

1st May 2015

Hon. Roger Gyles AO QC
Independent National Security Legislation Monitor
PO Box 6500
CANBERRA ACT 2600

Dear Mr Gyles,

Thank you for the opportunity to appear before you earlier this week.

You said that you had an interest in oversight mechanisms in comparable jurisdictions overseas, and said you'd be happy to receive any information about how they deal with intelligence oversight. I undertook to write to you with more information because of the relevance of oversight mechanisms to 35P. In particular, if there is inadequate oversight on the executive from the legislative and judicial branches of the state, then the media is the only check on executive malfeasance. There is a possibility that lurks – and should lurk – in the mind of a politician that he or she would be in trouble if ever the media found out about executive malfeasance through a whistleblower. Another way to put this proposition is that 35P will remove this last check and thus create the potential for massive executive overreach.

The rationale for legislative oversight is that intelligence agencies are an arm of the state; Parliament gives them a task and the power to achieve it. Parliament should therefore be able to inspect them to ensure that (1) they continue to have the powers necessary to fulfill their task and (2) they are performing their duties lawfully.

The word 'oversight' encompasses a spectrum of activities that range from very little scrutiny to scrutiny that could genuinely be called oversight. At the minimalist end of the spectrum, oversight may be limited to nothing more than an examination of an organisation's finances and administration. Australia's Parliamentary Joint Committee on Intelligence and Security (PJCIS) is at this minimalist end of the spectrum (Australia, Intelligence Services Act 2001, Section 29), as is the UK's Intelligence and Security Committee, which examines the 'expenditure, administration and policy' of the UK's intelligence services (UK, Intelligence Services Act 1994, Section 10(1)).

By contrast, the US Congress has a much better oversight system: the executive is required to brief select groups of congressmen on specific types of operation before they take place. Members of the so-called Gang of Four, comprising the chairpersons and most senior opposition members of the House and Senate intelligence committees, receives briefings on 'sensitive non-covert action intelligence programs', such as highly sensitive intelligence collection programs. Members of the so-called Gang of Eight (comprising the Gang of Four and the speakers and opposition leaders of the House and Senate) receive briefings from the executive on forthcoming covert actions, without having the power to approve or veto executive plans. This preserves executive freedom

whilst also ensuring a check on executive overreach. Furthermore, all members of the House and Senate intelligence committees and their key staffers are regularly provided with extended footage of completed operations involving, for example, drone strikes.

Oversight may also be performed by non-parliamentary bodies of a quasi-judicial nature, which have a specific mandate in respect of intelligence operations. Our submission described Germany's G10 Commission, which authorizes the interception of communications, monitors their implementation and orders termination of such interception as required. I would also add that the Netherlands' Review Committee on the Intelligence and Security Services (known as CTIVD) can subpoena intelligence officers and members of the executive branch to testify, can subpoena agencies to provide evidence and can inspect premises of intelligence agencies.

Australia's oversight mechanisms do not include judicial oversight, unlike in the USA. Our main submission provided detail on this point.

Sincerely,

Clinton

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