

Submission to Independent National Security Legislation Monitor

Seven West Media

1. This submission is made on behalf of Seven West Media (**SWM**).
2. SWM is the leading, listed national multi-platform media business based in Australia. It comprises:
 - (a) the Seven Network, Australia's highest rating television network;
 - (b) Pacific Magazines, the country's second largest magazine group by readership;
 - (c) Yahoo!7, one of the nation's most successful internet platforms,
 - (d) Western Australia's leading newspaper, the West Australian and associated WA regional newspapers and radio stations.
3. SWM welcomes the opportunity to make a submission to the review being undertaken by the Independent National Security Legislation Monitor regarding the impact on journalists of the provisions of section 35P of the Australian Security Intelligence Organisation Act 1979 (CTH) (**ASIO Act**) enacted under the National Security Legislation Amendment Act No.1 2014 (**National Security Act**).

Section 35P ASIO Act

4. The recent commencement of the National Security Act saw the introduction of section 35P of the ASIO Act, which creates an offence for the disclosure of information "relating to" a "special intelligence operation" (**SIO**). The penalty for this offence is 5 years.
5. A further offence is created (section 35P(2)) for the disclosure of such information with the intent to endanger the health of a person, or prejudice the conduct of the SIO, or where the information has that effect. The penalty for this offence is 10 years.
6. There is no exception applicable to journalists reporting on matters of public interest or on any other relevant basis.
7. SIOs by their very nature will be undisclosed. SWM submits that this uncertainty will tend to expose journalists to an unacceptable level of risk and consequentially have a chilling effect on the reportage of all intelligence and national security material. A journalist or editor will simply have no way of knowing whether the matter they are reporting may or may not be related to an SIO.
8. Further, the offence continues to apply to SIOs well after they have taken place as section 35P is not subject to any sunset clause.
9. Whilst SWM accepts the need for laws to meet national security considerations, for example not endangering ASIO agents by disclosing their identity, SWM is concerned that the new provisions could see journalists jailed for undertaking and discharging their legitimate role in a modern democratic society – reporting in the public interest.
10. In particular, journalists risk offending against the provisions by disclosing information which would reveal that ASIO officers had committed unlawful acts outside the terms of their enabling SIO. The idea of legislation which allows Australia's secret intelligence officers to commit certain crimes and which also then prevents any subsequent media reporting, review or commentary on such activities is greatly troubling to SWM and, in SWM's view, would also be to the Australian public.

11. Examples of potential scenarios in which the provisions of section 35P might be engaged include the following:

Example 1: 2012 Melbourne terror raids – scenario based on actual events

In the days following anti terror raids conducted throughout Melbourne in September 2012, a report was published in The Australian (see here <http://www.theaustralian.com.au/news/nation/how-informers-fears-triggered-terror-raids/story-e6frg6nf-1226474501095>) and reproduced behind **TAB 1**) which described the immediate impetus for the raids – an ASIO informer embedded within a group with terrorist links left his mobile phone behind and his messages with his ASIO contact were discovered by the group and published by them.

It is conceivable that this operation would have been conducted as an SIO were it taking place today, for example if the ASIO informer were in fact an ASIO agent and required authorisation under the auspices of an SIO for his contact with the terrorist group. If that were the case:

- (a) the reporter involved might suspect that the operation was an SIO. At that point, the reporter faces the decision whether to proceed with investigating a story the publication of which may prove to be illegal;
- (b) in any event, the reporter has no way of knowing with certainty whether the operation was an SIO since no source would be likely to provide such information given that they would be breaching the law by disclosing its existence;
- (c) it is likely in those circumstances that the reporter would at best receive a “cannot confirm or deny” response from official sources without the means to make further inquiries or to know whether the SIO was ongoing;
- (d) the reporter, editor and ultimately the publisher are left with a choice either to self censor and drop the story or run the risk of breaching s35P(1) or (2) if they publish.

Example 2 – hypothetical scenario

A situation could conceivably arise whereby two ASIO agents are involved in the covert penetration of a suspected terror cell of young men with histories of drug trafficking but who have recently been seduced by ISIS and who are believed to be considering a terrorist attack.

Both ASIO agents effectively work undercover in trying to win the trust of the group to learn of their plans. It is likely in these circumstances that the operation may be authorised as an SIO.

In the course of their work, one of the ASIO agents realises that his partner is becoming too close to the group and suspects that he is actually involved in the unauthorised trafficking of drugs, lining his own pocket outside the terms of the SIO. He suspects his partner is playing down the terror threat which this group poses in order to protect his own racket. In frustration the “good” ASIO agent goes to his superiors but they ignore him, as does the Inspector General of Intelligence and Security, telling him that his partner is authorised to dabble in drugs with the group in order to win their trust and that there is no evidence that he has gone to the “dark side”.

The ASIO agent believes that his partner has gone rogue and wants to expose it. He provides information to a journalist who prepares a major report on the rogue ASIO agent. The journalist approaches the Government for comment, but the spokesman asserts only that it would be illegal to publish any such story. The journalist now has a reasonable basis to believe the operation has been conducted as an SIO, and therefore would be subject, together with the editorial chain, to 5 or 10 years jail if the story were published.

In those circumstances, it can be assumed that the story is never written. The ASIO agent goes unpunished for two years until he is finally caught by ASIO's internal investigators and his employment quietly terminated. No-one knows anything publicly and they never will. Any dangerous or illegal activity engaged in by the ASIO agent whilst trafficking on his own account, including activity which might pose a serious threat to Australia's national security interests, would remain permanently secret.

The lack of public scrutiny effectively means that ASIO and the Government are unlikely to be under any pressure to take firm measures to ensure that similar events do not occur again.

12. SWM has sought counsel's views on several questions regarding the operation of section 35P. We attach a copy of the advice provided by Dr AS Bell SC and Brendan Lim which answers those questions and highlights particular issues arising from the drafting of section 35P – please see **TAB 2**.
13. Concerns about the operation of section 35P have also been raised by others, such as Bret Walker SC and former New South Wales Court of Appeal Judge, the Honourable Anthony Whealy QC in interviews and other public statements they have given since the introduction of the legislation – please see some examples at **TAB 3**.
14. In order to balance the issues highlighted above together with Australia's legitimate national security interests, SWM submits that the following amendments be considered to section 35P:
 - (a) **section 35P(3) exceptions**: an additional exception be made to the offences created by ss35P(1) and (2) if the disclosure met certain criteria and was made in the public interest, for example as set out in the draft amendments behind **TAB 4**;
 - (b) **"relating to"**: the terms of the offence be amended by replacing the words "relating to" with words of more precise application (see the discussion at paras 44 to 51 and 68-69 of counsel's advice – **TAB 2**);
 - (c) **sunset provisions**: section 35P should cease to operate within a short, specified period following the conclusion of the SIO in order that appropriate reporting and discussion of completed operations be permitted (see the discussion of the otherwise ongoing nature of the offence at paras 52 to 54 of counsel's advice behind **TAB 2**);
 - (d) **section 35P(2) note**: the ambiguity created by the absence of a note addressing the fault element in respect of paragraph 35P(2)(c) be clarified (see paragraph 39 of counsel's advice at **TAB 2**).

Foreign Fighters Act

15. In addition to the matters raised above and in counsel's advice, SWM also notes with concern the introduction of the Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (**Foreign Fighters Act**) and certain offences which potentially attach to the publication of items of news containing certain proscribed information, especially those which are now included in section 119.7(2) and (3) of the Criminal Code.
16. Whilst we understand that the terms of the Foreign Fighters Act do not presently fall within the scope of the current review, SWM would also wish to make submissions on their likely impact on journalists and will do so shortly.

Further submissions

17. SWM would be happy to supplement this submission in person or in writing if requested.

13 March 2015