

# Operation of section 35P of the Australian Security Intelligence Organisation Act 1979: IMPACT ON JOURNALISTS

## **It is time for a fresh start: new suite of balanced ‘anti-terror’ laws needed**

Laws curtailing freedoms, expanding surveillance and reversing the ‘innocent until proven guilty’ principle have become so odious in Australia that there’s a clear need to start again, Civil Liberties Australia says.

*From a clean slate, we need to create reasonable laws around “terrorism” issues that better balance rights and freedoms with responsibilities and the legitimate (but not excessive) requirements of people responsible for crime and security.*

It is not only CLA calling for such an overhaul: the British Parliament is of like mind (see below), and is wanting to ensure there is legal constraint on storage, restraint, retention, sharing and destruction of data.

The “Silence the Media” laws applying to commentary on ASIO activities provide government and Australia’s homeland secret agency with the selective power to shut down comment when it suits them to do so. Like other recent laws, and changes to security operations, the law could have a massive impact on journalists and commentators, because it comprises the worst form of censorship, mandatory self-censorship.

New data retention law just enacted clearly demonstrate how much further has balance been lost. The laws presume all Australians are likely to be guilty, so the Big Brother apparatus keeps all identifying details across all e-communications for two years.

The latest excesses comprise a thick veneer of surveillance over layers of laws covering from treason and sedition offences, through control and detention orders and mandatory financial reporting on you by banks, to anti-freedom of association, speech and movement laws contained in a myriad of bills passed over the past 14 years, since “9/11”.

The legislative regime enables overweening surveillance so profound that your home can be invaded at any time, secretly. A device or software may be planted on the computer I’m typing on, and on your computer, phone and tablet, reporting every keystroke and finger-press...and we would never know. Journalists, of course, as the conduits for information, are more primary targets than Joe Blow members of the public.

Like waterboarding, the continuous cascade of anti-freedom laws in Australia since September 2001’s plane crashes in America have eroded the sense of outrage we should feel with each new limit on liberty dreamed up by spooks and police. By special pleadings which have delivered new legislation for the past 14 years, these incompetent public servants declare themselves incapable of enforcing the entirely adequate and robust existing criminal laws and powers they have possessed for decades. Those laws are called the Crimes Act. The existing laws have proven always, to date, sufficient to jail alleged terrorists and would-be terrorists in Australia.

Civil Liberties Australia does not support terrorists or extremist religious fanatics of any religion. We agree that police and security services need strong laws: but they had strong laws before 2001, and have barely used all the extreme laws since then in chasing down guilty parties.

The people who have suffered most from the laws passed since 2001 are ordinary Australians. We have become suspects rather than citizens. We bear the burden: in many cases, literally, in that the burden of proof has switched from the state proving us guilty to citizens having to prove they are innocent.

And the new ASIO “Silence the Media” and data retention laws simply make the perilous situation obvious. Virtually everything you say and write in normal electronic communication is now being recorded with a view to being used against you if the state chooses. With the ASIO laws, what you think can't be reported, even if it is clearly the product of an imaginative mind rather than any information leak.

We are a long way from the Anzac freedoms hard fought for and won a century ago.

## **Balance needed in right to debate and discuss**

All terrorism laws passed since 911 are poor, because they are predicated on human rights and civil liberties not being as important as safety and security. Safety and security can be guaranteed by locking someone in a solitary prison cell in the middle of an open paddock forever...but that is not “living” as the word is normally understood. So balance is the key, not safety alone, or security alone, or human rights alone or civil liberties alone, for that matter.

A law, such as that which burdens Australians, including journalists and commentators, to NOT write or speak about “special intelligence operations” (SIOs) is at the extreme end of a continuum of bad law which is gradually becoming worse with each new iteration: data retention law is the latest and one of the worst of these poor laws.

In the case of not discussing SIOs, the law is Rumsfeld-esque.

*Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.*

– Donald Henry Rumsfeld, US Secretary of Defence (SOD), February 2002

As a commentator on civil liberties and human rights, Civil Liberties Australia has produced a monthly newsletter of around 15-20 pages on average every month for a decade, that's more than 120 editions, probably a quarter of a million words. How, in hindsight, would we know whether or how often we had commented on a secret SIO over that time? Obviously, we wouldn't, we couldn't.

If hindsight is no guide, how can foresight, or anticipation, possibly do any better to predict secrecy? If ASIO operates in total secrecy, as it does, how can any journalist or commentator possibly know what ASIO is planning. That is an unknown unknown. Indeed, a “difficult category”, as SOD Rumsfeld would say.

To some extent, though, that is the least of the problems with the legislation. The most of the problems is that it forces people to self-censor to not break the law. Self-censorship is almost the total opposite of public interest journalism. It is SWEN to news, completely turning the role and rights of journalists and news commentators – who represent the people – around. They must guess what they are not allowed to say: this is a Beria-friendly law.

Lavrentiy Beria was renowned in Stalin's time in the USSR for settling old scores under cover of security crackdowns. Where everything is secret, how could ASIO ever prove it was not operating to “get even” against a journalist it decided to target under this amorphous, diaphanous law. Whenever ASIO invokes this law, the agency itself will be suspect.

The ASIO “Silence the Media” legislation is also patently ridiculous and selective. Recently a G20 meeting was held in Brisbane. It was obvious to Blind Donald that ASIO would have a presence, and would run an SIO. Yet any journalist or commentator who mentioned that obvious fact would have subjected himself or herself to the draconian penalties under the new ASIO repression tool.

Indeed, CLA’s newsletter ran articles about ASIO being one of the police and spook agencies at the Brisbane G20 event. We are yet to be charged, convicted and jailed...but there is no doubt we could be, and maybe will be. Any law which can jail people for stating the bleeding obvious is a bad law. So far as we are aware, none of the many commentators who mentioned ASIO in connection with the G20 event in Brisbane have been charged under the new law. Alternatives are possible:

- ASIO did not conduct, or was not involved in, a Special Intelligence Operation at/around the G20 in November 2014, or
- the new law will be applied selectively, when it suits the government and ASIO to apply it.

It is inconceivable that ASIO had no presence at the G20: ASIO would be derelict in duty if it was absent. So we are left with a law that is to be applied selectively.

A law that is to be applied selectively to the Australian media – and to commentators like us in Civil Liberties Australia – when it suits the government to apply such a law to gag people has no place in Australian legislation.

However, while examining the “Silence the Media” law, INSLM should examine the effects of it as a cumulative measure, not an island unto itself. It would not have been possible for the government pass a law such as the “Silence the Media” law unless is built upon the foundation of repressive laws past since 2001. This law, in isolation, would not have passed parliament, in the year 2000.

Civil Liberties Australia has consistently asked Parliamentary Committees, inquiries, INSLM previously and others to look at the laws of the past 14 years cumulatively. We understand that INSLM has a current one-issue reference, but that reference cannot be properly evaluated unless it is seen in context.

## **Politicians have created an out-of-kilter society**

The mishmash of ‘terrible’ laws, inflicted on Australians for a decade by frightened and cowardly politicians of both major parties have changed the nation for the worse.

We are a more spied on and inhibited society, imbued with an underlying fear maintained by regular injections of frightening rhetoric from MPs, usually flanked by “Men In Uniform, with Flags Rampant”. In this regard, we are far worse off than Americans, British, Canadians and New Zealanders, all of whom have fundamental protection from bills of rights.

The politicians’ personal nadir is reflected in security guards, armed to the teeth, now patrolling behind one-way glass on the floor of the houses of parliament, and the Prime Minister’s suite soon to be walled off by a security fence of Gaza-like proportions. Armed government police are to patrol the corridors of the press gallery at parliament house: symbolically, the press gallery patrols say it all, in that journalists and commentators, and their contacts, won’t be able to move without armed face-to-face surveillance, adding to the ubiquitous CCTV coverage.

The corollary of the ASIO “Silence the Media” law will be a new bill, introduced in 2015, that makes it illegal for members of the press gallery to report on anything that happens in relation to armed police patrols in the media offices’ corridors of the parliament. And, of course, journalists will be prevented from writing warnings about what could happen if an armed police patrol mistakes a camera tripod for a weapon.

## **Sensible security, while retaining liberties and rights**

What Australians want is sensible security, without removing individual liberties and rights.

For example, no-one believes that mushrooming public-area CCTV through Australia's cities, suburbs and towns will prevent any terrorist act, indeed any crime. CCTV is useful after an event.

Most air travellers want a better system than the currently excessive inconvenience, not infrequently accompanied by rudeness, which greets flyers at Australia's major airports.

Meanwhile, the security "theatre" on the passenger side is not matched by equal diligence on the cargo side of the barrier, even though Alan Kessing warned the government a decade ago and the government has spent more than \$200m on beefing up airside security at airports, and similarly at ports.

The spend on "security" – throughout Australia as well as inside and around Parliament House – and the enacting of ever-more restrictive laws knows few bounds in Australia. As one commentator put it: "The crazies of the US are capturing the whole asylum (of Australia) bit by bit".

But the problem in Australia is that we have no equivalent to the US Bill of Rights to afford us individual citizen protection. Can you imagine America without a Bill of Rights? If you live in Australia, you can.

## **'Security' largesse never ends: laws support over-indulgence**

As the Budget is handed down in May, pay attention to the spending on "security": it will inevitably be increased, as will associated staff, buildings and technology, while a host of social services will be slashed and burned through funding and staffing cuts: pensioners of all varieties are frequently a target without power to fight back.

As you watch security continue to expand, remember that no Australian has died in Australia from a clearly terrorist act for decades. However, police have shot people dead in what they claim are terrorism-related incidents in Australia.

Meanwhile Australian women are dying at a rate of about 3 to 4 a week across Australia in domestic violence incidents; Aboriginal children and adults are locked up in jails in outrageously unfair percentages – they comprise half the people in jail in one major state. Spending on these national disgraces is minuscule by comparison with money spent on 'security'.

Security's greedy share of the national funding bucket, and the mushrooming laws which support that over-indulgence, require correction.

The police, security, legal, justice and societal system has lost its links to balance, and to the reality of what affects people in a day-to-day sense. The government has announced a \$30m boost to countering domestic violence...but spending on security increases by at least 10 times that amount every year. The responsibility for fixing the imbalance problem lies with politicians: they have created the out-of-kilter society.

It is often demanded of us that Civil Liberties Australia provides solutions to various issues if we criticise what is happening. Where we have positive suggestions to make, we make them. But does Australia every witness a contest of ideas and suggestions for a positive, more freedom-oriented future in the people's houses? Parliamentary debate – and Question Time is a prime example – has become the theatre of the absurd, rather than of aspiration and hope. Snide point-scoring replaces promoting a better national future. Federal MPs, particularly of the major parties, virtually never take on their faction bosses, not even in ideas and suggestions, so nothing gets properly debated, and nothing gets fixed.

## In US, at least they try...

Two US House of Representatives lawmakers want to completely repeal the Patriot Act and other legal provisions to dramatically rein in American spying.

Representatives Mark Pocan (photo, Democrat, Wisconsin) and Thomas Massie (Republican, Kentucky) last month unveiled their Surveillance State Repeal Act, which would overhaul American spying powers unlike any other effort to reform the National Security Agency.

"This isn't just tinkering around the edges," Pocan said during a Capitol Hill briefing on the legislation last month. "This is a meaningful overhaul of the system, getting rid of essentially all parameters of the Patriot Act."

Their bill would completely repeal the Patriot Act, the sweeping national security law passed in the days after 11 Sept, 2001, as well as the 2008 FISA Amendments Act, another spying law that the US National Security Agency has used to justify collecting vast swathes of people's communications through the Internet, as is happening in Australia.

It would also reform the secretive court that oversees the nation's spying powers, prevent the government from forcing tech companies to create "backdoors" into their devices and create additional protections for whistleblowers.

"Really, what we need are new whistleblower protections so that the next Edward Snowden doesn't have to go to Russia or Hong Kong or whatever the case may be just for disclosing this," Massie said.

The bill is unlikely to be adopted by leaders in Congress, who have been worried that even much milder reforms to the nation's spying laws would handicap the nation's ability to fight terrorists. A similar bill was introduced in 2013 but failed to gain any movement in the House.

Firm opposition to government spying is mounting, just as US lawmakers race to beat a 1 June 2015 deadline to re-authorise parts of the Patriot Act. <http://tinyurl.com/qh6mo5z>

Can you ever see a Liberal and a Labor MP combining in federal parliament in Australia to seek to overturn the ASIO "Silence the Media" act, or the new data retention regime? Why not? What is it about control and fear that turns our major party MPs into mass-produced automatons?

## 2500 people control your data

Some 2500 bureaucrats in more than 20 agencies throughout Australia will be able to authorise access to your phone and internet records under the new data retention laws.

About 900, 400 and 300 of the 2500 will be police officers in NSW, Victoria and Queensland respectively. The AFP have 190 officers who can authorise requests. Others who can pry into your data include the new Border Force (customs and immigration, as was), the ATO, the Australian Crime Commission, the Australian Competition and Consumer Commission and the NSW Independent Commission Against Corruption.

"The absence of external checks is very concerning," said Prof George Williams in relation to the new data-prying system. "Limiting metadata approval to more senior people within these organisations would be a start, but I do not think that would be sufficient. It is well accepted in other comparable areas that external checks and oversight is required in regard to the decision to access sensitive, private material." <http://tinyurl.com/ommevpc> External checks and monitoring is needed on all the repressive legislation passed since 2001, including the ASIO "Silence the Media" law, if it is not thrown out, as it should be.



## The Dutch ditch data-snoop laws introduced to Australia

The Abbott government's data retention laws would be illegal in The Netherlands and the EU.

A judge in the Netherlands last month struck down a Dutch law that forces local telcos to store customer internet and phone metadata, in a law similar to that passed in Australia. In April 2014, the European Union's top court also over-ruled EU data collection legislation it deemed too broad and offering too few privacy safeguards. The Dutch judge said that the metadata retention law helped solve crimes, but it also breached the privacy of telephone and internet users.

The Dutch Justice and Security Ministry said it was considering an appeal.

Under the Dutch law, telephone companies were required to store information about all fixed and mobile phone calls for a year. Internet providers had to store information on their clients' internet use for six months. <http://tinyurl.com/pjbbaoz>



### Press Council chair slams data retention proposals

The chair of the Australian Press Council, Professor David Weisbrot (photo), says the Abbott government's data retention bill is "far too intrusive" and will crush investigative journalism.

"I'm very strongly opposed to the current proposals and I strongly hope that they will change," Weisbrot told *Guardian Australia* last month as he took over the APC job, replacing Prof Julian Disney.

"I am opposed to it as a private citizen. It's far too intrusive and really changes the relationship between government, policing and the individual in a way that I don't think we've fully worked out as a society.

"It goes well beyond the traditional social contract. It may be that we are willing to give up rights and freedoms for the added protection but I haven't really been convinced yet the benefits will outweigh the obvious detriments."

Prof Weisbrot said he planned to lobby the government to come up with a "sensible media carve-out or judicial oversight". <http://tinyurl.com/pdvgt3>

But no "sensible media carve-out is possible with the ASIO "Silence the Media" law. The law is the problem. Civil Liberties Australia urges INSLM to recommend that the law be abolished.

### Hysteria, ramped-up fear, industry greed...our greatest threats

The greatest threat to values just now is from hysteria. It drives language to extremes. It encourages reckless responses and feeds the greed of the security industry. All sense of proportion vanishes as the politics of the scare grips every politician, every lobbyist, every media outlet. Half of these stories should never have made it into the news. The way to stamp out terror is to deny it the oxygen of publicity and glamour.

– Simon Jenkins, writing in The Guardian <http://tinyurl.com/mtqlk9n>

### Time to take stock: time for a basic review of all 'terror' laws

Finally, to return to the beginning: by any measure, the current security laws have grown like topsy over the past 14 years since '911'.

It is not possible to view the ASIO "Silence the Media" law – the subject of this inquiry – in isolation if the inquiry is to produce a sensible outcome. That law and the data retention laws are the (current) top rungs on a ladder of laws which put security agents and police above the people, beyond the adequate control of any current monitoring system.

If they are to remain, they require a system of governance as profound as the ASIO “Silence the Media” and data retention laws are pervasive.

Civil Liberties Australia proposes, if the laws are kept, that:

- There be a four-person monitoring group, the People’s Monitors, comprising a representative from each of:
- privacy, civil liberties, women’s group and youth, serving a one-year only term before being replaced by someone from the same grouping, with;
- authority to monitor and evaluate, by random sample selection, from the entire range of data access cases undertaken by all authorised agencies, of the order of 10 per quarter, with
- all aspects – without exception – of the selected cases being made available to the People’s Monitor representatives, who are to be charged with providing
- a full report, with recommendations for action by Parliament, unable to be expurgated by any agency or the government, and released to the media under embargo one hour before being tabled in Parliament, to be provided quarterly.

The People’s Monitor group to be funded by the government, and provided adequate salary and benefits (including travel) support staff, office accommodation and electronic communication aids to be able to function properly.

At the same time, a reference be given to the Australian Law Reform Commission to produce a draft set of simplified ‘terror’ laws, combining all aspects of the laws passed and amended since 11 September 2001, but written from a human rights and civil liberties-friendly perspective.

CLA’s major recommendation to INSLM is that he recommend the ASIO “Silence the Media” law be abolished; that the data retention laws – as they relate to journalists and to everyone else – be abolished; and that the government starts from scratch to re-write all terrorism-related laws passed since 911.

## **Mass surveillance commonplace in UK: total overhaul of laws needed**

Britain’s laws governing intelligence agencies and mass surveillance require a total overhaul to make them more transparent, comprehensible and up to date.

So says the UK parliament’s intelligence and security committee (ISC) in a landmark report prompted by the revelations of Edward Snowden, the former US National Security Agency contractor.

After an 18-month inquiry, the ISC found that existing laws were not being broken by the agencies and said bulk collection of data by the government is not mass surveillance or a threat to individual privacy.

But it also says the legal framework is unnecessarily complicated and – crucially – almost impenetrable. The current laws could be construed as providing the agencies with a “blank cheque to carry out whatever activities they deem necessary”, it says.

In the single most important revelation, the report reveals for the first time that the agencies have had the capability to trawl through personal records and form and examine “bulk personal datasets” without any statutory oversight.

In a heavily censored section of the report, the committee reveals these datasets containing personal information about a wide range of people vary in size from hundreds to millions of records, adding there is no legal constraint on storage, restraint, retention, sharing and destruction. Surveillance agencies do not require ministerial authorisation to access the information.

Its key recommendation is for all the current legislation governing the intrusive capabilities of the security and intelligence agencies to be replaced by a new, single act of parliament. <http://tinyurl.com/nbpl4q8>

## UK Parliament endorses good uses of online secrecy

A UK Parliament entity has concluded that it would be "not seen as acceptable" to ban online anonymity.

Commenting specifically about Tor, the parliamentary report says it would be "technologically infeasible" to block people from using the service in the UK.

The new report, prepared by the Parliamentary Office of Science and Technology, mentions terrorism briefly, but mostly focuses on how Tor and its extension, Hidden Services, allow for the creation of criminal markets (like Silk Road) and aid in whistleblowing, journalism, and circumvention of censorship.

The report says that even if the UK government wanted to ban online anonymity, it isn't clear how it would go about doing it. <http://tinyurl.com/npa3byd>

It seems that only the Australian Parliament is hell-bent on closing down transparency and limiting people's access to information, as in the ASIO "Silence the Media" law.

## Wales bewails govt rights violation

Wikipedia co-founder and entrepreneur Jimmy Wales (photo) has slammed the Australian government's plan to make telcos store the metadata of every phone and internet user as a "human rights violation".

Mr Wales is co-chairman at The People's Operator (TPO), a mobile service provider in Britain that gives 10% of every customer's bill to the charity of their choice. Mr Wales said he understood the need for data retention schemes in fighting crime, but law enforcement bodies should be forced to get warrants when seeking people's information.

"With proper judicial oversight, probable cause, warrants, judges and not just police overseeing it, the ability to get access to information is perfectly valid," he said. "Warrantless systems really bother me because I think there's a real danger of them being abused and misused against people who haven't committed a crime." <http://tinyurl.com/pu8cj8g>

If the ASIO "Silence the Media" law is to remain, it should operate on the basis of ASIO being required to prove to a judge that a warrant to not publish information, against a media outlet or commentator, is absolutely necessary.



## Government hunts child refugees whistleblowers

Child protection whistleblowers who alerted the Australian Human Rights Commission (AHRC) to child sexual abuse, violence and self-harm on Nauru are being investigated by the Australian Federal Police.

Ben Doherty in *The Guardian Australia* has reported that the AFP has been asked by the Department of Immigration and Border Protection to investigate Save the Children staff who anonymously wrote a submission to the commission's inquiry, outlining cases of sexual and physical abuse of children, and acts of self-harm. <http://tinyurl.com/lpdcnae>

Any law which provides an opportunity for punitive retaliation by the government against its critics runs a serious risk of being used for that reason. The ASIO "Silence the Media" law could clearly be used in that way.

## Greste delivers media lesson

The Australian Al Jazeera journalist freed from an Egyptian prison gave a lesson in media studies while addressing the National Press Club in Canberra last month.

When asked about the topic of asylum seekers, and the lack of access granted to media outlets to information and their conditions, Peter Greste was steely and direct, Lisa Davies reported.

*"The public has a right to know, it's as simple as that. We hired the government, they work for us, not the other way around. And ... if we lose sight of that, if we lose sight of the public's need to know and to make decisions and to make democracy work, then again I think we - I think we run the risk of losing control."* <http://tinyurl.com/nbrjpxd>

If Australians are free to criticise the judiciary, the executive, and the parliament, why should one security agency, ASIO, be above critique when it is conducting the most intrusive and presumably dangerous – “special” – operations? CLA asks.

## Cost-benefit is a better way to analyse terrorism response

*Our risk and cost-benefit analyses have shown air marshals to be a waste of money, full-body scanners to be marginal at best, **hardened cockpit doors to be extremely cost-effective**, and hardening of most buildings and bridges becomes cost-effective only if the threat level is exceedingly high* – Mark Stewart, John Mueller. <http://tinyurl.com/qetq2j2> (bold added)

This unfortunate comment was written just before the crash of the German aircraft in southern France last month, with 150 lives lost. Even security and “safety” measures that are proven cost effective are not immune from abuse or misuse.

The ASIO “Silence the Media’ law – and the data retention laws – provide no clear and untrammelled benefit to civil society, only to ASIO’s self-perception as an authority above the normal law, and to development of a ‘police and spook state” in Australia.

In relation to the specific terms of reference of the INSLM inquiry, If ASIO is incapable of keeping its plans secret, it should get out of the secret spy agency business. Australia does not need this law which puts a secret agency above criticism, forces the media to self-censor, and provides the perfect mechanism for a government to use the force of law to silence its critics.

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