Guardian Australia

Submission

to the

Review of section 35P of Division 4 of Part III

Australian Security Intelligence Organisation Act 1979 (ASIO Act)

by the

Independent National Security Legislation Monitor

The security of the nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority to preserve the even greater values of free expression and the right of the people to know.

Murray Gurfein, former military intelligence officer, later a judge,

in his ruling early in the *Pentagon Papers* litigation, 1971[1]

... The security apparatus is today able in many democracies to exert a measure of power over the other limbs of the state that approaches autonomy: procuring legislation which prioritises its own interests over individual rights, dominating executive decision-making, locking its antagonists out of judicial processes and operating almost free of public scrutiny. The arbitrary use of sweeping powers of detention, search and interrogation...illustrates a long-term shift both in what is constitutionally permissible and in what is constitutionally acceptable. The former may be a matter for Parliament, but the latter is still a matter for the rest of us.

Stephen Sedley, after his retirement as a judge of the UK Court of Appeal, 2013[2]

Introduction

Guardian Australia is part of Guardian News and Media, which through its editorial operations in Australia, the United Kingdom, and United States publishes its journalism at www.theguardian.com, via mobile digital applications, and in daily, Sunday and weekly newspapers.

The Guardian shared with the Washington Post the 2014 Pulitzer Prize for public service for its reporting on the surveillance activities of governments disclosed by the whistleblower Edward Snowden.

You will recognise in this submission the concern which has grown among journalists in Australia about the cumulative adverse impact on journalism of aspects of three recent pieces of recent legislation. Section 35P is just one element.

We trust that your review offers a meaningful prospect that s35P, and gradually other measures harmful to freedom of expression, will be more carefully examined and can be reconsidered before they do damage.

Australia lacks at federal level an equivalent of the US First Amendment and the UK Human Rights Act 1998, both of which are important factors in the balancing of security and liberty, especially freedom of speech and of the press.

Guardian Australia submits that –

> Section 35P is unjustified by evidence, is likely to harm Australia's system of democratic checks and balances, and ought to be repealed.
>
> Section 35P shoves a smothering wad into one of democracy's great safety valves: the capacity of journalists to make disclosures in the public interest about agencies of the State, especially those which necessarily exercise power secretly and with limited accountability.
>
> New Division 4 of Part III of the *ASIO Act* confers significant power. It creates 'special intelligence operations' (SIOs) in which agents of the State are immunised against the criminal and civil law consequences of their actions, including causing injury to people so long as it is short of serious injury. Such power and privilege merit potent oversight.
>
> In Australia's democratic model, that oversight comes partly from specialist roles like INSLM, Inspector General of Intelligence and Security and the Ombudsman, partly from parliamentarians – individually and in committees such as the Joint Intelligence and Security Committee and the Joint Human Rights Committee – partly from the judiciary and partly from journalism in its 'Fourth Estate' role.
>
> Division 4 of Part III, having shut out the judiciary insofar as criminal and civil proceedings would have involved it in accountability case by case, seems through the inclusion of s 35P designed to deter the oversight that the Fourth Estate traditionally provides. The judicial branch, in Australia and other Five Eyes

jurisdictions, has regularly recognised the legitimacy of media scrutiny and disclosures in the public interest about intelligence and security.[3]

Section 35P is likely to chill journalistic scrutiny, to fuel witchhunts, create needless martyrs and diminish precisely the kind of public interest disclosures by journalists which in the past have revealed failings that formal oversight was unable or unwilling to detect or stop.

It will also deter exactly the kind of constructive consultation between journalists and security and intelligence agencies which reduces the likelihood that media disclosures could inadvertently harm legitimate operations – see Attachment.

If repeal of s 35P is not your preferred recommendation, we hope you will conclude that s 35P does need amending to –

- narrow its unreasonable breadth;
- add a public interest defence;
- blunt its severity where the disclosure is of information about a special intelligence operation which has ended;
- insert a provision to sunset Division 4 of Part III of the *ASIO Act* by October 2017 to allow Parliament to reconsider, with INSLM and other independent advice, whether after three years' operation the benefits outweigh the risks having regard to uses, chilling effects and oversight.

The adverse impact on journalism of s35P should be assessed alongside other recently enacted measures with implications for media. Their effect is cumulative and hostile to legitimate journalism in a democratic society.

Our aim is to avoid repeating in detail points made by other submitters to this review, or our own submissions to three recent parliamentary inquiries in which we drew attention to potential harm to journalism in several legislative measures.[4]

Because part of one of these submissions relates directly to s 35P and its adverse impact on journalism and on national security, an extract is enclosed as Attachment 1.

Guardian Australia shares all the concerns expressed by Seven West Media in its submission to your review and we too request that you give serious attention to the joint opinion of counsel which is attached to Seven West's submission.

Like the submitters from the UNSW Gilbert & Tobin Centre of Public Law, we are concerned that the prison term associated with s 35P (1) is five years when two years is the term associated with the provision which the Attorney-General's Department says is the model for s 35P (1) – that is, s 15HK (1) *Crimes Act 1914*.

We agree that –

> While several other offences apply to the disclosure of national security information, s 35P is deserving of special attention in that it attaches to a unique undercover operations regime. No comparable nation has seen it necessary to grant the same level of immunity to officers of their domestic security service for committing unlawful acts during undercover operations.

> The SIO regime is based on the controlled operations regime for Australian Federal Police (AFP) officers, but ASIO is not a law enforcement organisation and the SIO regime does not in any case recreate the same accountability mechanisms as those applying to controlled operations.[5]

We endorse the UNSW Gilbert & Tobin Centre of Public Law submission and its recommendations, in particular for a public interest defence which reflects grounds of public interest similar to those set out in the *Public Interest Disclosures Act 2013*.[6]

Cumulative adverse impact on journalism

Three recent pieces of legislation[7] - the amendments that included s 35P, the foreign fighters act and the data retention act – together amount to a serious re-balancing against liberty and in favour of security. It is perhaps the most serious re-balancing since the laws hastily passed in Australia in response to terrorist attacks in the US in September 2001, Bali in 2002 and London in July 2005.

The three pieces of legislation are part of a steady accumulation of powers and resources by security, intelligence and policing organisations which far exceeds the powers and resources of those who have formal roles to oversee those agencies.

Professor George Williams and his co-authors report that by the end of 2014, a total of 64 separate pieces of anti-terrorism legislation had been passed.[8]

The dominant theme of these laws is security, but they also contain a theme of hostility to journalism.

The Foreign Fighters Act creates an offence, punishable by up to 10 years' imprisonment, of entering or remaining in an area of the world declared by the Foreign Minister as off limits to Australians.[9] One exception is 'making a news report of events in the area, where the person is working in a professional capacity as a journalist...'

As Professor George Williams and his co-authors have observed –

> ...it is not normally accepted in a liberal democracy that a person should be jailed merely for travelling to an area designated by the government as a no-go zone. It is normally only the fact that a person travels to an area for an illegitimate purpose that makes it worthy of criminalisation.[10]

While we acknowledge the risk posed by some who may return from fighting in the current conflict in Iraq-Syria radicalised and militarised, we note that the measures affecting passports and no-go areas have the potential to hamper legitimate journalistic endeavours. The position of those undertaking journalism but not in a professional capacity is ambiguous. Like Professor Williams and his colleagues, we wonder whether in some cases 'the [foreign fighter act] measures arguably encroach too far upon basic freedoms, such as that to movement, without adequate justification.'[11]

Serious journalism in a democratic community has to mean more than the amplification of 'authorised leaks'. Assume for the moment that sources and journalists continue to co-operate to ensure that information which ought to be disclosed in the public interest is disclosed even if it relates to a 'special intelligence operation'. Use of s 35P would make

martyrs of the journalists involved, and probably some sources also. But it would not prevent the disclosures that the journalists and sources believed to be necessary in the public interest. We cannot see how such consequences from s 35P would advance the national interest. They are more likely to harm it.

Section 35P has been enacted without a body of supporting evidence that there is a problem with Australian journalism's coverage of national security and intelligence matters requiring legislative remedy, let alone this draconian one.

Section 35P is buttressed by the data retention scheme, which will seed and nourish investigations and prosecutions of journalists and sources.

This review is not into the data retention scheme or into the weaknesses of safeguards which the Government and Opposition agreed in private as the basis for their joint support of the legislation and their joint resistance to amendments which might have improved it.

But the data retention scheme and its application to journalists and their sources is relevant to an assessment of s 35P and the adverse impact it will have on legitimate work by journalists to cultivate and protect sources who help them to make disclosures which serve the public interest.

Whether intended or not, several effects of recent legislation degrade the ability of journalists to do their necessary work.

Submitted on behalf of

Guardian Australia

24 April 2015

Attachment

Excerpt from Guardian Australia submission, 5 August 2014, to

Parliamentary Joint Committee on Intelligence and Security

Inquiry into the *National Security Legislation Amendment Bill (No. 1) 2014* (Cth)

which among other things inserted section 35P into the *ASIO Act*

Harms to legitimate scrutiny and disclosure

A feature of several of the examples used so far throughout this submission to illustrate questionable activities of intelligence and security agencies has been the role of the media in first bringing matters to light.

Commonly, after journalists make initial disclosures other oversight entities take action within the limits of their powers and resources. It may be a responsible minister, a parliamentary committee or a purpose-built entity such as the Inspector-General of Intelligence and Security (IGIS).

Of the 20 public reports of the Inspector-General (as at 31 July 2014), nine appear to have been triggered directly or indirectly by media disclosures.1

The unfortunate case of Dr Mohamed Haneef was largely brought to light by the media. The inquiry it spawned led to an apparent acceptance within government that some improvements were required, according to the formal response to its recommendations.2

This Bill – specifically new section 35P if enacted in its present form - would chill this disclosure work. In some circumstances which are likely to occur it would punish it.

The Ex Mem states that the offences apply to 'persons who are the recipients of an unauthorised disclosure of information, should they engage in any subsequent disclosure.'

It is clear from the Ex Mem that the new offences and penalties are intended in part to have a deterrent effect. The Bill and Ex Mem neglect the critical role which intention and public interest may play in a just and proportionate assessment of a person who makes preparations to disclose information or does disclose information.3

The consequences of proposed new section 35P would do damage to one of the essential checks and balances in a democratic society. The work of journalists, co-operating sometimes with whistleblowers willing to take great risks to help expose unlawful or improper conduct in government and elsewhere, is one of democracy's great safety valves. Its public interest value is myriad.4 It may force an end for the time being to corrupt or harmful practices; it may avert them; it may serve more generally to inform voters' in their judgments at the ballot box.

The existence of the *potential* for disclosure can itself be a potent deterrent to wrongdoing or negligence or the kind of strained self-justifications to which like-minded people in closed decision-making environments are prone. It is the importance of *potential* disclosure which makes the chilling effect of provisions such as proposed new section 35P so damaging. Lips may not be pursed to blow a whistle. Journalistic enquiries may not begin, may not reach far enough.

These processes of disclosure and potential for disclosure have proved their worth many times over many years for many societies. We will not heap them up here but would be glad to provide the Committee with examples beyond those mentioned in this submission.

On 28 July 2014, Human Rights Watch and the American Civil Liberties Union released a 120-page report, *With Liberty To Monitor All – how large-scale surveillance is harming journalism, law and American democracy*. It reviews the effects on journalism when the balance between security and privacy goes too far towards security. The jurisdictional details are of course different, but the fundamentals apply also to Australia.5 The report may assist the Committee in assessing the Attorney-General's assertion in the Ex Mem that this Bill is compliant with the rights and freedoms of various international instruments.

For a powerful reminder of the importance of the particular category of journalism which would be damaged by this Bill – the kind that scrutinises the intelligence and security community - we refer the Committee to a dissenting judgment in the case of James Risen, a *New York Times* reporter specialising in national security matters. Risen has been pursued to reveal his sources for a story which described a failed attempt by the Central Intelligence Agency to disrupt Iran's nuclear planning. In 2013 the US Court of Appeals overturned a lower court's ruling protecting Risen and his sources and ordered Risen to disclose. (He appealed again.) In dissenting, Judge Gregory said in part –

> The freedom of the press is one of our Constitution's most
>
> important and salutary contributions to human history....
>
> Democracy without information about the activities of
>
> the government is hardly a democracy....
>
> The public, of course, does not have a right to see all classified information held by our government. But public debate on American military and intelligence methods is a critical element of public oversight of our government....Public debate helps our government act in accordance with our Constitution and our values. Given the unprecedented volume of information available in the digital age – including information considered classified – it is important for journalists to have the ability to elicit and convey to the public an informed narrative filled with detail and context. Such reporting is critical to the way our citizens obtain information about what is being done in their name by the government.
>
> A reporter's need for keeping sources confidential is not hypothetical. The record on appeal contains affidavits proffered by Risen detailing the integral role of confidential

> sources in the newsgathering process. Scott Armstrong, executive director of the Information Trust and former Washington Post reporter, points to three ways in which investigative journalism uses confidential sources:
>
> "developing factual accounts and documentation unknown to the public,"
>
> "tak[ing] a mix of known facts and new information and produc[ing] an interpretation previously unavailable to the public," and
>
> "publiciz[ing] information developed in government investigations that has not been known to the public and might well be suppressed."
>
> "It would be rare," Armstrong asserts, "for there not to be multiple sources – including confidential sources – for news stories on highly sensitive topics."
>
> ...Such guarantees of confidentiality enable sources to discuss "sensitive matters such as major policy debates, personnel matters, investigations of improprieties, and financial and budget matters." ...The affidavits also recount numerous instances in which the confidentiality promised to sources was integral to a reporter's development of major stories critical to informing the public of the government's actions. See...Dana Priest noting, among many stories, her reporting on the existence and treatment of military prisoners at Guantanamo Bay, Cuba; the abuse of prisoners in Abu Ghraib, Iraq; the existence of secret CIA prisons in Eastern Europe; and the "systematic lack of adequate care" for veterans at Walter Reed Army Medical Center relied upon confidential sources.6

These dynamics will not be new to Committee members, who as Members of Parliament are surely, to varying extents, participants in some of them from time to time.

The proposed offences and penalties in 35P are drafted in a way that would severely interfere with activities vital to the proper functioning of Australia's democracy. Journalists, public servants, lawyers, community groups, and others concerned with liberty, government accountability and the rule of law are likely to be affected in ways disproportionate to what is appropriate to balance security with other important public interests.

Unintended consequences – disabling the filters of responsibility means less security, not more

Legislation aimed at intimidating and punishing journalists and others who play legitimate roles in the checks and balances of democratic life is likely to have serious unintended consequences.

Disclosures by insiders will continue. Snowden followed Ellsberg7 and Manning8 (notwithstanding what was done to his two predecessors). Others will follow Snowden. Communications technologies increasingly will empower them.

The question facing the intelligence and security community is whether they want to disable the filtering role that journalists have so far played. Most media professionals – like, we presume, most intelligence and security professionals - feel obligations to ethical behaviour and the public interest. Journalists test a source's motives and the accuracy of his or her proffered material. They weigh the potential for disclosures to put lives at risk or to imperil active lawful operations aimed at preventing substantial harms. They consider whether delay is appropriate. They understand the significance of compromises inherent in redaction.

To wreck with heavy-handed law this kind of subtle interaction – first between journalists and sources, and second between editorial decision-makers and government representatives – would be a net loss to the security of Australia.

Viewed as part of the balancing of the public interests implicated in this Bill, how is it proportionate to legislate in a way that ensures future Snowdens are more likely, not less likely, to publish by themselves - irretrievably and to the world - the information they believe ought to be known? Once would-be whistleblowers understand the effect that these proposed provisions would have on media outlets, they may feel that to approach a media partner increases the whistleblower's risk rather than reduces it.

So what is the probable result of new offences and penalties like those proposed? Not the eradication of whistleblowers but the rise of unfiltered disclosures with all their increased potential for live operations to be compromised, for the identities of operatives and perhaps sources to become known, and for exposure of lawful techniques which renders the techniques ineffective. In short, the probable result is more harm to national security, not less.

The actual lived experience of publication of material from Snowden - and, earlier, material provided to long-established media entities by Julian Assange and Wikileaks - is that media outlets such as the Guardian, New York Times, Washington Post and Der Spiegel took responsible steps to ensure complex and competing public interests were weighed.

From a national security perspective their role was positive not negative.

Branding whistleblowers as traitors and criminalising acts of journalism do not assist in the reasoned balancing of liberty and security.

Conclusion

Official confirmation in recent days that the CIA broke into the computer system of the committee of the US Senate that oversees the CIA at the time the committee was conducting a sensitive investigation of the CIA is a timely reminder of the risks inherent in agencies which are entrusted with strong powers and large resources to invade the lives of others, including, potentially, their elected political overseers.9

Guardian Australia urges the Committee to reaffirm through this inquiry the legitimacy of activity in a democratic society that tries to hold to account, under law and before the public, the intelligence and security agencies.

We urge that, if the Committee endorses a special intelligence operations scheme, its recommendations include a three-year sunset clause so that Parliament can review and if necessary reconsider the legislation in light of both its actual operation and the integrity with which Executive Government agencies respond to the balances made under law and the efforts to oversee them.

Endnotes to Attachment

1 http://www.igis.gov.au/inquiries/index.cfm
2 http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Documents/Government%20response%20to%20the%20report%20of%20the%20inquiry%20into%20the%20case%20of%20Dr%20Mohamed%20Haneef.pdf
3 Ex Mem paras 553-562
4 The US Senate formally designated 30 July 2014 as 'National Whistleblower Appreciation Day', linking it to the day in 1778 when the Continental Congress resolved to encourage the reporting of government wrongdoing by any person in the service of government who had knowledge of it.

5 http://www.hrw.org/reports/2014/07/28/liberty-monitor-all

6 *US v. Sterling*, Court of Appeals, Fourth Circuit, No 11-5028, 19 July 2013, Gregory J, pp 86-90 (internal citations and brackets omitted).

7 Provider of the Pentagon Papers to the New York Times – see Daniel Ellsberg, *Secrets: a memoir of Vietnam and the Pentagon Papers* (Penguin Books, 2002).
8 Chelsea, formerly Bradley, Manning, now in prison in the US for providing classified information to Julian Assange and Wikileaks. For accounts of other whistleblowers and their treatment see, for example, the cases of Thomas Drake http://www.newyorker.com/magazine/2011/05/23/the-secret-sharer and, in the UK, Clive Ponting, tried and acquitted after leaking information about the sinking by UK forces of the Argentine ship *Belgrano* during the Falklands War in 1982 – Richard Norton-Taylor, *The Ponting Affair* (Cecil Woolf: London 1985) and Clive Ponting, *The Right to Know* (Sphere: London 1985)
9 Summary by the Intelligence Community Inspector General, 31 July 2014 https://www.scribd.com/embeds/235569152/content?start_page=1&view_mode=scroll&show_recommendations=true ;'Inquiry by CIA affirms it spied on Senate panel', New York Times, 31 July 2014 http://www.nytimes.com/2014/08/01/world/senate-intelligence-commitee-cia-interrogation-report.html?hp&action=click&pgtype=Homepage&version=HpSum&module=first-column-region&region=top-news&WT.nav=top-news&_r=0 ; 'The CIA's reckless breach of trust, editorial, NYT, 1 August 2014 http://www.nytimes.com/2014/08/01/opinion/The-CIAs-Reckless-Breach-of-Trust.html?hp&action=click&pgtype=Homepage&module=c-column-top-span-region&region=c-column-top-span-region&WT.nav=c-column-top-span-region&_r=0 On 25 July 2014 McClatchyDC reported that the CIA appeared to have intercepted emails between officials of the oversight body, the Intelligence Community Inspector General, and Congress at a time the Inspector General was investigating claims of retaliation by the CIA against whistleblowers who has assisted a Senate Committee investigation into the CIA http://www.mcclatchydc.com/2014/07/25/234484/after-cia-gets-secret-whistleblower.html

Endnotes to submission

[1] *United States v New York Times Co*, 328 F Supp 324, 331 (SDNY 1971), in Anthony Lewis, *Make No Law – the Sullivan case and the First Amendment* (Random House: NY 1991) p 240.
[2] *London Review of Books*, vol 35, no 17, 12 September 2013

[3] 'Spycatcher case' *Attorney-General UK v Heinemann Publishers* [1987] 8 NSWLR 341 and [1987] 10 NSWLR 86 and (1988) 165 CLR 30 and *Attorney-General UK v Wellington Newspapers Ltd* [1988] 1 NZLR 129 and *Attorney-*

General v Guardian Newspapers Ltd No 2 [1988] UKHL 6, eg Lord Goff; 'Defence Papers case' *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39; 'Pentagon Papers case' *New York Times Co. V United States* 403 US 713 (1971); *R v Shayler* [2002] UKHL 11, eg Lord Bingham at para 21; ; *US v Sterling*, Court of Appeals, Fourth Circuit, No 11-5028, 19 July 2013, Gregory J in dissent, pp 86-90 http://www.ca4.uscourts.gov/Opinions/Published/115028.P.pdf .

[4] Senate Legal and Constitutional Affairs References Committee inquiry into the comprehensive revision of the *Telecommunications (Interception and Access) Act 1979* (Cth); Parliamentary Joint Committee on Intelligence and Security inquiry into the *National Security Legislation Amendment Bill (No. 1) 2014* (Cth), which inserted section 35P into the *ASIO Act;*Parliamentary Joint Committee on Intelligence and Security Inquiry into the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth)

[5] UNSW Gilbert & Tobin Centre of Public Law, submission to this review, page 2.

[6] The grounds of public interest set out in the amendments to s 35P proposed by Senator Xenophon in March 2015 during the Senate's consideration of the data retention legislation are also a useful reference.

[7] National Security Legislation Amendment Act (No. 1) 2014; Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014; Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015.

[8] Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials,* page 3.

[9] Criminal Code, Division 119, Part 5.5.

[10] Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials,* page 87

[11] Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials,* page 91.