

5 April 2015

Re: ASIO Submission

Dear Mr Gyles,

I write in response to the call for submissions in relation to changes to Article 35P of the Australian Secret Intelligence Organisation Act 1979 criminalising journalists' disclosure of 'special intelligence operations'. I am happy for the following submission to be made public.

I write with a strong sense of pessimism that anything anyone can say will make any difference with regards to this ill-advised and dangerous law, especially given that it is supported by both major parties, but under the circumstances I believe this matter is too important to stay silent.

Liberal-democratic political systems are set up on the basis that a major threat to citizens' freedom, perhaps the major threat, is the government, in particular executive power wielded in secret. Hence the constitutional checks on executive power e.g., an independent judiciary, bicameralism, federalism and so on, not to mention more recent innovations like anti-corruption agencies, independent regulators, ombudsmen, etc. Yet probably at least important as any of these checks on executive power is the media, and hence the particular danger of this law in restricting journalists' ability to scrutinise government action where it is most likely to be abused, i.e. national security. I hope the examples below make clear my concerns.

'Watergate', one would think, is a one-word clinching argument for why this new law is a terrible idea. Rightly seen at the time and since as the defining instance of the media checking the illegal and unaccountable use of executive power, this is exactly the sort of activity that may be criminalised under the new law. As is well known, Nixon used 'special intelligence operations' like bugging and phone-tapping by the CIA and FBI to harass domestic political opponents, often privately excused on the grounds of 'national security'.

Lest it be thought that this example is ancient history, recent examples from the age of the 'war on terror', the defining context of this law, are relevant. In the US Senate in March 2013 Director of National Intelligence James Clapper was asked 'Does the NSA collect any type of data at all on millions or hundreds of millions of Americans?' Clapper unequivocally answered that the National Security Agency did not. Only leaks by journalists 21 June that year revealed that Clapper had lied (or as he put it, given the 'least untruthful' answer), in that the US government had deliberately collected phone metadata on millions of Americans without their knowledge or consent. Clearly the constitutional check on executive power, in this case the Senate Intelligence Committee, would have failed but for journalists making public this 'special intelligence operation'.

A similar example would be the US interception of Society for Worldwide Interbank Financial Transfers (SWIFT) financial information in violation of the laws of many European countries

and EU data protection law (though the program was legal under US law). European governments were happy to turn a blind eye to these illegal activities until the details of this 'special intelligence operation' were published by three American newspapers 23 June 2006. Only after this story broke, in the teeth of resistance from the US government, was this program put on a lawful basis in the EU thanks to a 2009 agreement. Once again, democratic governments, in this case in Europe, were prepared to collude in an illegal 'special intelligence operation' as part of the war on terror, an operation only revealed by journalists.

These kind of examples of the abuse of executive power under cover of the war on terror, only fully revealed by investigative journalism, could be multiplied *ad nauseam*, from extraordinary rendition to waterboarding. There is no convincing reason to think that the Australian government is any less prone to engage in such activities. This is especially so given the weakness of oversight mechanisms in this country compared to the US (with its strong Senate committees, strong shield laws for journalists, bill of rights, etc.) and the EU (with data protection laws, the European Court of Human Rights, etc.), and past instances of ASIO's abuse of its powers (e.g. what Justice Michael Adams referred to as ASIO's 'kidnapping' of UNSW medical student Izhar ul-Haque in 2007 during a trial where ASIO agents' testimony in defence of their actions was judged untruthful).

Thank you for your consideration, I would be happy to expand on any of these points, in writing or in person.

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