official secrecy. With the exception of the 1954-55 Royal Commission on Espionage, which notably both was commissioned by and reported to the Menzies Coalition Government, all major independent reviews concerning Australia's intelligence and security framework were initiated by Labor governments until the 2001 Flood Inquiry (which recommended formalising the existing practice of regular review). Similarly, the strong majority of review and oversight institutions were initially established under Labor governments, including the AAT, ALRC, IGIS, PJCASIO, and INSLM (with the exception of the Ombudsman[947]). More recently, the Gillard Labor Government's 2013 reinvigoration of 'open government' and enactment of a public interest disclosure scheme inclusive of intelligence and security agencies further expanded authorised disclosure mechanisms.

This is not to say that these developments were universally resisted by Coalition Oppositions or rejected by subsequent Coalition governments; the Fraser Government's avowals of ASIS and DSD in accordance with the recommendations of the Whitlam-initiated First Hope Royal Commission are evidence to the contrary. Further, much of the legislation which provided a statutory basis for intelligence collection and assessment agencies was enacted under Coalition Governments, including in respect of ASIO (1956 and 1979), ASIS and DSD (2001) and ONI (2018). While such legislation also provided for various intelligence and security powers, the establishment of the purposes and functions of these agencies in legislation was viewed historically as an important transparency measure.[948] Nevertheless, the findings do suggest a stronger association between periods of Labor government and the increasing openness of government. This thesis therefore concludes that political partisanship existed in the approaches of successive governments to official secrecy policy. In this sense, the policy context in which Australian governments used NCND was, to an extent, politically partisan.

Incongruence?

The finding of historical political agreement on NCND itself but divergence on the broader elements of official secrecy policy could be interpreted as incongruent. Possible explanations include that partisanship in official secrecy policy deems the use of NCND inherently partisan, and articulations of bipartisanship purely rhetorical; or that an analytically irredeemable politics of convenience has driven the historical use of NCND, or official secrecy policy, or both.[949] However, this thesis finds that this apparent incongruence is an indicator of the more

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[947] *Ombudsman Act 1976* (Cth) (2025).

[948] Samuels and Codd, "Report on the Australian Secret Intelligence Service," 195.

[949] Thanks to Jean Bou for sparking the idea for this form of words.

particular role NCND has played in Australian liberal democratic governance historically. This is further explored in the following part.

Part 9.3: What role has NCND played in Australian liberal democratic governance?

Two key contradictions remain in the findings of this thesis. Both flow from the apparent paradox of the near-universal commitment of successive Australian governments to NCND, and yet demonstrable variation in Australian governments' actual use of NCND historically. The first is that, based on governments' own logic of strict and unbroken application, any changes in the use of NCND (let alone its clear evolution over time) should not be possible. As examined above, the second and more specific contradiction is the incongruence between apparent political bipartisanship on NCND, anchored in this same logic, and partisanship on its specific use and official secrecy policy more broadly. These contradictions shed light on the role NCND has actually played in Australian liberal democratic governance historically, the third research question of this thesis. In answering this question, the last part of this chapter addresses and proposes a resolution to these contradictions.

This thesis ultimately concludes that NCND has played a critical role in mediating the tension between the imperatives of national security secrecy and liberal democratic transparency in Australia historically. Rather than being anti-democratic, the findings of this thesis suggest that NCND is an intrinsically liberal democratic principle, the need for which has arisen in direct relation to the discharge of the duties of liberal democratic government, and which has offered a structured yet adaptable approach by which to navigate evolving security and information technology environments.

The logical core and evolution

The first of two remaining contradictions is the incompatibility between unwavering adherence in policy and change in practice. Further light is shed on the historical role of NCND in liberal democracy by re-examining its 'logical core' and relationship with strategic ambiguity. As established in Chapter 1, these are key features of the operation of NCND. Governments historically have insisted that the strategic ambiguity (and therefore advantage) generated by NCND relies on strict, unbroken application, lest the principle logically collapse; the argument being that even one errant denial would render the impression that all previous faithful instances of NCND constituted denials, and vice versa. In this context, the very notion of any change, including 'evolution,' in NCND policy initially appears paradoxical. While it is outside the scope of this thesis to determine whether NCND constituted 'good' policy (in terms of success in protecting information, public popularity, or ethical legitimacy, or with reference to other criteria), some observations can be made in terms of the role it has effectively played in the context of liberal democratic governance.

A conceptual answer to this puzzle is found through a re-consideration of the 'use cases' of NCND. As discussed in Chapter 1, these are connected with strategic ambiguity. This thesis contends that evolution of Australian governments' relationship with and use of NCND was conceptually 'possible' because the national security matters to which NCND applied for Australia were not a closed system, as in the case of nuclear-capable vessels, but were also continuously evolving.

The nuclear armament status of a nation's warships represents a set of finite, effectively quantitative, data, which could well be vulnerable to inference and extrapolation should parts of it be revealed through confirmation or denial (leaving aside other methods of discovery, such as counter-intelligence). In this context, which requires strategic ambiguity to be total, the logic of strict adherence arguably makes sense. However, as this thesis has demonstrated, the broader 'national security matters' in connection with which Australian governments have used NCND have been far from finite or fixed over time. On the contrary, they have continually evolved. Further, though different categories of 'sensitive information' have historically been proposed or implemented in various contexts (such as by the Gibbs Review as discussed in Chapter 6, or in the various legislated formulations of Commonwealth secrecy offences as discussed throughout), 'national security matters' at the level of data are functionally infinite and certainly qualitative.

In this context, strategic ambiguity as generated by NCND is affording a marginally different effect. While inferences about elements of national security matters could certainly be made should governments engage in unstructured confirmation or denial, the 'logic' of NCND in this context is not operating in relation to the strict protection of a dataset. Rather, it is preserving the current and future ability of government to exercise executive discretion to make decisions about the disclosure of information. This reflects both that the circumstances in which such decisions are made evolve, such as through the changing definition of 'national security,' the sensitivity of specific matters relative to contemporaneous security threats, the public expectations of transparency over time; and that safeguarding the executive discretion of future governments, a critical enabler of governance on behalf of the public, is consistent with liberal democratic values. It also implicitly recognises that official confirmations or denials are of a different character to even highly credible allegations, being at a minimum of significantly more direct consequence to public policy (including pressing areas such as public safety and national defence), in addition to the historical record and many other considerations. In this sense, there is inherent value in preserving the prerogative to make such statements, regardless of whether credible allegations exist. In addition to demonstrating the evolution of NCND, the development of the practice of avowal makes clear that the purpose of 'maintaining commitment' to NCND has not been to continue using it indefinitely in relation to individual national security matters. Rather, the findings of this thesis support the conclusion that a consistent NCND posture has enabled successive governments to exercise discretion over information disclosure contemporaneously with their unique historical circumstances and democratically mandated political judgment, resulting in both decisions to disclose and to refrain from doing so.

The distinction between 'use cases' is most apparent in the historical developments explored in Chapter 5 in relation to Australia's alliance relationships. As examined, the US's adamance in avoiding breaches of its NCND policy in relation to nuclear vessels ultimately caused it to suspend its ANZUS treaty responsibilities in respect of New Zealand. Simultaneously, in the context of mounting tensions and protest activity in Australia over nuclear arms, the UK sought guarantees from the Hawke Government that NCND policy would be respected and expressed willingness to reduce naval engagement with Australia if it were threatened. The extreme steps to maintain NCND over nuclear vessels were not taken in relation to broader national security matters, however. Concurrently with the ANZUS crisis and growing nuclear tensions in Australia, the US acquiesced to the Hawke Government's push to lift long-standing NCND over the purpose and functions of the JDFs (as discussed above), leading to the 1984 and 1988 avowals revealing their character as intelligence facilities. There were, naturally, many other factors entering into all of these decisions by governments, both explored in Chapter 6 or outside the scope of this thesis. However, the stark divergence of approach to the 'iron logic' of NCND in relation to contemporaneous use cases supports the conclusion that NCND played a marginally different role in each use case.

This thesis contends that it is for this same reason that Australian governments have continued to see value in and ultimately remain committed to NCND through changes in the information technology environment, the most significant of which being the advent of mass unauthorised disclosure. As examined in Chapter 7, the WikiLeaks and Snowden disclosures heralded a step-change in the ability of governments to maintain information security. Elements of public discourse argued that this paradigm shift rendered NCND obsolete.[950] The scale of the resulting unsecured material, coupled with the increasing public availability of technology to rapidly disseminate, process, analyse information, certainly changed the information sharing dynamic between governments and the public, and heightened the likelihood of increasing

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[950] Norton-Taylor, "Why 'Neither Confirm Nor Deny' Has Become Untenable for British Spies"; Kevin, "Abbott's Spy Games."

inference via mosaic analysis. However, if the role of NCND was not only to protect specific information but to preserve the latitude of government to make considered and principled decisions about official disclosure, as concluded above, then it continued to have a role in the Information Age.

(Bi)partisanship

The second of the two remaining contradictions is the incompatibility between political bipartisanship on the principle of NCND, and political partisanship on broader official secrecy policy. In addition to not correlating with agreement on official secrecy policy, bipartisanship on NCND did not always produce an identical approach to its use. In an example of both, where the Morrison Coalition Government sought to establish in Court the importance of maintaining NCND in pursuing the prosecution of secrecy offences, the subsequent Albanese Labor Government opted to discontinue the prosecution, while reaffirming commitment to NCND. As concluded above, the role of NCND in relation to the ‘national security matters’ use case has been to preserve the current and future ability of government to exercise judgement about the disclosure of information. This ongoing ability is critical, in light of the finding of this thesis that the factors that shape these judgments have consistently evolved over time, primarily the dynamic between security and liberal democratic imperatives and, therefore, the relative imperative to protect specific information. This was acutely substantiated in practice in the *Collaery* case, during which the Morrison Government sought leave to update its arguments on the sensitivity of parts of its evidence owing to the time elapsed in the proceedings.

If even the passage of very short periods of time can produce different judgements about the use of NCND from the same government, it follows that a difference in judgements about the use of NCND across governments of different political persuasions does not negate bipartisanship on the overall principle. While it is intuitively likely that each of the two major political parties are hopeful of preserving their own future executive discretion (rather than that of the other) in using NCND while in government, this is inherently uncertain; bipartisan commitment to NCND, therefore, is of mutual benefit. Further, it follows from the above discussion that the role of NCND in safeguarding executive discretion from government to government not only implicitly anticipates, but is premised on, future differences in judgment. This thesis therefore concludes that there is no incompatibility between the bipartisan commitment to the principle of NCND, and the differences in its use across governments.

Conclusion

NCND has played an important role in Australia’s liberal democracy over the studied period as a mediator of the tension between secrecy and transparency. The findings of the historical chapters demonstrate that Australian governments’ relationship with and use of

NCND has continually evolved over time, primarily due to changes in the dynamic between security and liberal democratic imperatives, and also in response to changes in the information technology environment. Evolution occurred in two key ways: the use of NCND by Australian governments, and their approach to shared secrecy with the US and UK as security partners. Evolution of the use by Australian governments involved both the gradual institutionalisation of NCND as formal policy, and refinement of the scope of its application, including through avowal. Evolution of the approach to shared secrecy was characterised by strong early influence from the US and UK on Australia's official secrecy policy, including the near-dictation of Australia's secrecy offences and domestic security arrangements, which moderated over time as Australia's national agenda on official secrecy policy matured. Similarly, Australia maintained a constructive but increasingly assertive approach towards US and UK NCND, imposing conditions under which it was prepared to accept the ambiguity of US and UK nuclear-capable vessels.

This thesis has also found that Australian governments' use of NCND has been, in two senses, bipartisan. Every government since Chifley has maintained or expressed support for NCND, indicating unbroken bipartisan commitment to NCND as a principle. In parallel, NCND and its gradual institutionalisation facilitated greater bipartisanship on national security matters in general. However, bipartisanship on official secrecy more broadly has not always been consistent. Cumulative 'turns' towards greater structural transparency, both oriented towards the public and in terms of information sharing with the Parliamentary Opposition, have been more strongly associated with Labor governments.

While this appears to raise a potential incongruence, this thesis finds that the underlying role of NCND in Australia has been to preserve the current and future ability of government to exercise judgement about the disclosure of information. In light of this finding, it is not incongruent for governments to refer to consistent, bipartisan use of NCND, while adopting diverging policy positions on specific matters and official secrecy more broadly. It is not that no historical constancy can be identified in the categories of national security information to which governments have applied NCND; this thesis has demonstrated that almost all governments have considered material relating to operations and methods to be in scope of application, for example (though its early uses were far broader). However, approaching governments' uses of NCND as though they were a Venn diagram and attempting to identify the categories at the 'union' misinterprets the role of NCND. This research has demonstrated that specificity of scope has not been the enlivening factor in the use of NCND by Australian governments. Rather, the role of NCND has been interdependent with its bipartisan use; the growing stability of its precedent has enabled successive governments to exercise executive discretion over information disclosure in the context of their moment in history and its attendant dynamic of security and liberal democracy. It does not necessarily flow from this finding that all disclosure decisions based on executive discretion have been proper, or even contemporaneously popular. The former would be the subject of a different study, and the latter is arguably demonstrated through the repeated electoral endorsement historically for review and reform of official secrecy. Nonetheless, the primary use of NCND by Australian governments identified by this thesis has been to navigate the 'permanent tension' of secrecy and transparency, an inherent demand of liberal democracy. In this sense, NCND has been not only an important part, but a critical facilitator of, Australian liberal democratic governance.

Conclusion

This thesis has examined Australian governments' relationship with NCND historically, and developed an analysis of the historical role played by NCND in Australian liberal democratic governance. Its analysis has demonstrated that NCND is both worthy of specific study and a valuable indicator of the evolution of Australian governments' approach to official secrecy policy more broadly.

Three main conclusions are drawn. The first is that Australian governments' relationship with and use of NCND has continually evolved since its adoption in 1948. Evolution was primarily precipitated by the changing dynamic between security and liberal democratic imperatives, but also shaped by changes in the information technology environment. There were several aspects to this evolution. These included the gradual formalisation of NCND as Australian government policy and the evolution of the matters to which it applied; the development of the complementary practice of avowal; the evolution of the extent to which Australia was able to influence the US and UK on matters of shared secrecy, including shared used of NCND; and the evolution of the conditions under which Australia accepted US and UK NCND policy in relation to nuclear-capable vessels, which primarily related to public safety.

The second conclusion is that Australian governments' commitment to NCND has been generally bipartisan. While the overall approach to official secrecy policy has been partisan, including through a stronger association of 'turns' towards greater openness with periods of Labor government, this has not affected both sides of politics' ongoing support for the principle of NCND. While this may appear paradoxical or a manifestation of political convenience, this thesis has argued that a resolution to this contradiction is found through the analysis of the role NCND has played in Australian liberal democratic governance.

Following this finding of bipartisanship on NCND, the third conclusion is that NCND has historically played a key role in Australian liberal democratic governance in multiple ways. NCND has preserved the current and future ability of government to exercise executive discretion to make contemporaneous decisions about the disclosure of national security matters. Security challenges (and the relative sensitivity of information) have not been static over the studied period, nor have public expectations of transparency and accountability remain unchanged. Liberal democracy requires government responsiveness to both. Commitment to NCND has afforded governments the flexibility to respond to these changes, including through individual disclosure and broader policy reform. Simultaneously, the structure of NCND has afforded a level of assurance and continuity in ongoing government decision making about the protection of national security information. That every Australian government since 1948 has expressed commitment to NCND speaks to its significant historical value in facing the challenges of Australian liberal democratic governance.

Original contribution

The original contribution of this research is twofold. First, it addresses a pressing gap in the scholarship on Australia's national security history by offering an account of governments' historical relationship with and use of NCND. Second, it examines and develops a scholarly understanding of the role NCND has played in Australian liberal democratic governance specifically, including developing a study of the establishment, practice, and evolution of avowal. The imperatives of national security and liberal democratic imperatives are conceptually 'permanent;'[951] it follows then that the need to mediate this tension is correspondingly permanent. NCND has historically 'bridged the gap' between these imperatives. In the early days of NCND, in line with Australia's cultural and political inheritance of concentrated executive discretion, it played a more unstructured and expansive role; in the absence of disclosure frameworks such as Opposition briefing, freedom of information laws, and formal oversight institutions (let alone explicit legislative provisions for secret activities of government), NCND emerged as a practical and informal approach to the management of national security information. As both the business of government and the expectations of transparency in a contemporary liberal democracy grew, executive discretion was increasingly decentralised (though not abandoned entirely) through the enactment of new administrative law, establishment of intelligence and security frameworks in legislation, and independent oversight and review. In this context, NCND played an increasingly defined role; successive governments developed its scope of application, established precedent and form for its modification through avowal, and institutionalised aspects of its operation in legislation. This overall trend towards greater openness and increasing specification of NCND as policy has not transpired as a process of linear exchange of secrecy for transparency, however.

While the relationship of tension between secrecy and transparency imperatives has been framed historically (and sometimes contemporarily) as a 'balance,' this thesis has demonstrated that the policy history of these imperatives has not been one of mutually exclusive, strictly competing factors. Rather, each has intermittently enabled and arguably enhanced governments' ability to achieve the other. As was accepted by Fraser in 1977, Hope reasoned that the public disclosure of the existence of ASIS could enhance its security, including the applicability of secrecy offences. The 1982 enactment of freedom of information legislation, one of the pillars of open government, also formally enshrined NCND in law. Hawke's 1984 and 1988

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[951] Richardson, "Volume 3," 122.

avowals of the purpose and functions of the JDFs were made in the explicit hope of building public support for their operations, to which NCND continued to apply. The application of certain secrecy obligations to oversight mechanisms, such as the IGIS, enables public reporting on Australia's intelligence and security framework without compromising NCND. Scholarship on Australian public policy has begun to reflect that secrecy and transparency need not be a direct trade-off, reflecting the direction of the literature more broadly.[952] The findings of this thesis add historical weight to such a conclusion.

Final thoughts

This research offers a deep historical grounding to inform the use of NCND in Australia's contemporary liberal democracy. Based on the ongoing, bipartisan commitment to NCND established in this historical study, it appears unlikely that Australian governments will repudiate NCND as policy or practice in the foreseeable future. However, as this research has demonstrated, while this historical 'commitment to' NCND may have been largely uninterrupted across successive centre-left and centre-right governments, the relationship with and use of NCND in practice was not static. Despite the oft-reiterated 'iron logic' of NCND by governments, it therefore follows that there are likely to remain questions for policymakers on contemporary and future use. Beyond the 2022 discontinuation of the *Collaery* prosecution, contemporary developments such as the 2024 repatriation of Julian Assange, founder of WikiLeaks,[953] and 2024 'Safeguarding Australia's Military Secrets' legislation,[954] and two recent reviews of Commonwealth secrecy offences[955] demonstrate the live relevance of such questions to Australian official secrecy policy. Any future military conflict, it goes without saying, could re-enliven not only Australia's NCND policy but also its approach to that of security allies, as recent media coverage already suggests.[956]

Extrapolating from the historical account established in this research, these questions may include the scope of proactive applications of NCND (including decisions on the policy definition of 'national security,' and the nature of intelligence and security activities conducted by the executive); the priority accorded to NCND in relation to other principles of public policy,

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[952] Medcalf and Mansted, "Submission to the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press"; Birchall, "Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness"; Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security*; Mokrosinska, *State Secrecy and Democracy*; Horn, "Logics of Political Secrecy"; Waldron, "Security and Liberty."

[953] Mark Dreyfus, Penny Wong, and Anthony Albanese, "Media Release: Mr Julian Assange," June 26, 2024, https://ministers.ag.gov.au/media-centre/mr-julian-assange-26-06-2024.

[954] *Defence Amendment (Safeguarding Australia's Military Secrets) Act 2024* (Cth) (2025).

[955] Blight, "Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995"; Attorney-General's Department, "Review of Secrecy Provisions: Final Report."

[956] Greene, "Officials Can Neither 'Confirm nor Deny' US Bombers in Australia Carry Nuclear Weapons."

such as open justice; the question of whether, when and how to make future avowals; the extent to which Australia embraces the NCND policies of its allies; and the inclusion of NCND and official secrecy in the terms of reference for future reviews and inquiries, among others. It is hoped that the historical analysis in this thesis is of enduring relevance to policymaking on such questions, and will assist policymakers to develop overall official secrecy policy in response to future changes in the security and information technology environments. Naturally, in addition to matters of policy, these questions may also prove fruitful case studies for future scholarship.

As particularly demonstrated by historical instances of avowal, the role of NCND in Australian liberal democratic governance has not been to maintain impenetrable and unyielding secrecy indefinitely. Rather, NCND has allowed governments to navigate the not only permanent, but continually evolving, tension between security and liberal democratic imperatives. Were Australia (and liberal democracies generally) not committed to values such as transparency and accountability, this tension would not arise; undemocratic governments internationally are comparatively unfettered in their security pursuits, resulting in an 'asymmetric' global dynamic.[957] While liberal democratic governance does not guarantee impartiality and propriety in practice, it is nonetheless the case that the fundamental need to mediate this tension is inherent to liberal democracy.[958] In the context of US NCND in relation to nuclear capable vessels, Goldsmith observed that "NCND reveals a residual desire to maintain the moral basis of a particular relationship by at least not openly lying to the other participant."[959] This thesis argues that NCND as policy reveals more than faded moral desire. Rather, Australia's development, adoption and use of NCND in relation to national security reveals a deep, ongoing commitment to the values and practice of liberal democracy.

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[957] Robert J. Lemke and James J. Marquard, "Freedom and Transparency: Democracies, Non-Democracies, and Conventional Arms Transfers," *Democracy and Security* 3, no. 3 (2007): 347; Leuprecht and McNorton, *Intelligence As Democratic Statecraft*.

[958] Richardson, "Volume 1," 162–66.

[959] Goldsmith, "Neither Confirm Nor Deny: Language, Logic and Morality in Foreign Policy," 15.

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