INSLM REVIEW

IMPACT ON JOURNALISTS OF THE OPERATION OF SECTION 35P OF THE ASIO ACT 1979

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A combined submission from:
NSW Council for Civil Liberties
Liberty Victoria
Queensland Council for Civil Liberties
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INSLM review of impact on journalists of the operation of section 35P of the Australian Security Intelligence Organisation Act 1979

Submission of the councils for civil liberties across Australia

The councils for civil liberties across Australia[1] (the CCLs) welcome the opportunity to make a submission to the Independent National Security Legislation Monitor's (INSLM) review of 'any impact on journalists of the operation of section 35P of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).'

INTRODUCTION

1. Australia's legislative response to terrorist threat – the broad context

The CCLs have engaged with the development of Australia's extensive suite of counter-terrorism legislation at all stages since the 9/11 terrorist attack on the USA transformed the reality and the political climate in relation to terrorism in this country and elsewhere[2]. The legislative response in Australia has been exceptional in its volume of new laws and in the breadth of powers granted to intelligence and security agencies.[3]

We have acquired a broad understanding of these laws and their cumulative implications. (This understanding has been greatly assisted by the body of descriptive and evaluative work done by the first INSLM ,Bret Walker SC.)

The CCLs accept that security and intelligence agencies should have powers and resources necessary for the protection of national security, including protection against the current real threat of terrorist activity in Australia - with the obvious caveat that such powers are ultimately compatible with our democratic values. Where legislation expands agencies powers and/or weakens safeguards, parliamentary endorsement should depend upon persuasive evidence justifying the necessity for such changes and clear demonstration that rights and liberties are not being unwarrantedly or disproportionately encroached upon.[4]

[1] New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties, Australian Council for Civil Liberties

[2] Initially as individual organisations but increasingly, in recent times, jointly.

[3] Australia had passed 64 separate pieces of anti-terrorism by the end of 2014. Andrew Lynch, Nicola McGarrity, George Williams:Inside Australia's Anti-Terrorism Laws and Trials, Sydney 2015 p 3.

[4] This was the starting point for our response to the proposed SIO regime and the s 35P offences in 2014. *Submission Of The Civil Liberties Councils Across Australia To The Parliamentary Joint Committee On*

The CCLs have had longstanding concerns with some of the post 9/11 counter-terrorism provisions and in 2012 launched a national campaign for the repeal of the most disturbing and dangerous 'extraordinary' ASIO counter-terrorism powers. [5] None of these powers has been wound back. Instead, sunset clauses, which had been inserted in relation to some of these powers to gain assent to their passage through parliament, were recently extended without proper review. In recent times, there has been a veritable tsunami of new national security and counter-terrorism legislation incorporating numbers of new extraordinary provisions which have greatly exacerbated our concerns.

The special intelligence operations (SIO) provision and the related s 35P offences are recent additions to a disturbing trend in the extension of secrecy provisions, inhibitions on the reasonable disclosure of information in the public interest and weakening of reasonable public scrutiny of executive government and intelligence agencies.

The cumulative impact of these laws (and others outside the specific counter-terrorism/ national security legislative framework) on the work of journalists and the viability of a free and effective media in Australia is considerable.

For example, the hugely important protection afforded to journalists and their sources within the (Cth) Evidence Act 1995[6] is effectively by-passed and undermined by the cumulative impact of the s 35P offences and recent mandatory data retention laws. Although a warrant is now required for access to a journalists meta-data – and a public interest advocate can intervene on behalf of the public interest- access is very likely to be granted to this data which can readily reveal the identity of a source – when the justification for seeking a warrant is the suspected breach of S35P (disclosure of information relating to a special intelligence operation). This is a serious crime.

Intelligence And Security Inquiry Into The National Security Legislation Amendment Bill (No 1) 2014 (*CCL's Submission NSL Amendment Bill (No1) 2014*) p2

[5] The National ASIO Campaign was launched at the NSWCCL annual dinner in October 2012.

[6] Evidence Act 1995 s126H *(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.* This protection is subject to a public interest test

Further, as the issuing of a warrant is secret, the journalist will have no way of knowing when and if his meta-data has been released to ASIO or any other law enforcement authority. The uncertainty and the resulting chilling effect are obvious.

This is the broad context and perspective from which the CCLs approach this review of one provision of one recent tranche of the (probably) uniquely extensive Australian suite of counter-terrorism laws.

2. Summary of the CCLs' position

The impact of s 35P cannot be assessed in isolation from other provisions in the ASIO Act and other related legislation. A serious effort by Government to protect a free and robust press in Australia would require a broader review of the cumulative impact of counter-terrorism and national security legislation on journalists – as well as the adequacy of whistleblower protection provided by the Public Interest Disclosure Act 2013.

For the purpose of this review on s 35P, comment is made on only the related special intelligence operations provision of the ASIO Act and the recent mandatory data retention amendment to the Telecommunications (Interception and Access) Act 1979.

While we regard it as a major issue, we are concerned at the exclusive focus on the impact of s 35P on journalists. Persons other than journalists will obviously be affected by these offences. It would not be an adequate response therefore, to develop strong protections for journalists and ignore the impact on others.

We provide some analysis of the detailed problems we have with aspects of the SIO regime and the s35P offences generally and as they impact on journalists. We address some options for protecting journalists, whistleblowers and others in the specific context of s35P but do not consider them adequate responses.

The CCLs reaffirm their strong opposition to the concept of the SIO regime and argue for its repeal. The repeal of the s35P offences flows logically from this position. But even if the SIO is maintained (hopefully more tightly defined and with stronger safeguards), the

CCLs would argue for the repeal of s35P offences as unnecessary, draconian and dangerous for our democratic well-being.

We understand that it is likely that these provisions will be maintained – hopefully with some strong amendments to counter their chilling effect. But we affirm our intention to maintain our advocacy for their repeal and the repeal or significant amendment of other exceptional counter-terrorism and national security laws which cumulatively are eroding important accountability mechanisms, freedom of speech and freedom of the press.

Though it is outside the parameters of this review we also suggest to the INSLM that in his first year of office he might consider a wider review of counter-terrorism/security provisions which impact on journalists and whistleblowers.

3. The core issue - freedom of speech and freedom of the press and robust democracy

The key civil liberties at stake in relation to s 35P are freedom of speech and freedom of the press. The starting point of this submission is the proposition that free speech, the free press, and the free flow of information are essential to democracy and should not be lightly curtailed.

Australians enjoy a right to freedom of expression, particularly in relation to political and governmental matters. This is recognised at common law,[7] in the *Constitution*, and in international human rights instruments.[8]

The free press plays a crucial watchdog role in a democracy, supplying the public with information to guard against abuses of power and government's mistakes. To operate in this way, the free press depends on access to information and sources, including whistleblowers within government and government agencies. The High Court has described the free flow of

[7] *Evans v NSW* [2008] FCAFC 130 (15 July 2008), [74], citing William Blackstone, *Commentaries on the Laws of England* (T. Tegg, 17th ed, 1830), Book 4, 151-152; *Evans v NSW* [2008] FCAFC 130 (15 July 2008), [72]; TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148, quoted with approval in *Minister for Immigration & Citizenship v Haneef* (2007) 163 FCR 414 and *Evans v NSW* [2008] FCAFC 130 (15 July 2008), [72].

[8] For example, the right to freedom of expression contained in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).

information from sources to journalists as 'a vital ingredient in the investigative journalism which is such an important feature of our society'.[9] More recently, the importance of investigative journalism and journalists' access to sources has been recognised by the Commonwealth and several state governments in their enactment of 'shield laws'.[10]

Legitimate whistleblowers are essential to a healthy democracy for the exposure corruption and misuse of power to public scrutiny. Every democratic community needs them from time to time.

The s 35P offences will have, and appear intended to have, a major deterrent effect on legitimate whistleblowers, on the freedom of the media to report on abuses of power by ASIO and on debate relating to intelligence and counter terrorism issues- even when these pose no threat to national security.

DETAILED COMMENT

4. Special Intelligence Operations

While this review is formally limited to the impact on journalists of the operation of s 35P, it clearly cannot be done in isolation from consideration of the SIO regime. The purpose of the s 35P offences is to keep these covert operations secret.

The new statutory framework for the conduct by ASIO of Special Intelligence Operations (SIOs) is based on the controlled operations regime in Part IAB of the Crimes Act 1914 (Crimes Act) in relation to activities of the Australian Federal Police. The SIO regime provides ASIO officers and affiliates with immunity from criminal and civil liability for unlawful conduct when operating in an authorised SIO.s

[9] *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 356. See also *Liu v The Age Co Ltd* [2012] NSWSC 12 (1 February 2012), [115], [162]-[164].

[10] [10]*Evidence Act 1995.*(Cwealth) *Protection of journalists' sources*, s126H; *Evidence Amendment (Journalist Privilege) Act 2011* (NSW); *Evidence Amendment Act 2011* (ACT), s 4; *Evidence Amendment (Journalist Privilege) Act 2012* (Vic); *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA).

The CCLs put forward a detailed case opposing the SIO regime in our submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) last year and in direct evidence to the Committee.[11] We will not revisit this detail here and will confine our comments to those aspects of the SIO regime which make the s 35P offences deeply disturbing. (Relevant extracts from the CCLs' submission are included in Appendix 2).

The ambit of SIO activities as defined by the legislation is very broad, encompassing activities relevant to ASIO intelligence work. Although the Government says SIOs will very rare and deal only with serious threats, the legislation allows a much broader interpretation. Any ASIO activity could be declared an SIO.

The immunity from prosecution provision is very broad, encompassing all unlawful conduct with only 4 exceptions[12]. Such a context is conducive to dangerous cultural change within ASIO in which sanctioned unlawful conduct is increasingly accepted as normal.

The ministerial authorisation process for an SIO, while formally independent of ASIO[13], remains loose. The criteria are very broad and it is always likely to be politically challenging for a minister to reject an intelligence agency's urgent request. This is particularly so in the highly charged political environment relating to counter-terrorism issues.

It is the combination of the available scope of ASIO activities, the breadth of the immunity provision and the lack of an independent judicial authorisation safeguard that gives such significance to the s 35P offences in relation to an SIO.

Potentially a significant part of ASIO's activities, including unlawful activities and misuse/abuse of powers could be kept secret permanently under these provisions. One of the unacceptable features of this provision is that there is no timeline for the secrecy provision in relation to a SIO to end.

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[11] *CCL's Submission NSL Amendment Bill (No1) 2014* pp8ff

[12] Conduct causing death or serious injury; torture; a serious sexual offence and serious property damage. Australian Security Intelligence Organisation Act 1979 s 35K(1)(e)

[13] The original proposal had been for internal ASIO approval at a senior level.

The CCLs accept that ASIO officers need to work covertly and that there will be some limited contexts in which intelligence gathering and terrorism investigations may require the commission of unlawful acts-most likely in the context of agents being embedded in organisations which pose a threat to national security. However, adequate protections for ASIO officers in these limited contexts already exist and the Government has not provided evidence to substantiate its claim that intelligence operations have not been commenced, or have been abandoned, because of the lack of guaranteed immunity from prosecution.[14]

The SIO provision effects a very significant weakening of safeguards relating to ASIO's operations and brings with it considerable risk. Such a significant change required strong justification from the Government which, in our view, was not provided

The final legislation included some additional safeguards. Most significant was the provision for external authorisation of an SIO by the Attorney-General. The CCLs had argued that independent judicial authorisation was necessary.

If the SIO regime is to continue, significant additional safeguards are required - including tighter specifications of scope and specification of a time limit on the secrecy provision for each SIO.

But the CCLs opposition is to the concept and the inherent dangers of a statutory regime providing immunity for almost any unlawful activity in the context of covert operations of an intelligence organisation. History would suggest this is an invitation for such conduct to become acceptable and normal. It is a dangerous as well as unnecessary law. Over time it is likely to facilitate misuse and abuse of ASIO powers. This is especially so given the s 35P offences.

Recommendation 1

The CCLs recommend that ASIO's special intelligence operations provision in the ASIO Act should be repealed as soon as practicable.

[14] Explanatory Memorandum to the National Security Legislation Amendment Bill (No 1) 2014 p14 Par54

5. The s 35P Offences

Section 35P contains two offences. The offence in s 35P(1) criminalises all disclosures of information, where the person making the disclosure is reckless as to whether the information relates to a special intelligence operation (**SIO**). The aggravated offence in s 35P(2) is similar to s 35P(1) except that it must also be shown that the disclosure will (or that the person intended to) endanger the health or safety of a person or prejudice the effective conduct of a SIO. Liability for both offences is excepted under s 35P(3). The exceptions in s 35P(3) do not relate to journalists but to legal obligations to disclose or the performance of ASIO functions.

The maximum penalty for contravening s 35P(1) is 5 years imprisonment, while the aggravated offence in s 35P(2) carries a maximum penalty of 10 years imprisonment.

The stated justification of the offences contained in s 35P is that they are:

> *necessary to achieve the legitimate objective of protecting persons participating in a SIO and to ensure the integrity of operations related to national security, by creating a deterrent to unauthorised disclosures, which may place at risk the safety of participants or the effective conduct of the operation.*[15]

CCLs understand the need for secrecy in relation to certain intelligence gathering operations. However, the Bill fails to draw an important distinction between disclosures which undermine the effectiveness of particular operations and endanger the lives of those involved in them, on the one hand, and on the other, public interest disclosures, for example those regarding any aspect of ASIO activity generally which might legitimately be considered a cause for concern.

While the offences may prevent the publication of information that is harmful to Australia's national security interests, they will also have the effect of preventing legitimate publication of matters in the public interest, relating to the use and misuse of government power which have nothing to do with national security – or even serious matters.

[15] Revised Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014, [79].

The Government has argued that it will be difficult in practice to sustain a conviction of a journalist engaged in legitimate journalistic activity because of the requirement that they act recklessly or with intention when disclosing SIO information.[16]

This misses the point. As long as the *possibility* of a conviction and a harsh punishment exist, a chilling effect will operate to deter whistleblowers and journalists from publishing information relating to intelligence and national security. Possible evidentiary difficulties for prosecutors in making out recklessness are unlikely to soothe the fears of a whistleblower or journalist risking five years in gaol. Journalists do not need to be imprisoned for this section to strike a major blow to the free press in Australia.

The CCLs' position is that s 35P and its concomitant chilling effect on whistleblowers and journalists present a major threat to freedom of speech and the public's right to know, without any legitimate justification. Accordingly, the section burdens civil liberties in a manner disproportionate to its purpose. We strongly submit that it should be repealed

Recommendation 2

The CCLs recommend that, consistent with their recommendation that the SIO provision in the ASIO Act be repealed, the related s 35P offences provision for the disclosure of information relating to an SIO also be repealed as soon as is practicable.

5.1. Problems with the drafting of s 35P provisions

The s 35P offences have an excessively broad and indiscriminate operation and there is lack of clarity as to meaning of some aspects. If the provisions are not repealed they should be significantly amended to address these problems.

5.1.1. Scope of 'disclosure'

The offences in s 35P may criminalise the disclosure of information that is already in the public domain as the result of an earlier disclosure. It is clearly unjustifiable that criminal liability attach to public discussion of information already in circulation from an earlier

[16] Most recently see letter from Paul O'Sullivan Chief of Staff, Office of the Attorney-General to Jeannie Rea, National President NTEU 16th March 2015.

'disclosure'. Multiple disclosures will occur in the process of reporting. When a journalist reports on a matter relating to a SIO there will likely be multiple disclosures. One may be the disclosure of information from a source (potentially a public official whistleblower) to a journalist. Another disclosure will occur when the journalist discloses that information to the editorial staff, and then the news media source agency will decide whether or not to publish the information.

As drafted, the offences criminalise all the 'disclosures' in the process of publishing news articles. It may also be possible that a recipient of information in that process is liable as an accessory to that disclosure. The Act's failure to distinguish between the disclosing parties inhibits a journalist's ability to receive information from sources and communicate that information to editors in the process of legitimate journalistic activity.

5.1.2. Section 35P is problematic as it relies on the broad and circular concept of an SIO.

An SIO may relate to any intelligence activity. The Minister's decision whether to grant an SIO Authority does not contain definite criteria. To require the Minister to consider whether the circumstances are such as to justify the granting of a SIO Authority is circular. [17]
Imposing criminal liability in respect of a matter at the discretion of the Minister creates an unacceptable risk of misuse.

The offences in s 35P only require that the person making the disclosure be reckless that the disclosed information relate to a SIO, ie that the person is aware of a substantial risk that the information relates to a SIO. There are two key problems with the offences in s 35P, insofar as they rely on the concept of SIO.

First, what is authorised under a SIO Authority is secret. There are no subject-matter restrictions on what types of operation may be a SIO – rather the restriction affecting the content of a SIO is purposive: the SIO Authority must state how the SIO will assist ASIO in the performance of one or more of the special intelligence functions, and the Minister must

[17] ASIO Act, s 35C(2)(b).

be satisfied on reasonable grounds that the operation will assist ASIO in the performance of those functions. The 'special intelligence functions' are at a high level of generality and relate to collecting and sharing intelligence, and intelligence cooperation.

The Minister has what is in effect an unfettered discretion in deciding to grant a SIO Authority.. This circularity built into the decision-making process will likely have the result that the Minister is effectively unconstrained in making a decision under s 35C, save for the matters listed in s 35C(2)(e). In addition, there are limited opportunities to review whether the Minister's decision under s 35C has been made lawfully.

As the Gilbert + Tobin Centre for Public Law has noted,[18] the SIO regime is different from the controlled operation regime in Pt IAB of the *Crimes Act 1914* (Cth) insofar as the authorising officer for a controlled operation needs to be satisfied on reasonable grounds, that (for example) a serious offence has been, is being or is likely to be committed.[19] The Minister's decision to grant a SIO Authority is not so limited.

5.1.3. Meaning of "relates to" an SIO

The requirement that the information disclosed "relates to" a SIO makes the offence extremely broad. The meaning of "relates to" is not capable of any fixed meaning, but is a wide term given colour by the context in which it is used.[20] It is unclear whether the information disclosed needs to be directly or substantially connected with a SIO, or whether only a tangential connection will suffice. Given the breadth of the concept of SIO discussed above, it is possible that a tangential connection only would be sufficient.

The uncertainty of the scope of the offence means that the net of criminal liability is cast broadly and indiscriminately. The offences in s 35P may equally capture a journalist

[18] Gilbert + Tobin Centre for Public Law, Submission 2 to PJCIS, *Inquiry into National Security Legislation Amendment Bill (No 1) 2014*, 31 July 2014, 8.
[19] *Crimes Act 1914* (Cth), s 15GI(2)(a)(i).
[20] *Waugh Hotel Management Pty Ltd v Marrickville Council* [2009] NSWCA 390, [38]-[52] and the cases cited therein including *Bull v The Queen* (2000) 201 CLR 443; *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301; *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602.

reporting on a person in plain clothes who was seen removing another individual from a building (when that conduct formed part of a SIO) and a journalist who obtains a SIO Authority and publishes it. The former is clearly different from the latter and should not be the subject of criminal penalty.

The requirement that the disclosed information "relates to" a SIO in both ss 35P(1) and 35P(2) creates a wide scope of liability that inhibits reporting on matters of security in a way that goes beyond what is necessary to ensure the effective conduct of secret operations and the safety of persons involved in them.

5.1.4. Anomalies in penalties

A disclosure which does not prejudice the effective conduct of a SIO or endanger health and safety can lead to five years' imprisonment under s 35P(1). A disclosure of this kind has no negative consequences for security and is outside the stated rationale for the s 35P offences. It should not attract such a severe penalty and arguably should not be criminal conduct.

Section 35P(2) provides a maximum penalty of 10 years for a person who discloses information that relates to a special intelligence operation if either:

- the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation;
- or the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

It is inappropriate that a disclosure which endangers the health or safety of a person and a disclosure which merely prejudices the effective conduct of a special intelligence operation are captured by the same aggravated offence. Disrupting an operation in circumstances where there is no intention to cause harm (or likelihood that it will) is significantly less severe than a disclosure which does intend to (or will) cause harm.

It is telling that in justifying higher penalties for s 35P(2) the Explanatory Memorandum refers only to the harm. It states that s 35P(2), 'applying to the disclosure of information with an intent to cause harm (or where harm will result from such a disclosure), appropriately attracts a heavier penalty than the offence in subsection 35P(1)'.[21]

Without a justification as to why these different elements should be considered equally severe it is inappropriate to combine them in one offence.

Journalists and whistleblowers may disclose information in the public interest for the purpose of disrupting an SIO being conducted illegally or improperly. In such cases journalists and whistleblowers whose disclosures do not endanger operatives should not be in breach of the same aggravated offence as a disclosure which does. This is especially the case if the object of a disclosure is to reveal an abuse of power, where the operation itself is misdirected and its disruption in the public interest.

Failing to make such a distinction is likely to discourage disclosure in the public interest and as such the section should be repealed.

The maximum penalty for contravening s 35P(1) is 5 years imprisonment. The aggravated offence in s 35P(2) carries a maximum penalty of 10 years imprisonment. We believe these penalties are excessively severe.

All of these problems in the drafting of the offences and the SIO provision need to be addressed if the offences are to remain. But they do not go to the central issues which make these provisions so inappropriate for a democracy that values free speech, free media and effective accountability for government and its agencies.

The central issue of concern is the cumulative impact of secrecy provisions and the penalties: inhibiting the reasonable disclosure of information in the public interest and weakening of reasonable public scrutiny of executive government and intelligence agencies

[21] Revised Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014, [564].

in the counter-terrorism/national security context. The key factor is the absence in the Act of any public interest defence provisions which could ameliorate the chilling effect of the offences on journalists, whistleblowers and media.

6. Protections for Journalists, whistleblowers and others under s35P

If section 35P is not repealed there must be amendments to address as fully as possible this undoubted chilling effect.

6.1. Exempting journalists

It is clearly important that journalists are given effective protection/exemptions from prosecution for responsible publication (disclosure) of important information in the public interest in relation to ASIO's SIOs. Journalists have an important public interest function in a democracy in exposing governments and key agencies to public scrutiny when they have abused powers or made significant mistakes.

As it stands section 35P fails to distinguish between:

- disclosures which undermine the effectiveness of particular operations and endanger the lives of those involved in them; and
- disclosures which serve a public interest by subjecting organs of state power to legitimate scrutiny.[22]

Journalists' reporting of intelligence and security agencies activities has played an important accountability function in recent times. One pertinent example is the reporting of Headley Thomas from *The Australian* on the detention and prosecution of Gold Coast doctor Mohamed Haneef in 2006. Thomas' investigation exposed flaws in the prosecution case against Dr Haneef. Those exposures ultimately led to Dr Haneef's release and exoneration.

Australia's conduct with respect to ASIS's covert recording of the deliberations of the Timor-Leste cabinet provides another useful example. After journalists revealed the existence of the recording, the AFP raided the house of Timor-Leste's Australian lawyer and confiscated

[22] CCLs submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the *National Security Legislation Bill (No 1) 2014*, date unknown, page 11.

confidential legal documents related to a dispute between the two countries. The bugging would not have been revealed were it not for these media reports.

It is important that journalists can responsibly report ASIO wrong doing or mistakes in a SIO operation - so ASIO can be help properly accountable. Therefore, the CCLs propose that journalists reporting on such operations ought to be excepted from section 35P.

One approach is to build in a journalists' exception provision. This would provide stronger and more certain protection than the current special arrangement made for journalists after the passage of the Act. The Attorney-General decided to use his powers to require the Commonwealth Director of Public Prosecutions to gain the consent of the Attorney-General to prosecute a journalist for a s 35P[23]offence.

6.2. Specific exemption or general public interest exception

In carving out an exception that has the effect of ensuring journalists' can fulfill their accountability function, two approaches may be taken. The first is to insert a specific exception for journalists reporting on special intelligence operations. The second is to insert a general public interest exception for any such disclosure by any person.

The strengths of the specific exemption are:

- A specific exception creates legal certainty. To hold government agencies to account, journalists must operate in a certain environment. A public interest exception introduces a high degree of uncertainty into a journalist's decision whether or not to publish. This is because a journalist can never be sure how a public interest test may be applied in any given situation. This uncertainty will lead to a chilling effect, as journalists are discouraged from reporting on national security investigations. On the other hand, if a journalist can be sure that an exception is applicable, he/she can

[23] *"I have today decided to take advantage of the powers available to me under Section 8 of the Commonwealth Director of Public Prosecutions Act to give a direction to the Commonwealth Director of Public Prosecutions (DPP) that in the event that the Director had a brief to consider the possibility of the prosecution of a journalist under Section 35P or under either of the two analogous provisions which I have mentioned, he is required to consult me and no such prosecution could occur without the consent of the Attorney-General of the day." Attorney-General George Brandis, Media statement 30/10/14.*

fulfill his/her accountability function without delay and speculation about the legality of particular publications.

- Judicial discretion has tended to favor restrictive interpretations of the public interest.[24]

- A journalist may have difficulty making out a general public interest defence in this context. Much of the evidence which a journalist would seek to rely on is information which a journalist is unlikely to have lawful access to. Without access to this information, journalists and media organisations would labour under an extremely onerous burden when preparing arguments as to why the public interest in freedom of expression should outweigh any other public or security interests.

6.3. Exempting persons/professions other than journalists

Concerns about the impact of s 35P cannot be confined to journalists. Obviously, the reference would have to be interpreted to extend to the impact on journalists' sources. But there are others who are also likely to be impacted by s 35P. Academics, members of civil society and religious groups, community advocates and ordinary members of the community may well be caught up by s 35P.

We note, for example, the recent correspondence between the National Tertiary Education Union (NTEU) and the Attorney-General. The NTEU raised concerns about the impact of s 35P on academics and academic freedom and urged Senator Brandis to 'extend *your direction to the DPP to include the exercise of academic freedom, by extending the direction to academic or research staff where s35P disclosure of information is a fundamental aspect of their professional responsibilities.'*[25]The response from the Office of the Attorney-General provided a detailed argument that the available defences in s 35P (3) were such that there was little cause for concern:

[24] See Hannah Ryan, 'The Half-Hearted Protection of Journalists' Sources: Judicial Interpretation of Australia's Shield Laws' (2014) 19 *Media and Arts Law Review* 325.
[25] Letter from Jeannie Rea, National President NTEU to Senator George Brandis, 14/1/14[sic] 15

..on this basis the Government is satisfied that a person who engages in the usual practices of responsible journalism or academic writing or research, is highly unlikely to be exposed to prosecution because such actions would be credible evidence supporting a conclusion that a person did not act unjustifiable in making the disclosure' [26]

Nonetheless, the letter concluded with an apparent recognition that uncertainty may in fact exist:

"Accordingly the Government will give careful consideration to your organisation's suggestion the consent requirement is extended to academics and researchers who make disclosures in that professional capacity' [27]

While this correspondence relates to the existing requirement for the DPP to gain the Attorney-General's consent to a prosecution of a journalist, it signals clearly that other professional groups will seek coverage by any exception that is attached to s 35P.

This suggests that a general public interest exception might be the better way to go. This would also be consistent with a principled position of extending any protection to all persons.

6.4. Exempting whistleblowers

Journalists are largely dependent on whistleblowers for access to information about covert SIO activities which go wrong or are misconceived. Whistleblowers are often responsible for 'tipping off' journalists. The relationship between the journalist and the whistleblowers who disclose information to them is of critical importance to a free press. It is unlikely that any kind of protection for journalists' would be effective in holding government agencies accountable unless the exception also applied to the whistleblowers who often disclosure secret information to journalists.

[26] Letter from Paul O'Sullivan Chief of Staff, Office of the Attorney-General to Jeannie Rea, National President NTEU 16th march 2015. See also '*Scope of ASIO Act has potential to criminalise reporting on intelligence*' The Australian 10 April 2015 for an account of alleged confusion as to correct interpretation of the application of s 35P on journalists and as to scope of information covered.

[27] ibid

The Public Interest Disclosure Act 2013 (Cth) currently provides a whistleblower framework for public officials. In the context of s 35P most whistleblowers are likely to be public officials. But restrictions in relation to disclosure of intelligence information would not protect their disclosing information about an SIO (or other secret intelligence information) to a journalist.

Therefore, the same kind of specific exception or general public interest exception inserted into the s 35P would have to apply to whistleblowers to protect them in disclosing otherwise secret or SIO information to journalists or the public.

A draft s 35P exception provision for both journalists and whistleblowers is included in Appendix 1 of this submission.

The CCLs on balance favour a general public interest defence or exception if the s 35P is not repealed in line with our recommendation.

7. Broad review of C-T/Security Laws and Impact on Journalists Whistleblowers and Free Press

Though it is outside the parameters of this review the CCLs suggest to the INSLM that in his first year of office he might consider a review of all the provisions within the growing counter-terrorism/national security suite of legislation which erode legitimate journalistic freedom and weaken protections for legitimate whistleblowers.

This 'very serious policy' issue was flagged recently by the previous INSLM Bret Walker SC in a related context:

> *The very serious policy which isn't addressed by this law is whether, as a society, we want effective shield laws for journalists and comprehensive whistleblower legislation. They are really big issues which are really not addressed at all by this law or current laws.*[28]

[28] Walker was speaking on the impact of the new mandatory data retention laws. ABC Media Watch 20th March 2015.

Recommendation 3

The CCLs suggest that the INSLM consider incorporating a review of all the provisions within counter-terrorism/national security suite of legislation which erode legitimate journalistic freedom and weaken protections for legitimate whistleblowers with the intention of developing a comprehensive set of effective shield laws for journalists and comprehensive and effective whistleblower legislation which protects all citizens.

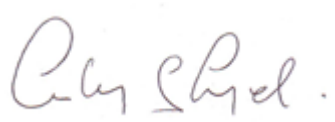
8 Conclusion

The CCLs have only offered two formal recommendations in response to the specific review issue. We have recommended the repeal of both the SOI and s 35P provisions. We of course understand that this is an optimistic position in the current context. However, we consider it to be in the long term public interest to maintain this position.

We have offered detailed analysis of the provisions and explored ameliorating amendments for both the core SIO provision and the s35P offences provision –albeit without formal recommendations. We hope this submission will assist the INSLM in his important work on these provisions. Representatives of the CCLs would be very willing to discuss these matters further in the context of the scheduled public hearings or in any other context.

This submission was coordinated on behalf of the joint CCLs across Australia by Dr Lesley Lynch NSWCCL. The major work was done by the NSWCCL Freedom of Speech and Privacy Action Group with assistance and advice from Michael Stanton Vice President LibertyVictoria and Andrew Vincent from Liberty Victoria.

With regards



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Appendix 1

DRAFT SECTION 35P EXCEPTION (ASIO ACT)

Sections 35P(1) and (2) do not apply if the disclosure was made by either:

(a) A journalist in the normal course of their work; or

(b) An informant who gives information to a journalist in the expectation that the information may be published in a news medium; and

EITHER:

(1) The journalist did not intend to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; or

(2) The disclosure exposes conduct by ASIO, a government department or agency, or any other entity or person involved in a special intelligence operation that may be capable of constituting:

(a) conduct involved in the special intelligence operation that:

(i) involves the death of, or serious injury to, any person;

(ii) constitutes torture;

(iii) involves the commission of a sexual offence against any person; or

(iv) results in significant loss of, or serious damage to, property; or

(b) misconduct by ASIO, a government department or agency, or any other entity or person involved in a special intelligence operation; or

(c) a power exercised for an improper purpose by ASIO, a government department or agency, or any other entity or person involved in a special intelligence operation;

(d) conduct by ASIO, a government department or agency, or any other entity or person involved in a special intelligence operation that is beyond the scope of a special intelligence operations authority; or

(3) The disclosure was otherwise in the public interest.

(4) A defendant who wishes to deny criminal responsibility by relying on subsection (2) bears an evidential burden in relation to that matter.

1. Persons to whom the exception applies

The proposed defence applies to journalists and their whistleblower sources.

The 2014 PJCIS Report listed the difficulty in defining the term 'journalist' as reason for considering an explicit defence to s 35P as inappropriate. The report states: 'the term "journalist" is increasingly difficult to define as digital technologies have made the publication of material easier. The Committee considers that it would be all too easy for an individual, calling themselves a "journalist", to publish material on a social media page or website that had serious consequences for a sensitive intelligence operation.'[29]

While there are complexities and it is rapidly transforming, it is possible to formulate a workable, limited definition of 'journalist'. Journalists can be understood to be those persons involved in the profession of collecting, writing and publishing news. They are guided by codes of ethics, such as those of the Media, Entertainment and Arts Alliance.[30] It is not likely to comprehensive or unproblematic.

Further, the term "journalist" has recently found definition in Commonwealth legislation. The 'Shield Laws' contained in *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth) specify definitions of journalists and informers for the protection of the confidentiality of sources where journalists are compelled to give evidence or produce documents to a court.[31]

A journalist is defined in the *Evidence Amendment (Journalist' Privilege) Act 2011* (Cth) as 'a person who is engaged and active in the publication of news.' This covers professional journalists employed at well-known media organisations, as well as free-lance journalists, commentators, and news 'bloggers', so long as a court would consider that they have been involved in reporting news on an ongoing basis.

An informant should be defined as 'a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium'. This would cover any whistleblower or other person who supplied information to a journalist, but would not extend beyond the disclosure to the journalist.

2. Mental state for the exception

[29] Parliamentary Joint Committee on Intelligence and Security (2014), *Advisory Report on the National Security Legislation Amendment Bill (No. 1) 2014* (Partliament of the Commonwealth of Australia; Canberra), p

[30] http://www.alliance.org.au/code-of-ethics.html

[31] *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth), Schedule 1.

In subsection 1 of the proposed draft, journalists and their informants are not criminally liable where the accused establishes that they did not intend to endanger the health or safety of any person, or prejudice the effective conduct of a special intelligence operation. Ordinarily a journalists who does not intend to endanger the health or safety of a person, or prejudice the conduct of a special intelligence operation, will not have either of those effects.

3. Circumstances that the exception covers

Subsection (2) of the proposed exception does not apply to all disclosures by journalists of information that relates to special intelligence operations. The circumstances we propose are examples of legally recognised wrongs capable of being committed by persons, government agencies, departments, entities or other persons involved in a special intelligence operation. Some of these circumstances are criminal offences, such as torture or damage to property. Others relate to the state acting beyond its legitimate powers. The defence does not, and should not, put the burden of proving these wrongs on a journalist or informant defendant. The test is not that the circumstance had occurred, but rather that the information disclosed tended to indicate conduct that may be capable of constituting one of these circumstances.

a. Death, serious injury, torture, sexual offence, and loss or damage to property

Section 35C of the Act confers broad powers on the Minister to grant special intelligence operation authorities, and, by s 35C(2)(c), authorises unlawful conduct 'to the maximum extent consistent with conducting an effective special intelligence operation'. This power is only curtailed by s 35C(2)(d), which specifies that:

> (e) any conduct involved in the special intelligence operation will not:
>
> (i) cause the death of, or serious injury to, any person; or
>
> (ia) constitute torture; or
>
> (ii) involve the commission of a sexual offence against any person; or
>
> (iii) result in significant loss of, or serious damage to, property.

The behaviour specified s 35C(2)(d) not only constitutes various serious criminal offences, but also conduct that is grossly inappropriate for Australian intelligence operations. The criminalisation of journalists for bringing such information to light cannot be justified by a need for government secrecy.

b. Misconduct

c. Beyond the scope of the special intelligence operations authority

Conduct that is 'beyond the scope' of the special intelligence operations authority is any conduct that is not authorised by the specific authority. ASIO should not be able to conceal abuses of power through a cloak of secrecy.

d. Otherwise in the public interest

We consider it important that the defence contain a safety net of the public interest, so that disclosures by journalists of serious wrongdoing by government that do not meet one of the above circumstances may still be covered by the defence.

NSWCCL FREE SPEECH AND PRIVACY ACTION GROUP

20TH APRIL 2015

Appendix 2

SUBMISSION OF THE CIVIL LIBERTIES COUNCILS ACROSS AUSTRALIA TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY INQUIRY INTO THE NATIONAL SECURITY LEGISLATION AMENDMENT BILL (NO 1) 2014

Relevant Extracts

1.1. Special Intelligence Operations

The Bill proposes a new statutory framework for the conduct by ASIO of special intelligence operations (SIOs) based on the controlled operations regime in Part IAB of the *Crimes Act 1914* (Crimes Act) in relation to activities of the Australian Federal Police. The regime will provide ASIO officers and affiliates with immunity from criminal and civil liability when operating in an authorised SIO.

This is a very significant amendment to the safeguards relating to ASIO's operations and brings with it considerable risk. In our view such a significant change requires strong justification from the Government.

The Explanatory Memorandum states that 'some significant investigations either do not commence or are ceased due to the risk that an ASIO employee or ASIO affiliate…. could be exposed to criminal or civil liability.' [32] As there is no information as to how many 'significant' investigations have not commenced or have ceased for this reason it is not possible for us to assess how powerful a justification this is.

There is also the implication that, as such immunity exists for the AFP in controlled operations, it is obviously unproblematic to extend it to ASIO officers. Thus the Attorney-General argued that it is appropriate to extend 'corresponding protections' available to AFP to participants in 'covert intelligence operations.'[33]

On the face of it, this argument is plausible. We accept that ASIO officers need to work covertly and that there will be some contexts in which intelligence gathering and terrorism investigations may require the commission of unlawful acts. However, there are deeper and more important issues at stake with this proposal and the CCLs on reflection, consider the proposed SIO regime unnecessary, dangerous and inappropriate for a domestic intelligence agency.

It is not appropriate to presume that powers appropriate for the AFP as a law enforcement agency are automatically appropriate for ASIO. Law enforcement agencies operate more visibly, are subject

[32] EM p14 Par54
[33] Commonwealth Parliament *Parliamentary Debates* 16th July 2014. 2R speech ,Senator Brandis

to accountability through the criminal trial process and sit in a different administrative position from ASIO. The latter is – of necessity - a far more secret organisation.

It is not necessary, because ASIO has strong collaborative arrangements with the AFP who are able to conduct these covert operations for them exercising their powers and immunities under the controlled operations regime. We presume this would be possible in most contexts. In any context where AFP collaboration may not be possible, ASIO officers can operate covertly and avoid unlawful acts- or if unlawful acts are necessary, they can seek the discretionary power of the Director of Public Prosecutions (DPP) to not prosecute. It is difficult to envisage a context in which the DPP would not exercise this discretion if ASIO officers had reasonable justification for their unlawful actions. While there may be a slight risk factor for ASIO in relying on this protection from prosecution, this may not be a bad thing. It imposes an independent safeguard that covert, unlawful actions are appropriate and essential for the intelligence task.

We note that similar intelligence agencies in the United Kingdom, New Zealand and Canada do not have immunity from criminal and civil liability.

The CCLs are deeply uneasy with the proposed SIO regime for ASIO and do not support its implementation.

We do note however, that the PJCIS report in 2013 does recommend the creation of an SIO regime…' ' (R 28).

The CCLs urge the PJCIS to reconsider this recommendation.

If the SIO regime is implemented, it is of critical importance that strong safeguards apply. The PJCIs was explicit that its support for SIOs was : 'subject to similar safeguards and accountability arrangements as apply to the Australian Federal Police controlled operations regime under the Crimes Act 1914.'(R28)

While there are safeguards embedded in the Bill, they are not as strong as those that apply to the AFP controlled operations regime. In our view, the safeguards for an immunity regime encompassing covert operations of a domestic intelligence agency should be at least as strong as those applying to the APF.

Most significantly, the APF controlled operations regime activates an external independent check if the duration of the operation is to be extended beyond the initial 3 months authorised period. While the Commissioner or Deputy Commissioner can authorise the initial period, renewal after 3months requires authorisation by the Administrative Appeals Tribunal.

The CCLs urges that a similar independent, and external to ASIO body, exercises renewal authorisations for SIOs after the first three months.

The AFP controlled operations authorisations must be renewed after 3 months and have a maximum duration of 24 months. The SIO authorisations are for up to 12 months and can be renewed internally indefinitely. The intervention of an independent body to authorise SIO extensions is very important to place effective checks on their duration.

As with other extraordinary new ASIO powers, the CCLs consider this provision should be subject to review and a sunset clause after three years.

1.2. New offences S35P

The Bill introduces two new offences relating to unauthorised disclosure of information relating to an SIO.[34] Under the current wording, the unauthorised disclosure offences would apply to disclosures by ***any person*** including persons who are *recipients* of an unauthorised disclosure. They will carry maximum penalties of five years' imprisonment, and ten years for an aggravated offence.

The first offence is exceptionally broad and is of major concern.

CCLs understand the need for secrecy in relation to certain intelligence gathering operations. However, the Bill fails to draw an important distinction between disclosures which undermine the effectiveness of particular operations and endanger the lives of those involved in them, on the one hand, and on the other, public interest disclosures, for example those regarding any aspect of ASIO activity generally which might legitimately be considered a cause for concern.

The Bill provides for very limited defences largely relating to legal obligations to disclose or to the performance of ASIO functions. As a result, these provisions could, for example, be used to prosecute journalists who report in the public interest on information they receive about SIOs. The person may not be aware that the information relates to an authorised SIO. They can be convicted on the basis of recklessness if the person is aware of a substantial possibility that the information is in any way connected to an SIO. The penalty is five years.

This offence is particularly concerning because of the very broad range of activities that fall within the scope of SIOs. Under the amended ASIO Act , an 'SIO' will mean an operation for which SIO authority has been granted by the Director-General of Security or the Deputy Director-General, 'is carried out for a purpose relevant to the performance of one or more special intelligence functions' and 'may involve an ASIO employee or an ASIO affiliate in special intelligence conduct'.[35]

This extremely broad definition may catch activities that, if disclosed, could reveal serious government wrongdoing without posing a security threat.

It is the view of the CCLs that no agency of the state should be shielded from public scrutiny in this way. We are concerned that in addition to preventing publication of information which is harmful to Australia's national security interests, the new offences could be used to prevent or deter

[34] National Security Legislation Amendment Bill (No.1) 2014, Schedule 3, Item 3 inserting new Division 4 into the ASIO Act. The new offences will be in new Section 35P.
[35] National Security Legislation Amendment Bill (No.1) 2014, Schedule 3, Item 1 amending Section 4 of the ASIO Act.

publication or disclosure of important information regarding the use and misuse of official power that is essential to the proper functioning of a democratic state.

The CCLs oppose the creation of this offence.

It will have- and appears intended to have- a major deterrent effect on legitimate whistleblowers, on the freedom of the media to report on abuses of power by ASIO and on debate relating to intelligence and counter terrorism issues. More broadly, and when considered in conjunction with the increased penalties and new offences applying to unauthorised disclosures by ASIO employees and contractors proposed in schedule 6, these provisions will have a chilling effect on the operation of democracy in this country.
