



Submission to the Acting Independent National Security Legislation Monitor

Inquiry into section 35P of the *ASIO Act*

Chris Berg
Senior Fellow

Simon Breheny
Director, Legal Rights Project

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Background

This submission has been drafted in response to an invitation to the Institute of Public Affairs to make a submission to the Acting Independent National Security Legislation Monitor's Inquiry into section 35P of the *ASIO Act*.

Our submission recommends the repeal of section 35P.

We contend that there are three key problems with section 35P:

1. Individuals can engage in illegal conduct without being aware they are breaking the law
2. Restrictions on disclosure about special intelligence operations last forever
3. Any exemption will provide only limited protection for journalists but journalism is an ambiguous term, and the exemption will not protect freedom of speech

National security is one of the most basic and important functions of the state in a liberal democracy. Likewise, the protection of rights and freedoms of the citizenry is one of the state's most vital roles.

However, these two priorities can often come into conflict. Particularly since 11 September 2001, the threat of terrorism and the complex military and law enforcement action required to deal with that threat has increased pressure to constrain civil liberties. Australia, like most Western countries, has gone through a substantial amount of reform of national security law, surrounding fraught and complex questions about surveillance and privacy, sedition and freedom of speech.

After thirteen years of reform, there remains a justified need for national security legislation reform. A series of reports in recent years have presented a number of possible and important changes to existing law.

The Independent National Security Legislation Monitor has identified significant gaps in Australia's counter-terrorism and security legislation. These include problems with introducing evidence for the prosecution of foreign fighters and limitations in passport confiscation powers.¹ The Parliamentary Joint Committee on Intelligence and Security (PJCIS) found that some reform to the warrant system used by the Australian Security Intelligence Organisation should be enacted that would not unduly constrain civil liberties.² The Council of Australian Governments Review of Counter-Terrorism Legislation also recommended a large number of changes to the counter-terrorism framework.³

Furthermore, the case for some of these changes is strengthened by the changed security environment that the conflict in Iraq and Syria presents. There are a large number of Australian residents and citizens who have travelled to these conflict zones in order to fight on behalf of the Islamic State – the so called "foreign fighters". This is both in clear contradiction of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, and presents a complex security dilemma at home. A

¹ Bret Walker, *Independent National Security Legislation Monitor Annual Report 28 March 2014* (Canberra: Commonwealth of Australia, 2014).

² Parliamentary Joint Committee on Intelligence and Security, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (Canberra: Parliament of the Commonwealth of Australia, 2013).

³ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (Canberra: Commonwealth of Australia, 2013).

survey of jihadists from North America, Western Europe, and Australia who travelled to fight in foreign conflicts found that one in nine of those individuals returned to attempt domestic terror attacks in the West.⁴

The government's legislation addresses the concerns raised by the reviews and reports, as well as justifiably focusing on the specific threat that the foreign fighters phenomenon presents to national security. However, a number of the proposed and legislated changes to national security law unjustifiably limit basic and fundamental liberal principles – particularly the right to freedom of speech. Freedom of speech is a fundamental human right. It is necessary for the maintenance of a democratic order, and a reflection of a deeper liberty – freedom of conscience and thought. Prime Minister Tony Abbott told the Institute of Public Affairs in 2012 that a “threat to citizens’ freedom of speech is more than an error of political judgement. It reveals a fundamental misunderstanding of the give and take between government and citizen on which a peaceful and harmonious society is based.”⁵

Some constraints on freedom of speech are justified. However, they are only justified to the extent that the conduct crosses the boundary between words and actions. On this model, laws against incitement to violence, fraud, or intimidation are justifiable limits on speech, where laws against offense or insult are not.⁶ In the United States, where the First Amendment provides the most powerful protection against government limits on free speech in the world, courts have ruled that “Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”⁷

This submission addresses a provision which we believe is a clear threat to Australia's freedom of speech rights: section 35P of the *Australian Security Intelligence Organisation Act 1979*, which creates a new offense of unauthorised disclosure of information.

Section 35P is an excessive limitation on free speech which is not justified in a liberal democratic country. Parliament should repeal the new section 35P of the *ASIO Act*.

⁴ Thomas Hegghammer, 'Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting,' (2013) 107 *American Political Science Review* 1.

⁵ Tony Abbott, 'Freedom Wars', Speech to the Institute of Public Affairs (Sydney 2012).

⁶ Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation (Institute of Public Affairs; Mannkal Economic Education Foundation, 2012).

⁷ Cited in Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, Mass.: Belknap Press, 1983), 74.

Introduction

The *National Security Legislation Amendment Bill (No. 1) 2014* amended the *Australian Security Intelligence Organisation Act 1979* to create a new regime of special intelligence operations (SIOs). Such a regime was recommended by the PJCIS in 2013, to “provide ASIO officers and its human sources with protection from criminal and civil liability for certain conduct in the course of authorised intelligence operations.”⁸ In the Attorney-General’s second reading speech, he stated that:

covert operations can in some instances require participants to associate with those who may be involved in criminal activity—for instance, the commission of offences against the security of the Commonwealth.

Covert operations may, therefore, expose intelligence personnel or sources to legal liability in the course of their work. For this reason, some significant covert operations do not commence or are ceased.

To address this issue, the Bill implements the recommendation to create a limited immunity for participants in authorised, covert operations.⁹

The SIO regime resembles the Australian Federal Police’s controlled operations regime, which also provides for AFP officers to receive immunity for prosecution and civil liability indemnity for operations for the purpose of obtaining evidence which may lead to the prosecution of a serious Commonwealth offence or state offence with a federal aspect.¹⁰

Alongside the introduction of the SIO regime, the bill also introduces a penalty for “unauthorised disclosure of information” concerning SIOs.

35P Unauthorised disclosure of information

(1) A person commits an offence if:

- (a) the person discloses information; and
- (b) the information relates to a special intelligence operation.

Penalty: Imprisonment for 5 years.

(2) A person commits an offence if:

- (a) the person discloses information; and
- (b) the information relates to a special intelligence operation; and
- (c) either:
 - (i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; or
 - (ii) the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

⁸ Parliamentary Joint Committee on Intelligence and Security, *Report of the Inquiry into Potential Reforms of Australia’s National Security Legislation*, 109.

⁹ George Brandis, 'National Security Legislation Amendment Bill (No. 1) 2014, Second Reading,' (Senate, 2014).

¹⁰ Australian Federal Police, Australian Crime Commission, and Australian Commission for Law Enforcement Integrity, *Controlled Operations Annual Report 2012-13* (Canberra: Commonwealth of Australia, 2013).

Penalty: Imprisonment for 10 years

Note: Recklessness is the fault element for the circumstance described in paragraph (2)(b)— see section 5.6 of the Criminal Code

The bill provides for a limited number of exceptions in paragraphs (3)(a-g). These concern the disclosure of information as it constitutes part of the SIO itself; for instance, in accordance with ASIO's current legal disclosure requirements or in the commissioning of legal advice.

In summary, section 35P creates a new crime consisting of the reckless disclosure of information concerning a SIO conducted by ASIO with a penalty of five years imprisonment. If the disclosure of information is either intended to or will endanger the health or safety of any person or prejudice the effective conduct of an SIO then the penalty constitutes 10 years.

As written, section 35P could easily capture journalism that is conducted in the public interest. The bill provides no exceptions for exposure of information in the conduct of reporting news.

1. Individuals can engage in illegal activity without being aware they are breaking the law

Most concerning of all is the lack of any provision that a person illegally disclosing information about an SIO be aware that an SIO is ongoing. There will be no “public register” of SIOs – and nor could there be, for the regime to achieve its goals – but this creates enormous problems for journalists, academics, or anyone who wishes to discuss matters of national security. Analysts from the Gilbert & Tobin Centre of Public Law have argued that under this provision:

A journalist might, for example, be subject to up to five years imprisonment where they publish an article containing any – even very vague – information about an ongoing terrorism investigation that relates to an SIO. A teacher who subsequently uses this article as a discussion aid in a legal studies class might also be caught by the offence.¹¹

Similarly, a joint submission by Australia’s media organisations argued that not only would the bill penalise journalists who unwittingly disclosed information about SIOs to the public, it would also penalise journalists who shared that information with editors and producers – the very individuals in media organisations who have ultimately responsibility to weigh up the public interest value and potential danger in publication:

the discloser – who may be a journalist, doing what they are legitimately entitled to do as part of their job – could be jailed for disclosing information that is related to an SIO, even if they were not aware of it at the time, or it was not an SIO at the time of the report.

This uncertainty is intensified as the proposed criminal offence is based on the disclosure of information that relates to an SIO – regardless of to whom the disclosure was made. For example, a journalist who checks with his/her editor or producer regarding the information and/or the story could be jailed for responsibly doing their job, even if the information is not ultimately broadcast or published.

To illustrate this further, if the producer or editor disclosed the information to anyone in the course of making an editorial decision, then the source, the journalist and the editor could all be jailed. The conversations that are currently able to be had as media outlets make responsible decisions about disclosure in the public interest, would be denied under the proposed legislation, because any disclosure by anyone – to anyone – would be a criminal offence.¹²

Section 35P will engender deep uncertainty for any reporting on national security – simply mentioning anything that could, plausibly, be tangentially related to an SIO, will involve taking on substantial legal risks. In this way section 35P will have a chilling effect on free speech.

¹¹ Kieran Hardy, Nicola McGarrity, and George Williams, *Submission to the Inquiry into the National Security Legislation Amendment Bill (No 1) 2014* (Gilbert & Tobin Centre of Public Law, 2014).

¹² Joint media organisations, *Submission to Inquiry into the National Security Legislation Amendment Bill (No. 1) 2014* (2014).

2. Restrictions on disclosure about special intelligence operations last forever

Furthermore, section 35P appears to apply to SIOs indefinitely – so that journalists, or even historians, would be unable to legally write about such operations forever.

The former Independent National Security Legislation Monitor Bret Walker has argued

I cannot see any justification for information relating to a special intelligence operation not being able to be disclosed if ... it shows the special intelligence operation has been conducted illegally.¹³

It has been argued that section 35P mirrors similar provisions which limit reporting on AFP controlled operations.¹⁴ However, SIOs differ from existing AFP operations in a number of ways. First, the AFP is a law enforcement agency. ASIO is an intelligence agency without any law enforcement responsibilities. Second, the AFP is tasked with investigating a limited number of specific crimes. ASIO is an intelligence agency with a mandate to collect information related to security. Third, the AFP is an open organisation. ASIO is an agency with a modus operandi for secrecy.

The attention that numerous inquiries have given to the introduction of SIOs suggests that this new regime is likely to become central part of ASIO's functions. Immunity from criminal or civil liability is a very substantial and broad power, and one which ASIO has been successfully functioning without since it was established in 1949. Its existence creates significant risks that ASIO agents, by intention or accident, could engage in conduct that the community might disapprove of. At the very least, introducing a prohibition on disclosure of SIO operations at the same time the SIO regime is first introduced will prevent public discussion about the efficacy and desirability of SIOs.

As *The Australian's* foreign editor Greg Sheridan has written:

[T]his legislation, by design or inadvertence, will massively shift power to government and away from media institutions, which are already much weaker than they were and much weaker than they should be. It was designed by people who either don't understand how journalists operate in national security stories, or understand perfectly well and want to shift the balance of power unhealthily to government.¹⁵

These concerns about press freedom parallel similar concerns made during the debate about the Independent Inquiry into Media and Media Regulation (the Finkelstein inquiry) and the *News Media (Self-regulation) Bill 2013* under the Gillard government.

¹³ Ben Grubb, 'Media reporting of ASIO killings illegal under new national security laws, says law expert,' *Sydney Morning Herald*, 30 September 2014.

¹⁴ See, *Crimes Act 1914* (Cth), s 15GD.

¹⁵ Greg Sheridan, 'Limits on media are a blow to the people's right to know,' *The Australian*, 9 October 2014.

3. Any exemption will provide only limited protection for journalists but journalism is an ambiguous term, and the exemption will not protect freedom of speech

An illusory distinction has arisen in the debate around section 35P. Much of the commentary about the appropriateness of this provision has focussed on the impact it will have on one particular class of individuals – those engaged in the journalism profession.

It is likely that the weight of section 35P will disproportionately fall on journalists and, in particular, investigative journalists seeking to report on the conduct of ASIO and other national security agencies. However, it is important to recognise that press freedom is not a standalone liberal democratic principle; it is a subset of the broader human right to freedom of expression. A free media is vital to liberal democracy. But the right to free speech does not depend on one's profession; it depends only on one's being human.

This is important given the calls for an exemption to be provided for journalists. There are two key problems with such an exemption: one practical and one principle.

First, such an exemption is likely to be limited to a subset of overall journalists. The exemption provided for under the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* restricts the relevant defence to persons "working in a professional capacity as a journalist". This is a narrow definition, which fails to capture a range of individuals who engage in conduct which is comparable to that engaged in by professional journalists. As Mark Pearson, Professor of Journalism and Social Media, Griffith Centre for Cultural Research and Socio-Legal Research Centre at Griffith University, has argued:

The issue arises time and again as more people practise what we know as journalism. Bloggers, students, academics and "citizen journalists" are now valuable sources of information for the public. Yet many of them are not necessarily working in a professional capacity as a journalist. Thus the new law would privilege the 20th-century definition of "journalist" and is a form of licensing.¹⁶

Even if the operation of the exemption can be guaranteed to protect some journalists from prosecution it would certainly not protect individuals who are not engaged in the profession of journalism. This means the vast majority of the population would not be afforded protection even under a limited defence.

Secondly, the inclusion of such a defence is objectionable in principle. Even if a definition of "journalist" could be included which could guarantee coverage of a range of individuals engaged in a broader conception of journalism, the inclusion of such a defence would still be wrong. This is because such a provision operates to effectively grant special free speech privileges to certain groups in the form of a legal defence. Free speech does not depend on government-granted privileges. The issue is not that the exemption is not broad enough, it is that such an exemption is required in order to protect free speech in the first place.

¹⁶ Mark Pearson, 'Five reasons terror laws wreck media freedom and democracy,' *The Conversation* 13 October 2014.

Conclusion

Section 35P of the *Australian Security Intelligence Organisation Act 1979* is a significant threat to freedom of speech in Australia.

While some constraints on freedom of speech are justified, they are only justified to the extent that the conduct crosses the boundary between words and actions. Section 35P fails to meet this standard.

Instead, section 35P will undermine the free speech of members of the press, as it will result in a high degree of uncertainty and legal risk in reporting or writing on national security matters.

Furthermore, any exemption that could be drafted and inserted into the act is likely to be limited to a narrow class of persons “working in a professional capacity as a journalist”. This is problematic, as many people who perform comparable work will not fit the definition. While it is inappropriate that special free speech exceptions have been carved out for certain narrow groups, it is doubly problematic that free speech exceptions are required at all. Free speech should not depend on what the government permits.

Section 35P is an excessive limitation on free speech which is not justified in a liberal democratic country. Parliament should repeal the new section 35P of the *ASIO Act*.

About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape.

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About the Authors

Chris Berg is a Senior Fellow at the Institute of Public Affairs. He is a regular columnist with ABC's *The Drum*, and an award-winning former editor of the *IPA Review*. His latest book is *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt*. A monograph, *The Growth of Australia's Regulatory State*, was published in 2008. He is also the editor of *100 Great Books of Liberty* (with John Roskam) published by Connor Court Publishing in 2010, and *The National Curriculum: A Critique* (2011)

Simon Breheny is Director of the Legal Rights Project at the Institute of Public Affairs. Simon has been published in *The Australian*, the *Australian Financial Review*, the *Sydney Morning Herald*, *The Age*, the *Daily Telegraph*, the *Herald Sun*, the *Courier Mail*, the *Canberra Times*, the *Sunday Tasmanian* and *The Punch*. He is regularly interviewed on radio around the country in relation to legal rights, the rule of law, civil liberties and the Nanny State, and has appeared on ABC's *Q&A*, *Lateline*, *News Breakfast* and *ABC News 24*, Channel 7's *Weekend Sunrise* and Sky News' *The Nation*, *AM Agenda*, *Lunchtime Agenda* and *PM Agenda*.

Simon has also appeared as a witness to give expert evidence before the Senate Standing Committee on Environment and Communications, NSW Legislative Council Standing Committee on Law and Justice, Senate Legal and Constitutional Affairs Legislation Committee and the Parliamentary Joint Committee on Intelligence and Security.