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# Freedom of information, truth and the media

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## Freedom of information, truth and the media

### **Abstract**

Much of the evidence from the 2002 Senate Select Committee inquiry into a 'Certain Maritime Incident' must be viewed as inconclusive, as most of the critical information was kept secret. A number of federal government departments and agencies refused to reveal to committee hearings most of their critical information on intelligence relating to border protection, asylumseekers, people-smugglers, double agents and a tragic boat sinking. The final Senate report stated that much of the intelligence material has been heavily censored and as a consequence, gaps exist in the intelligence picture on the tragic sinking of the boat named SIEV X.

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# Freedom of information, truth and the media

By David Blackall and Seth Tenkate

Much of the evidence from the 2002 Senate Select Committee inquiry into a 'Certain Maritime Incident'<sup>1</sup> must be viewed as inconclusive, as most of the critical information was kept secret. A number of federal government departments and agencies refused to reveal to committee hearings most of their critical information on intelligence relating to border protection, asylum-seekers, people-smugglers, double agents and a tragic boat sinking. The final Senate report stated 'much of the intelligence material has been heavily censored' and 'as a consequence, gaps exist in the intelligence picture on the tragic sinking of the boat named SIEV X'.<sup>2</sup>

Photo: © Elnur/Dreamstime.com

**N**ews follow-up to the tragedy was not prominent, as much of the media concentrated on the 'children overboard' affair, which played a role in the Howard government's re-election. Today, most Australians know nothing of the SIEV X sinking, nothing of the Australian Federal Police (AFP) involvement, nor how many people drowned.

On 21 October 2001, the asylum-seeker vessel known as 'SIEV X' sank with the loss of over 350 people, while en route from Indonesia to Christmas Island. An official government cable was sent two days later to the then prime minister's people smuggling taskforce (PST). The PST concluded that the 'vessel [was] likely to have been in international waters' when it foundered, placing the tragedy firmly in the Australian Operation Relex border protection surveillance and interception zone.<sup>3</sup> The federal Department of Foreign Affairs and Trade (DFAT) cable was sent to three senior Defence personnel, including the minister, and is referred to in a list of documents that the Department of Defence declined to release to the Senate committee under freedom of information, indicating that the Department was aware of this key document.

Tony Kevin, former Australian ambassador to Poland and Cambodia, and currently an honorary visiting fellow at the ANU Research School of Pacific and Asian Studies, has written widely on the SIEV X. He describes the experience of the asylum-seekers:

'Before dawn on October 18, 2001, armed Indonesian police herded hundreds of frightened men, women and children into launches, which ferried them to a small 19m boat moored in a bay near Bandar Lampung, Sumatra. Fully laden, the boat on which they were supposed to travel to Christmas Island rode barely above water. In all, 421 asylum-seekers were crammed into what later became known as SIEV X – a death boat, intended to sink and to kill; a final deterrent against people-smuggling. The voyage organiser, Abu Quessay, pistol-whipped terrified passengers into the launches... SIEV X sank 30 hours into its doomed voyage, in international waters some 50-65 nautical miles south of Java. It was planned to sink much earlier, in Sunda Strait, where frequent shipping might have saved more people.'<sup>4</sup>

The Select Committee on a Certain Maritime Incident was charged with finding out why people drowned and what role the Australian government played during its campaign to 'disrupt' people-smugglers. Meanwhile, the media was not watching.

## THE RIGHT TO TRUTH

Freedom of information (FOI) – that is, the right of a society to be informed – is a centrepiece of human rights. At its first General Assembly, the UN passed *Resolution 59(1)* which, in part, states that 'Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.'<sup>5</sup>

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Further, the right to be informed includes the right to be informed truthfully. In 2005, the UN Human Rights Commissioner endorsed *Resolution 59(1)*, with *Human Rights Resolution 2005/66*. This resolution recognises ‘the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights’.<sup>6</sup> In Australia, the *Freedom of Information Act 1982* (Cth) aims ‘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’.<sup>7</sup> The Commonwealth Ombudsman, who handles complaints about Australian federal government agencies, said that in 2006-07, most of the complaints it received in regard to FOI came from Centrelink and the Department of Immigration and Citizenship (DIAC).<sup>8</sup> Of course if the public, or the media on behalf of the public, are not applying for information, then none will be forthcoming.

### THE STATE OF THE MEDIA

A number of factors have affected the media’s ability to seek information in recent times and, arguably, one of the more telling factors has been diminished resources. The editor in chief of the *Canberra Times*, Jack Waterford, commented: ‘What is terribly alarming is the dumbing down of the rural and the provincial and the suburban press which are being run as factories with fewer and fewer staff with so much space to fill so that there is no time to investigate – you just process press releases.’<sup>9</sup> In the 2006 financial year, Rural Press (which has since merged with Fairfax) reduced its staff numbers and paid more to newswire service, AAP.<sup>10</sup> Rather than having local reporters source local stories, readers are receiving mass-produced news-copy written from a national perspective.

Australian media company, Fairfax, announced in August 2008 that it would be undertaking a ‘head count reduction of approximately 550 employees in Australia and New Zealand, or approximately 5 per cent of the Company’s full-time workforce’.<sup>11</sup> Almost one-third of the layoffs were to come from the ranks of journalists. News Limited, Fairfax’s main competitor in Melbourne and Sydney, said the cuts would ‘have momentous effects on the public’s ability to get quality journalism, as opposed to recycled press releases’.<sup>12</sup>

The Media, Entertainment and Arts Alliance federal secretary, Chris Warren, said: ‘It’s one of the most significant job losses in Australia this year, and it’s obviously going to have a serious impact on the ongoing quality of the company’s papers, magazines and websites in Australia and New Zealand.’<sup>13</sup> This pattern has been repeated globally<sup>14</sup> and, in the US alone, 6,675 newspaper staff have reportedly been laid off from July 2007 through to June 2008.

Fewer journalists in the field means more media releases and newswire material without any rewriting or scrutiny.

### THE AFP’S STANCE

On 29 January 2008, AFP Commissioner, Mick Keelty, gave an address to the conservative thinktank, the Sydney Institute, on policing terrorism. Mr Keelty told the gathering that the media should not report on a trial until ‘a person

who has been charged with a crime has fully exercised the right to a fair trial and the presumption of innocence has run its appropriate course’.<sup>15</sup>

During the course of criminal investigation and its trials and subsequent appeals, ‘public discussion about them should be delayed, in deference to judicial process’. He added: ‘call me old-fashioned, but I don’t believe anyone accused of, or charged with, a crime can receive a fair trial if the matter is tested in the court of public opinion before being appropriately tested in a court of law’.<sup>16</sup> Increasingly, the AFP is getting its wish, with more information kept from the public by the courts.

### SUPPRESSION AND MEDIA CONTROL

Suppression orders in Australia are issued by courts in a range of circumstances; however, some states see far more suppression orders issued than others. For example, from mid-2004 through to September 2007, 917 suppression orders were issued across the country. The state trying hardest to keep its justice system from public scrutiny is Victoria, where almost 700 of the 917 suppression orders were issued. During the same period, Tasmania did not issue a single suppression order.<sup>17</sup>

In the *Report of the Independent Audit into the State of Free Speech in Australia*, commissioned by the Australia’s Right to Know Coalition (a collection of media organisations), the example of the seemingly questionable and unnecessary issuing of a suppression order in Victoria was cited. The *Report* stated that ‘In the trial involving 13 men charged with terrorism-related offences, an order was made by a magistrate suppressing the identity of a witness from the United States. This was suppressed because the witness claimed he was concerned about his safety.’<sup>18</sup> This order was issued despite the fact that the witness’s plea bargain with authorities in the US was available on the internet, and stated as part of the agreement that he was bound to give evidence at the trial in Victoria.

Some states have made an attempt to reduce the number of suppression orders issued. The *Evidence (Suppression Orders) Amendment Bill 2006* (SA) states that suppression orders ‘should only be made if the court is satisfied that special circumstances exist giving rise to a sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship, to justify making the order’. These changes were widely welcomed in 2006.<sup>19</sup> In practice, they may have had little effect. In 2005 and 2006, prior to the Bill coming into force, five suppression orders were issued in SA. From January to September 2007, 60 suppression orders were issued.<sup>20</sup>

More recently there has been a push by governments to create a national register to remove cross-border confusion. The call came from Victoria, with Victorian attorney-general, Rob Hulls, telling a meeting of state attorneys-general that changes were needed. Mr Hulls said that ‘in the interests of open and transparent justice, and in an attempt to limit inadvertent breaches of suppression orders, it is important that we have a simpler and easily accessible means of obtaining information in relation to suppression orders’.<sup>21</sup>

Mr Hulls' push was not for suppression orders to be reduced in their frequency of application; it was to make the media more aware of what they should – or more importantly – should not be publishing.

Of course, rather than just impose suppression orders to prevent journalists from revealing information to the public, the police have also been pressuring journalists over the last year to punish the media for publishing information, with no shield laws on the horizon to protect the media.<sup>22</sup> In September 2008, *Canberra Times* journalist, Philip Dorling, said the Labor government was using the same tactics with the media as the Howard government, after his home was raided and two computers were confiscated, following the publication of a potentially embarrassing story in the *Times*. Dorling had written an article that relied on classified documents to claim that Australia was spying on South Korea and Japan. Reporters Sans Frontiers (Reporters without Borders) issued a statement saying, 'We firmly condemn this attack on the right to the confidentiality of journalists' sources, an inviolable principle that is one of the cornerstones of press freedom.'<sup>23</sup> In May 2008, Reporters Sans Frontiers also condemned a raid on *The Sunday Times* by 16 officers of the West Australian Major Fraud Squad, which was also looking for the source of a politically embarrassing story.<sup>24</sup>

Also in September 2008, the Queensland Police Union admitted that it had been monitoring the phone and bank records of journalists to look for the source of embarrassing leaks. Police union secretary, Mick Barnes, told *The Australian* that police had complained that internal affairs investigators had been monitoring phone records to check if officers had spoken to journalists.<sup>25</sup>

### TRUTH IN ANTI-TERRORISM TRIALS

In 2007, two men, Aruran Vinayagamoorthy, and Sivarajah Yathavan, were charged with being members of and providing support to the Tamil Tigers, a listed terrorist organisation. The Victorian Police held a press conference outlining details of the men's alleged crimes before they faced court and before one of them was formally charged. It was reported on the day of the arrest that, even though police had held a press conference saying the two men were using funds raised for tsunami victims to fund a terrorist group, it would still be 48 hours before Vinayagamoorthy's lawyer, Rob Stary, would be given details of the charges so that he could apply for bail.<sup>26</sup> On the day of the arrest, *The Age* quoted Mr Stary criticising the AFP for 'holding a press conference announcing the arrests before the men faced court'.<sup>27</sup>

In 2005, 13 men were arrested in Melbourne and nine men were arrested in Sydney and charged with terrorism-related offences. These men were to become known as the 'Barwon 13' and the 'Goulburn 9', after their places of incarceration. Then Victorian premier, Steve Bracks, was heavily quoted in the media saying that the arrests of the men had 'probably disrupted the most serious preparation for a terrorist attack that we have seen in Australia'. One of the accused men's lawyers was quick to point out that 'his

clients had not been charged with planning a terrorist attack, but only with membership of a terrorist organisation'.<sup>28</sup>

Apart from withholding information from the public at large, as well as from defence lawyers, the AFP has also been accused of keeping evidence from the court. In the Haneef case, an email from Dr Haneef's cousin was presented to the court as evidence, even though the Gold Coast doctor did not have prior knowledge of the attack and so the email was irrelevant.<sup>29</sup> Melbourne terrorism suspect, 'Jihad' Jack Thomas, faced the same problem at his first trial. The AFP had withheld evidence of an interview with American terrorist, John Walker Lindh, which stated that the Al-Farooq training camp in Afghanistan was run by the Taliban, while in court the prosecution was claiming the camp was run by al-Qaeda.<sup>30</sup> Of course, it is a worse offence to be training with a terrorist organisation than with the armed forces of a country receiving aid from Australia's closest allies.<sup>31</sup>

When Dr Mohamed Haneef was granted bail in Brisbane, the minister for immigration, Kevin Andrews, enacted a contingency plan between the AFP and immigration officials to cancel his visa, citing confidential information. The public was told nothing, other than that Dr Haneef was dangerous. It is also interesting to note that, under Labor, comments made by politicians continue to influence public perception during terrorism trials. Attorney-general, Robert McClelland, recently called the verdicts against six of the Barwon 13 the culmination of Australia's 'most successful terror prosecution', even though the jury was still considering a verdict for two of the accused. Stary pointed out that 'it beggars belief that whilst the jury was deliberating, the first law officer of the Commonwealth of Australia, Robert McClelland, was giving his remarks as to the convictions of those persons that were still to be tried by the jury'. It was also pointed out by the defence that, as four men were acquitted, the government appeared to be overstating the prosecution's success.<sup>32</sup>

### IF THE SENATE IS TO BE LEFT BLIND – THEN WE ALL ARE

According to Tony Kevin, the SIEV X case did not involve recourse to formal FOI processes by any individual, other than those involved in the Senate Committee.<sup>33</sup> As a case in point, SIEV X was a denial of the Senate's right – and therefore the right of the Australian media and the public – to know about commonwealth agency administrative processes. Kevin noted that:

'Witnesses and correspondents from agencies like Prime Minister and Cabinet, the Australian Defence Force, the Department of Foreign Affairs and Trade, the Department of Immigration and Multicultural Affairs, and the Australian Federal Police, repeatedly treated the Senate's requests for official information relating to SIEV X, either in committee or in responding to questions on the Senate notice paper, with evasion or lies, and increasing contempt for basic courtesy as time went on.'<sup>34</sup>

We know now that Abu Quesay, the people-smuggler mentioned in the official government cable supplied to the >>

PST, was a 'sting' operative, whose activities were to discredit and ultimately destroy the people-smuggling industry. A DFAT cable sent to three senior Defence personnel at the time of the sinking identified SIEV X as the 'Quessay vessel'. The cable also noted that people had refused to board the boat: '10 PII refused to embark due to the size of the vessel...'<sup>35</sup>

Kevin Ennis, allegedly another 'sting' operative, was used to establish such people-smugglers, and was in regular contact with AFP liaison officers in the Australian Embassy in Jakarta. Both men played a part in overloading a ship that was not seaworthy, so putting hundreds of lives at risk. Both men have links to the AFP, and although the AFP issued a warrant for the arrest of Quessay, it was not enforceable in Indonesia and he reportedly left the country.

Even though much of this is referenced by Kevin and authoritative detail of the Hansard records are meticulously compiled on Marg Hutton's website [www.sievx.com], very little of this information has appeared in the mainstream news media. Labor Senator, John Faulkner, who sat on the Senate Committee, stated that 'Given that the (people-smuggler) disruption programme in Indonesia is undertaken by the Australian government and funded by the Australian taxpayer, the federal government and commonwealth agencies must not avoid parliamentary scrutiny on this matter.'<sup>36</sup>

Despite Senator Faulkner's efforts in opposition to bring the information to the Senate, now in power and bound by cabinet solidarity, the Labor government will not be reopening these matters. If a Labor minister has referred to SIEV X publicly since Labor gained office, it is not on the record. Australian prime minister, Kevin Rudd, recently told the Pacific Area Newspaper publishers' Association Inc (PANPA) conference on the Gold Coast that: 'robust and effective internal government processes do require confidentiality'. He added, however, that his government will introduce legislation to abolish FOI conclusive certificates, which allow ministers to deny people the right to challenge FOI decisions.<sup>37</sup>

The Rudd government is now a year old and has yet to change much of the worst of the laws enforced by the Howard regime in relation to human rights and secrecy. Although mooted before the federal election, the Labor government has yet to implement shield laws protecting journalists from prosecution for refusing to reveal sources. The government has held an inquiry into the case of Dr Mohamed Haneef; however, the process has been held behind firmly closed doors. The public is none the wiser. Nothing has changed, and nothing will – until the government eases restrictions on access to information regarding human rights issues, including anti-terrorism trials and actions of federal government bodies in immigration cases. ■

- 2** Select Committee on A Certain Maritime Incident, Chapter 8.  
**3** M Hutton, 2003. *SIEV X and the DFAT cable: The conspiracy of silence* on Project SafeCom. <http://www.safecom.org.au/sievx-hutton.htm> and [www.sievx.com](http://www.sievx.com). **4** T Kevin, 2003. 'This evil people smuggler let 353 men, women and children drown. Australian police have evidence to convict him. So why has he been freed from jail?' *The Sunday Telegraph*, 5 January 2003. <http://www.sievx.com/articles/challenging/2003/20030105SundayTelegraph.html>. **5** UN, *Resolution 59(1) Calling of an International Conference on Freedom of Information*, 14 December 1946.  
**6** UN Office of the High Commissioner for Human Rights, *Human Rights Resolution 2005/66*. **7** *Freedom of Information Act 1982*, s3. **8** Commonwealth Ombudsmen, *Annual Report 2006-2007*, p108. **9** N Haxton, 'The Death of Investigative Journalism', p21 in S Tanner (ed), *Journalism investigation and research*, Pearson Education Australia, 2000, p21. **10** S Tenkate, 'Media Ownership and the Centralisation of News Resources in the Riverina', at *PR2K Public Right To Know Conference at UTS*, Australian Centre for Independent Journalism, October 2007. **11** *Fairfax Media Announces Business Improvement Program*, see [http://www.fxj.com.au/announcements/aug08/FXJ\\_restructure\\_260808.pdf](http://www.fxj.com.au/announcements/aug08/FXJ_restructure_260808.pdf). **12** Nick Tabakoff, John Lyons and Brad Norington, 'Citizen McCarthy Swings Fairfax Axe; *The Australian*, 30 August 2008. **13** Chris Zappone, 'Fairfax Media to Cut 550 Jobs', *Sydney Morning Herald*, 26 August 2008. **14** For example, see B Rosenberg, 'The Year of the Accountant', *Pacific Journalism Review*, Volume 14, Issue 1; April 2008, or <http://graphicdesignr.net/papercuts/?source=cmail>. **15** Mick Keelty, 'Terrorism: Policing's New Paradigm', speech given to the Sydney Institute on 29 January 2008. **16** *Ibid*. **17** Irene Moss, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, pp242-8. **18** *Ibid*, p198. **19** For example, see <http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Alerts/NA+-New+South+Australian+suppression+order+legislation+introduced>. **20** Irene Moss, n17, pp244-5. **21** Rob Hulls, Media Release, *Victoria Backs National Register of Suppression Orders*, 23 July 2008. **22** Dr D Blackall and S Tenkate, 'The Media and the Rule of Law' in *Precedent 84, Focus on the Rule of Law*, January-February 2008. **23** Reporters without Borders, *Federal Police Violate Confidentiality of Reporter's Sources by Raiding His Home*, 26 September 2008. **24** Reporters without Borders, *Police Raid on Perth Newspaper Highlights Need to Protect Confidentiality of Sources*, 7 May 2008. **25** N Bitá, and A Fraser, 'Police Hunt Media Leaks', *The Australian*, 29 September 2008. **26** D Oakes, J Medew and A Jackson, 'Pair Arrested over Tsunami Aid Sent to Tamil Tigers', *The Age*, 2 May 2007. **27** R Rennie, 'Two Face Court over Terror Funds', *The Age*, 1 May 2007. **28** Raymond Bonner, 'Australia Arrests 16 in Terror Sweep', *International Herald Tribune*, 9 November 2005. **29** For example, see Michael McKenna, 'Haneef Evidence Withheld', *The Australian*, 30 April 2008. **30** Alison Caldwell, ABC Radio, *The World Today*, 22 August 2006. **31** In May 2001, the US gave the Taliban \$43 million. See Robert Scheer, 'Drug War Led Bush Astray Before 9/11', *The Nation*, April 14 2004. **32** Paul Maley and Miranda Rout, 'Attorney-general Attacked over Terror Trial Boast', *The Australian*, 18 September 2008. **33** Dr D Blackall, email interview, quoting Tony Kevin, 5 September 2008. **34** *Ibid*. **35** M Hutton, 2003, *SIEV X and the DFAT Cable: The Conspiracy of Silence*, on Project SafeCom. <http://www.safecom.org.au/sievx-hutton.htm>. **36** [http://www.aph.gov.au/Senate/Committee/maritime\\_incident\\_ctte/report/e02t.htm](http://www.aph.gov.au/Senate/Committee/maritime_incident_ctte/report/e02t.htm). **37** Kevin Rudd, 'Address at Pacific Area Newspaper Publishers Association Conference, PANPA Conference, Gold Coast, 9 September 2008.

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**Notes:** **1** Select Committee for an inquiry into a certain maritime incident report, *A Certain Maritime Incident*, 23 October 2002. [[http://www.aph.gov.au/Senate/Committee/maritime\\_incident\\_ctte](http://www.aph.gov.au/Senate/Committee/maritime_incident_ctte)].