



# CENTRE FOR ADVANCING JOURNALISM

20 April 2015  
The Hon Roger Gyles AO QC  
Acting Independent National Security Legislation Monitor  
PO Box 6500  
Canberra ACT 2600

Dear Mr Gyles,

## **Inquiry into section 35P of the ASIO Act**

Thank-you for the opportunity to make a submission to this inquiry into the impact that section 35P of the *Australian Security Intelligence Organisation Act 1979* will have on journalists and reporting. We make this submission as staff members and higher degree students of the Centre for Advancing Journalism at the University of Melbourne. However the content reflects the view of the authors, and not necessarily that of the University.

*National Security Legislation Amendment Bill (No. 1) 2014* amended the ASIO Act to introduce a new framework for conduct by ASIO employees. 'Special intelligence operations' (SIOs) provide for limited protection from civil and criminal liability for ASIO staff and affiliates when engaged in the gathering of intelligence for national security purposes (Section 35K). Section 35P of the bill criminalises the disclosure of information related to an SIO with between five and ten years jail. There is no exemption for journalists, nor is there a public interest test.

Any expansion of the power of the state's security services needs to carefully consider the danger that it will be abused and the safeguards in place to prevent this. The dangers must be weighed in the balance against the perceived need for the increased powers. Alongside independent monitors and the judiciary, the media play a vital role in Australian democracy as one of the checks and balances on the exercise of executive power. Journalists have a professional and social obligation to speak truth to power and to expose corruption where it occurs. We believe that to criminalise the disclosure of information that is in the public interest is to remove portions of government from their necessary accountability to the public and to increase the likelihood of significant abuse.

Our chief concern is that the criminalisation of disclosure will discourage whistleblowers from approaching the media, journalists from pursuing stories and editors from publishing. This is the chilling effect. As SIO classification is done in secret, this will have an impact beyond only the operations designated as publishers overcompensate against the risk of accidental disclosure in order to protect themselves. It is inevitable that stories that are in the public interest, such as the widespread illegal surveillance revealed by Edward Snowden or the wiretapping of former Indonesian president Susilo Bambang Yudhoyono<sup>1</sup> will go unreported.

In the United States the Pew Research Center has found<sup>2</sup> evidence that empowering national security agencies impacts journalism. A study of journalists who cover national security topics found that 71 per cent of those surveyed believed that the U.S. government had collected their communications data, and 14 per cent said that

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<sup>1</sup> As was noted by the MEAA in their submission to the PJCIS inquiry, 2014.

<sup>2</sup> Pew Research Center (2015) 'Investigative journalists and digital security: perceptions of vulnerability and changes in behaviour', [http://www.journalism.org/files/2015/02/PJ\\_InvestigativeJournalists\\_0205152.pdf](http://www.journalism.org/files/2015/02/PJ_InvestigativeJournalists_0205152.pdf)

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belief had prevented them from 'pursuing a story or reaching out to a particular source' (2015:6). In the same report 18 per cent said that it became harder to find sources willing to go on the record in 2014 (2015:8).

In Europe, similar penalties for publishing information related to state security have led to a significant increase in the prosecution of journalists since 2006, despite the European Court of Human Rights noting that "'greatest care" needs to be taken when determining the need to punish journalists who publish material in breach of confidentiality when doing so in the public interest".<sup>3</sup>

It is important to consider that section 35P does not exist in a legislative vacuum. There is a recent history of legislation that contributes to the chilling effect by discouraging disclosure, publication, and free expression of the kind essential in media and, indeed, universities. Of particular concern are new advocating terror offences introduced in *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, the access to journalists' and sources' communications data provided by *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* and the lack of protections for public service whistleblowers to approach the media in the *Public Interest Disclosure Act 2013*.

Taking these bills together, there are more ways to identify whistleblowers, fewer defences for them and harsher penalties attached. Heavy-handed, continuous or intrusive surveillance leads to self-censorship<sup>4</sup>, which compromises the ability of the media to report in the public interest. As journalist Peter Greste put it (regarding data retention) on QandA<sup>5</sup> "we're creating a lot of dark spaces within government". The impact that section 35P will continue to have on journalism cannot be appreciated without consideration of this wider context.

In our view section 35P seriously compromises the ability of journalists to fulfil their professional obligation of holding the powerful to account and ethical obligation to protect the identity of their sources.

Yours sincerely,

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<sup>3</sup> Banisar D (2008) 'Speaking of Terror: A survey of the effects of counter-terrorism legislation on freedom of the media in Europe' [http://www.coe.int/t/dghl/standardsetting/media/Doc/SpeakingOfTerror\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/Doc/SpeakingOfTerror_en.pdf)

<sup>4</sup> Solove D (2006) 'A Taxonomy of Privacy' *University of Pennsylvania Law Review*, 154:493

<sup>5</sup> McMahon N (2015) 'Peter Greste delivers warning on Q&A: 'If we ignore it, it will come back to bite us' *Sydney Morning Herald*, <http://www.smh.com.au/entertainment/tv-and-radio/peter-greste-delivers-warning-on-qa-if-we-ignore-it-it-will-come-back-to-bite-us-20150413-1mkdw2.html>