Joint Media Organisations

Submission to Independent National Security Legislation Monitor

The impact on journalists in the operation of section 35P of the ASIO Act

INTRODUCTION

The media organisations that are parties to this correspondence are: AAP, ABC, APN News & Media, Australian Subscription Television and Radio Association (ASTRA), Bauer Media, Commercial Radio Australia (CRA), Fairfax Media, Free TV (representing all of Australia's commercial free-to-air television licensees), Media Entertainment and Arts Alliance (MEAA), News Corp Australia, SBS, SkyNews, The Newspaper Works and The West Australian (the Joint Media Organisations).

We welcome the opportunity to make a submission to the Independent National Security Legislation Monitor (the Monitor) regarding the impact on journalists in the operation of section 35P of the *Australian Security and Intelligence Organisation Act 1979* (the ASIO Act) concerning offences for the disclosure of information relating to a 'special intelligence operation' (SIO).

Scope of the review should include similar 'unauthorised disclosure of information' provisions

While we acknowledge that the current review is limited in scope to section 35P of the ASIO Act we note the Ministerial Direction issued under subsection 8(1) of the *Director of Public Prosecutions Act 1983*[1] (the Ministerial Direction) on 30 October 2014. It says:

> *The Director must not proceed with a prosecution of a person for an alleged contravention of the following sections without the written consent of the Attorney-General:*
>
> *(a) section 35P of the ASIO Act;*
> *(b) section 15HK of the Crimes Act*
> *(c) section 15HL of the Crimes Act; or*
> *(d) section 3ZZHA of the Crimes Act*
>
> *where the person is a journalist and the facts constituting the alleged offence relate to the work of the person in a professional capacity as a journalist.*

We observe that the Ministerial Direction applies to four 'unauthorised disclosure of information' provisions as they apply to journalists – while only one of which (section 35P of the ASIO Act) is the subject of the Monitor's review.

We encourage the Monitor to include all of these provisions in the current review, particularly as:

- section 35P of the ASIO Act has been justified by the existence of sections 15HK and 15HL of the *Crimes Act 1914* (Crimes Act);
- section 3ZZHA of the Crimes Act was enabled by the second tranche of national security legislation, the *Counter-Terrorism Legislation (Foreign Fighters) Amendment Bill 2014* (Foreign Fighters Bill); and
- all four provisions are 'unauthorised disclosure of information' provisions.

Therefore we include in this submission material that addresses sections 35P of the ASIO Act; sections 15HK and 15HL of the Crimes Act; and section 3ZZHA of the Crimes Act.

All tranches of the 2014-2015 national security amendment bills enacted provisions that limit freedom of the media, and require review by the Monitor

The media organisations that are parties to this submission do not seek to undermine Australia's national security, nor the safety of the men and women involved in intelligence and national security operations. We

[1] http://www.comlaw.gov.au/Details/C2014G02068

are however keen to engage constructively on matters that infringe on freedom of the media to report in the public interest.

To that end, and as the Monitor is aware, the Joint Media Organisations made submissions to the parliamentary review processes of the three tranches of national security amendment enabling legislation.[2]

We remain concerned about the provisions that limit freedom of the media separately and in aggregate. These provisions make it increasingly difficult for news gathering and reporting in the public interest. This does not in any manner support the Australian public's right to know.

Due to the similar nature of the limitation on freedom of the media we also include in this submission material regarding the provisions in the Foreign Fighters Bill regarding section 119.7 of Division 119 of Part 5.5 of the *Criminal Code Act 1995*, particularly subsections 119.7(2) and 119.7(3).

Lastly, while the current review is officially focused on section 35P of the ASIO Act, we note that the Monitor welcomes submissions relating to other matters. We will therefore make a separate submission regarding the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*.

This submission addresses the following:

Section 1 – Australia lacks a legislative protection for freedom of speech
Section 2 – Jailing journalists for doing their jobs – unauthorised disclosure of information provisions
1) Section 35P of the ASIO Act
2) Sections 15HK and 15HL of the Crimes Act
3) Section 3ZZHA of the Crimes Act

Section 3 – Inadequate protection for whistle-blowers
1) Section 35P of the ASIO Act
2) Sections 15HK and 15HL of the Crimes Act
3) Section 3ZZHA of the Crimes Act
4) Jailing journalists and a lack of protection for whistle-blowers

Section 4 – Public interest reporting and recruitment of foreign fighters
Appendix A – Recommended legislative amendments
1) Section 35P of the ASIO Act
2) Sections 15HK and 15HL of the Crimes Act
3) Section 3ZZHA of the Crimes Act
4) Subsections 119.7(2) and 119.7(3) of the Criminal Code

Attachments

[2] Submission 13 to PJCIS Inquiry into *National Security Amendment Bill (No. 1) 2014*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Submissions; Submission 23 to PJCIS Inquiry into *Counter-Terrorism Legislation (Foreign-Fighters) Amendment Bill 2014*, *http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Submissions*; Submissions 125 and 125.1 to PJCIS Inquiry into Telecommunications (Interception and Access) Amendment (Data Retention Bill) 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Data_Retention/Submissions

1. AUSTRALIA LACKS A LEGISLATIVE PROTECTION FOR FREEDOM OF SPEECH

The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no laws enshrining these rights. In the United States of America the right to freedom of communication and freedom of the press are enshrined in the First Amendment of the Constitution and enacted by state and federal laws. In the United Kingdom, freedom of expression is protected under section 12 of the *Human Rights Act 1998* subject to appropriate restrictions to protect other rights that are considered necessary in a democratic society.

In the absence of such clear protections, there are a number of keystones that are fundamental in Australia to ensure journalists are able to do their jobs. These include:

- The ability for journalists to go about their ordinary business and report in the public interest without the real risk of being jailed;
- Protection of confidential sources;
- Protection for whistle-blowers; and
- An appropriate balance of power between the judiciary, the executive, the legislature and the media.

These keystones must be considered in any assessment or review the operation of section 35P, and other legislation regarding national security and law enforcement.

2. JAILING JOURNALISTS FOR DOING THEIR JOBS – UNAUTHORISED DISCLOSURE OF INFORMATION PROVISIONS

1) SECTION 35P OF THE ASIO ACT

As the Monitor is aware, the Joint Media Organisations made a submission[3] to the parliamentary committee scrutinising the enabling legislation of section 35P of the ASIO Act, being the *National Security Legislation Amendment Bill (No. 1) 2014* (the Bill).

Overview of the provision

In short, section 35P of the ASIO Act makes it a criminal offence to disclose information relating to a 'special intelligence operation' (SIO). The two offences that have been created are:

i. Section 35P(1) – for the disclosure of information that relates to an SIO. The penalty is five (5) years imprisonment; and
ii. Section 35P(2) – for the disclosure of information that relates to an SIO, with the intention of endangering the health of a person or prejudicing the conduct of the SIO, or where the disclosure of the information will have that effect. The penalty is 10 years imprisonment.

While there are some exceptions to this provision, there are none that enable the media and journalists to engage in public interest reporting.

The issues with section 35P

As we have expressed previously, SIOs by their very nature are covert. This uncertainty will expose journalists to an unacceptable level of risk and consequentially have a chilling effect on the reportage of all intelligence and national security material.

This is exacerbated as the offences continue to apply to any or all SIOs post the operation itself – due to the lack of sunset clause in the provisions.

<u>The practical effect of section 35P</u>

A journalist or editor has no way of knowing whether the matter they are reporting may or may not be related to an SIO. We express this as information that 'may or may not be' related to an SIO because:

- it may or may not be known if the information is related to intelligence operations, and whether or not it 'relates to' an SIO;
- the relationship of the information (as it 'relates to' an SIO) is unknowable, as is the scope of intra-agency involvement in an SIO; and
- it is likely that clarity about any of these aspects would only come to light <u>after</u> information is disclosed – particularly in the case of reporting in the public interest.

This significantly increases the risk of reporting – in light of the criminal offences that apply at section 35P (and other provisions addressed in this submission) – and in all likelihood will chill reporting of national security matters as there is no way of knowing whether the information does, or does not, relate to an SIO.

[3] Submission 17, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Submissions

Additionally, as there is no sunset clause on the provisions, the risk of the offences applying continues in perpetuity. This further dampens the ability and willingness of journalists and the media to report in the public interest about national security and intelligence matters.

Notwithstanding this, the declaration of an SIO enables covert ASIO operatives to undertake a range of activities that would otherwise be criminal acts. Section 35P of the ASIO Act would preclude public interest reporting about an ASIO operative that acted corruptly while serving under an SIO.

Individually, and in aggregate, the chilling – if not freezing – effect of section 35P on public interest reporting by the media and journalists does not serve the Australian people well.

Scenarios

We reference the submission by Seven West Media (SWM) submission to this review. The SWM submission includes two (2) scenarios to illustrate how section 35P may be engaged. We repeat those scenarios here:

- Scenario 1 – Melbourne terror raids – scenario based on actual events

  In the days following anti-terror raids conducted throughout Melbourne in September 2012, a report was published in The Australian[4] (at Appendix A) which described the immediate impetus for the raids – an ASIO informer embedded within a group with terrorist links left his mobile phone behind and his messages with his ASIO contact were discovered by the group and published by them.

  It is conceivable that this operation would have been conducted as an SIO were it taking place today, for example if the ASIO informer were in fact an ASIO agent and required authorisation under the auspices of an SIO for his contact with the terrorist group. If that were the case:

  a) The reporter involved might suspect that the operation was an SIO. At that point, the reporter faces the decision whether to proceed with investigating a story, the publication of which may prove to be illegal;
  b) In any event, the reporter has no way of knowing with certainty whether the operation was an SIO since no source would be likely to provide such information given they would be breaching the law by disclosing its existence;
  c) It is likely in those circumstances that the reporter would at best receive a 'cannot confirm or deny' response from official sources without the means to make further inquiries or to know whether the SIO was ongoing;
  d) The reporter, editor and ultimately the publisher are left with a choice either to self-censor and drop the story or run the risk of breaching section 35P(1) or (2) if they publish.

- Scenario 2 – hypothetical scenario

  A situation could conceivably arise whereby two ASIO agents are involved in the covert penetration of a suspected terror cell of young men with histories of drug trafficking, but who have recently been seduced by ISIS and who are believed to be considering a terrorist attack.

  Both ASIO agents effectively work undercover in trying to win the trust of the group to learn of their plans. It is likely in these circumstances that the operation may be authorised as an SIO.

[4] http://www.theaustralian.com.au/news/nation/how-informers-fears-triggered-terror-raids/story-e6frg6nf-1226474501095

In the course of their work, one of the ASIO agents realises that his partner is becoming too close to the group, and suspects that he is actually involved in the unauthorised trafficking of drugs, lining his own pocket outside the terms of the SIO. He suspects his partner is playing down the terror threat that this group poses in order to protect his own racket. In frustration the 'good' ASIO agent goes to his superiors but they ignore him, as does the Inspector General of Intelligence and Security, telling him that his partner is authorised to dabble in drugs with the group in order to win their trust and that there is no evidence that he has gone to the 'dark side'.

The ASIO agent believes that his partner has gone rogue and wants to expose it. He provides information to a journalist who prepares a major report on the rogue ASIO agent. The journalist approaches the Government for comment, but the spokesperson asserts only that it would be illegal to publish any such story. The journalist has a reasonable basis to believe the operation has been conducted as an SIO, and therefore would be subject, together with the editorial chain, to five (5) or 10 years jail if the story were published.

In those circumstances, it can be assumed that the story is never written. The ASIO agent goes unpunished for two years until he is finally caught by ASIO's internal investigators and his employment quietly terminated. No-one knows anything publicly and they never will. And dangerous or illegal activity engaged in by the ASIO agent whilst trafficking on his own account, including activity that might pose a serious threat to Australia's national security interests, would remain permanently secret.

The lack of public scrutiny effectively means that ASIO and the Government are unlikely to be under any pressure to take firm measures to ensure that similar events do not occur again.

Whistle-blowers

As outlined in Scenario 1 above, the source of the journalist's information could also be liable under section 35P. If the source were a whistle-blower, the Commonwealth's *Public Interest Disclosure Act 2013* would also be relevant. We address this matter at Section 3 of this submission.

'Safeguards' to protect journalists from prosecution under section 35P

The following 'safeguards' are often referenced individually, in combination and in aggregate by those claiming section 35P is not harmful to public interest reporting.

- <u>The media hotline</u>

  It has been said that the ASIO media hotline, available to journalists, could be used for the normal practices of responsible journalism – for example fact checking, seeking comment, and possibly sounding out whether or not the information that is at hand may (or may not) relate to an SIO. Such contact seems to be problematic in and of itself.

  Given the covert/undisclosed nature of an SIO, it is not clear how the hotline could provide a 'safeguard' (rather than a heightening of the risk of making the contact).

  We also reference Scenario 2 above.

- Section 35P only applies to 'reckless' journalists and journalism

  The element of 'recklessness' has been held-up by some as a 'safeguard' to protect journalists from being prosecuted under section 35P.

  As we have illustrated in the Scenarios above, this does not serve to decrease the risk to reporting in the public interest.

- The aggravated penalty only applies if the disclosure of the information was intended to endanger the health of a person or prejudice the conduct of the SIO; or where the disclosure of the information will have that effect

  As outlined in Scenario 2, this could be the offence that a journalist, editor or publisher faces for publishing without the element of 'intent' but as a potential effect of disclosure.

  Also, this 'safeguard' implies that there are 'bright line' decisions in upholding freedom of the media to report in the public interest – in this case the decision between not reporting at all, and upholding one of the central tenets of a democratic society – freedom of the media.

- The Commonwealth DPP is required to consider the public interest in determining whether to prosecute

  We note that the Revised Explanatory Memorandum to the enabling Bill included a requirement for the Commonwealth DPP to consider the public interest in the course of establishing or continuing a prosecution. The EM states:

  > *'Subsection 35P(3) does not include an express defence for the communication of information relating to a special intelligence operation, where such communication is found to be in the public interest. The Commonwealth Director of Public Prosecutions (CDPP) is required, under the Prosecution Policy of the Commonwealth, to consider the public interest in the commencement or continuation of a prosecution. It would be open to the CDPP, in making independent decisions on this matter, to have regard to any public interest in the communication of information in particular instances as the CDPP considers appropriate.'* [5]

- The Commonwealth DPP requires the written consent of the AG to proceed with a prosecution of a journalist for the purpose of something they have produced in their professional capacity

  We acknowledge that subsequent to the passage of the enabling legislation, the Attorney-General issued a Ministerial Direction requiring the Commonwealth DPP to only proceed to prosecute a journalist under section 35P (and unauthorised disclosure offences under sections 15HK, 15HL and 3ZZHA of the Crimes Act) with the written consent of the Attorney-General.

  This raises a number of principled concerns including, but not limited to, the uncertainty brought about by the additional discretionary layer of the consent (or not) of Attorney-General; how the discretion will be applied; the question of consistency (or not) of application across Attorneys-General and Governments; and the uncertainty regarding the longevity of such an instrument given the ease of revocation of Ministerial Directions.

[5] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s969_ems_ad580183-6b63-4ad6-a73a-2147d31444a4/upload_pdf/79764RevisedEM.pdf;fileType=application%2Fpdf, at [582]

– <u>False assurances that section 35P is not intended to target to journalists, and the like</u>

It has been said that media companies have misunderstood or are confused about the impact of the recent national security enabling laws on the media and journalists. We disagree.

It has also been said that there has been erroneous, misguided and wrong reporting and commentary of the impact of provisions, such as section 35P, on news gathering and public interest reporting.

We reference here a range of assertions from various government representatives, regarding section 35P:

> *'Journalists aren't the target of these laws;'*[6] and
>
> Host: *'You are also creating a new offence, punishable by jail, for anyone who discloses information related to a special intelligence operation…Are you specifically going after journalists who report information they receive about operations?* Attorney-General response: *'No we're not and I think there's been a little bit of erroneous commentary on that provision. It's designed to plug a gap in the existing legislation. Under the existing legislation it's a criminal offence for an officer of a national security agency to disclose intelligence material to a third party but it's not an offence for an officer to copy or wrongfully remove that material. In other words, communication to a third party is an element of the current offence but it seems that it should be wrong and it should be an offence to illicitly remove intelligence material from an agency. That's all that's about;'*[7] and
>
> *'News that endangers the security of our country frankly shouldn't be fit to print and I'd ask for a sense of responsibility, a sense of national interest as well as simply of commercial interest, a sense of long-term best interest of the country as well as the short-term best interests of creating sensation to be present right across the country including in the media;'*[8] and
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> *'These offences are not intended to cover—and have, in fact, been intentionally designed so as to not cover—journalists who may report on an activity unaware that it is in fact a special intelligence operation;'*[9] and

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[6] 17 July 2014, Attorney-General George Brandis, Transcript of interview with ABC 774 Melbourne, http://www.attorneygeneral.gov.au/transcripts/Pages/2014/ThirdQuarter2014/17July2014-InterviewwithRafaelEpsteinABC774Melbourne.aspx

[7] 17 July 2014, Attorney-General George Brandis, Transcript of interview with ABC Radio National, http://www.attorneygeneral.gov.au/transcripts/Pages/2014/ThirdQuarter2014/17July2014-InterviewwithAlisonCarabineABCRadioNational.aspx

[8] 17 July 2014, Prime Minister Tony Abbott, as reported in the Sydney Morning Herald, http://www.smh.com.au/federal-politics/political-news/tony-abbott-defends-new-laws-that-would-jail-journalists-for-revealing-asio-secrets-20140717-3c3ex.html; The Australian, http://www.theaustralian.com.au/business/media/abbott-warns-media-against-endangering-australian-security/story-e6frg996-1226992466937; and The Guardian, http://www.theguardian.com/world/2014/jul/17/tony-abbott-media-not-endanger-security

[9] 12 August 2014, Official of the Department of the Attorney-General's Department, PJCIS Inquiry hearing transcript, http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/2066f963-ee87-4000-9816-ebc418b47eb4/toc_pdf/Parliamentary%20Joint%20Committee%20on%20Intelligence%20and%20Security_2014_08_15_2764.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/2066f963-ee87-4000-9816-ebc418b47eb4/0000%22

'…although journalists have taken umbrage at this, this is not a law about journalism, it's not a law about journalists. It's a law of general application about the disclosure of something which ought not for obvious reasons be disclosed;'[10] and

'There is no possibility, no practical or foreseeable possibility that in our liberal democracy a journalist would ever be prosecuted for doing their job;'[11] and

'*This is not a law about journalists. It is a law of general application*;'[12]

'Hypothetically…if it's a whistleblower, the whistleblower protection laws still apply. Secondly, if it is a journalist covering what a whistleblower has disclosed, then the journalist wouldn't fall within the reach of the section, because the relevant conduct is the conduct constituting the disclosure. So if the event is already disclosed by someone else and the journalist merely reports that which has already been disclosed, as it was by Snowden, then the provision would not be attracted.'[13]

Regardless of this range of material, it is clear to the media organisations that section 35P of the ASIO Act could apply to journalists, and their sources including whistle-blowers, in the course of undertaking their jobs.

Other commentary and opinion

The media organisations note here that our voice/s have not been alone in drawing attention to the importance of this issue.

Former Monitor, Mr Bret Walker QC; former NSW Court of Appeal Judge the Honourable Anthony Whealy QC and media law expert Mr Tom Blackburn SC have all offered interviews and commentary which we attach to this submission (at **Appendix B**)

We note also the range of commentary offered by Professor George Williams AO on the issues of national security amendments, including section 35P, and the submission made by Professor Williams to this review.

Joint Media Organisation position – recommended amendments to section 35P

In summary, the introduction of a serious criminal offence, punishable by jail, for journalists doing their job, does not offer a balance between national security concerns and the importance of public interest reporting by the media and journalists.
We remain strongly of the view that section 35P of the ASIO Act – along with the other provisions included in this submission – have a chilling effect on freedom of speech and freedom of the media, hindering news gathering to the detriment of Australia's place amongst modern democracies.

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[10] 1 October 2014, Attorney-General George Brandis, Transcript of Q&A at National Press Club Address, http://www.attorneygeneral.gov.au/transcripts/Pages/2014/FourthQuarter2014/1October2014-QAAtNationalPressClubAddress.aspx

[11] 30 October 2014, Attorney-General George Brandis, Transcript of Joint Press Conference, http://www.attorneygeneral.gov.au/transcripts/Pages/2014/FourthQuarter2014/30October2014-PressConferenceAnnouncingIntroductionOfTelecommunicationsInterceptionAndAccessAmendmentDataRetentionBill.aspx

[12] 14 October 2014m Attorney General George Brandis, Opinion in The Australian, http://www.theaustralian.com.au/opinion/asio-powers-are-no-threat-to-journalists/story-e6frg6zo-1227089321647?login=1

[13] 3 November 2014, Attorney-General George Brandis, Q&A Transcript, http://www.abc.net.au/tv/qanda/txt/s4096883.htm

Therefore, we continue to hold that the appropriate way to address the unjustified interference with freedom of speech posed by section 35P of the ASIO Act is for a media exemption to be applied.

We include suggested drafting at **Appendix B** of this submission.

2) SECTIONS 15HK AND 15HL OF THE CRIMES ACT

Sections 15HK and 15HL were introduced into the Crimes Act in 2010 via the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010.*

In short, these sections of the Crimes Act make it a criminal offence to disclose information relating to a controlled operation. The penalties are imprisonment for two years (section 15HK) and 10 years (section 15HL). The aggravated offence at section 15HL applies if the discloser *'intends to endanger the health or safety of any person or prejudice the effective conduct of a controlled operation;'* or the disclosure *'will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation.'*

Exceptions are listed for both of these provisions.

However there is not an exception for journalists and the media for public interest reporting.

Like section 35 of the ASIO Act, these provisions also have a chilling effect on freedom of speech and freedom of communication. This is particularly so in light of the lack of exemption for public interest reporting.

Joint media organisation position – recommended amendments to sections 15HK and 15HL

We continue to hold that the appropriate way to address the unjustified interference with freedom of speech posed by sections 15HK and 15HL of the Crimes Act is for a media exemption to be applied in each provision.

We include suggested drafting at **Appendix B** of this submission.

3) SECTION 3ZZHA OF THE CRIMES ACT

Section 3ZZHA was introduced into the Crimes Act via the Foreign Fighters Bill.

This section of the Crimes Act makes it a criminal offence to disclose information relating to a delayed notification search warrant. The penalty is two years imprisonment.

Exceptions are listed for this provision.

However there is not an exception for journalists and the media for public interest reporting.

As for section 35 of the ASIO Act, this provision also has a chilling effect on freedom of speech and freedom of communication. This is particularly so in light of the lack of exemption for public interest reporting. Similar issues arise as outlined above, when journalists report in the public interest.

We noted in our submission to the PJCIS that section 80.3 of the *Criminal Code Act* provides a good faith defence in relation to a number of provisions – but not those raised by the Joint Media Organisations – *for publishing in good faith a report of commentary about a matter of public interest*[14].

The Explanatory Memorandum to the Foreign Fighters Bill describes the application of the defence as follows:

> *The existence of a good faith defence in section 80.3 for the offence created by new section 80.2C provides an important safeguard against unreasonable and disproportionate limitations of a person's right to freedom of expression. The good faith defence ensures that the communication of particular ideas intended to encourage public debate are not criminalised by the new section 80.2C. In the context of matters that are likely to pose vexed questions and produce diverse opinion, the protection of free expression that attempts to lawfully procure change, points out matters producing ill-will or hostility between different groups and reports on matters of public interests is vital. The maintenance of the right to freedom of expression, including political communication, ensures that the new offence does not unduly limit discourse which is critical in a representative democracy.*
>
> ***This legislative safeguard, taken together with the ordinary rights common to criminal proceedings in Australian courts, provide certainty that human rights guarantees are not disproportionately limited in the pursuit of preventing terrorist acts or the commission of terrorism offences.***[15] [our emphasis added]

Joint Media Organisation position – recommended amendments to section 3ZZHA

We continue to hold that the appropriate way to address the unjustified interference with freedom of speech posed by section 3ZZHA of the Crimes Act is for a media exemption to be applied.

We include suggested drafting at **Appendix A** of this submission.

[14] Section 80.3(f) of the *Criminal Code Act 1995*
[15] at [148 and 149], http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s976_ems_c21ea737-5e59-4cdb-bceb-7af5e22aa6a9/upload_pdf/398980.pdf;fileType=application%2Fpdf

3. INADEQUATE PROTECTIONS FOR WHISTELBLOWERS AND LACK OF REAL AVENUE FOR 'UNAUTHORISED' DISCLOSURES – *PUBLIC INTEREST DISCLOSURE ACT 2013*

The Government introduced the *Public Interest Disclosure Act 2013* (PID Act) to provide a framework for Commonwealth public sector whistle-blowers – more appropriately described as members of the public sector who disclose information that would otherwise not be disclosed. Such information is not necessarily of a classified nature, or of a commercial nature.

The Joint Media Organisations submitted to the Inquiries into the Bill undertaken by both the House of Representatives Committee on Social Policy and Legal Affairs[16] and the Senate Committee on Legal and Constitutional Affairs[17].

While the final Bill did contain amendments to the draft Bill, there remain inadequate protections for public sector whistle-blowers.

Details of some of the outstanding issues with the PID Act are:

- The Bill does not cover intelligence agency personnel – they remain without protection if they go public;
- Staff of Members of Parliament are not protected;
- Wrong-doing of Members of Parliament is not included in the Bill;
- Public interest test remains skewed against external disclosure;
- Presumption of criminal liability should not lie against the media for using or disclosing identifying information during the course of responsible news gathering; and
- the Bill lacks a real avenue for 'unauthorised' disclosures.

The inadequate protections for public sector whistle-blowers is further exacerbated by section 35P of the ASIO Act; and sections 15Hk, 15HL and 3ZZHA of the Crimes Act. This is because there are no protections for external unauthorised disclosures, and information disclosure (external or otherwise) is criminalised – therefore interfering with freedom of speech and freedom of the media.

1) Section 35P of the ASIO Act

If a whistle-blower was from the ranks of intelligence personnel, section 35P of the ASIO Act imposes five (5) and 10 year jail sentences for disclosing information. This is a serious deterrent for sources and whistle-blowers.

Section 35P of the ASIO Act further compounds the lack of protection for persons, including intelligence agency personnel, driven to resort to whistle-blowing in the public domain. It is now unequivocal that the whistle-blower and the person/s who make the information public – most likely a journalist doing their job and reporting in the public interest – will face time in jail. Such an approach does not serve a free and open society and a modern democracy.

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[16] Submission 20, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%202013%20public%20interest%20disclosure/subs.htm

[17] Submission 19, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/publicinterestdisclosure/submissions

2) Sections 15HK and 15HL of the Crimes Act

As these provisions also relate to unauthorised disclosure of information, similar concerns arise as under section 35P – except that in these provisions the whistle-blowers will be personnel of the Australian Federal Police rather than intelligence personnel, and therefore have some coverage by the PID Act. However the PID Act remains skewed against external disclosures.

3) Section 3ZZHA of the Crimes Act

The introduction of section 3ZZHA to the Crimes Act further exacerbates the deficiencies in protections for whistle-blowers regarding intelligence information.

Specifically, section 3ZZHA makes it a criminal offence punishable by jail for anyone, including a whistle-blower, disclosing information that relates to an application for; or the execution of; or a report in relation to; or a warrant premises occupier's notice or an adjoining premises occupier's notice prepared in relation to; a delayed notification search warrant.

Therefore the effect of section 3ZZHA would likely be to discourage whistle-blowing – particularly in the absence of protections and the real risk of jail – further impairing the lack of protection for persons driven to resort to whistle-blowing in the public domain.

4) Jailing journalists <u>and</u> deficient protections for whistle-blowers

In combination, the two substantial issues detailed at Sections 2 and 3 of this submission – the combination of unauthorised disclosure offences and deficient protections for whistle-blowers means that a whistle-blower with no other avenue than whistle-blowing in the public domain and the person/s who make it public – most likely a journalist doing their job and reporting in the public interest – will face time in jail.

As we have expressed previously, such an approach does not serve a free and open democratic society well.

4. PUBLIC INTEREST REPORTING AND RECRUITMENT OF FOREIGN FIGHTERS

'PUBLISHING RECRUITMENT ADVERTISEMENTS' CRIMINALISES LEGITIMATE BUSINESS PRACTICES AND PEOPLE, OVERREACHES AND REQUIRES EXCEPTIONS / DEFENCES

New Division 119 of Part 5.5 of the *Criminal Code Act 1995* – section 119.7

The new Division 119 of Part 5.5 of the *Criminal Code Act 1995* addresses foreign incursions and recruitment. Proposed section 119.7 deals with the recruitment of persons to serve in or with an armed force in a foreign country; and proposed subsections 119.7(2) and 119.7(3) address *'publishing recruitment advertisements'*[18] which include news items that may relate to such matters.

- Lack of clarity about the 'news items' that are the source of recruitment or information about serving in or with an armed force in a foreign country

  There is a lack of clarity regarding 'what' it is – particularly at section 119.7(3), and particularly as it relates to a news item – that is being targeted.

- Lack of clarity regarding who the offence is targeting

  There is also lack of clarity regarding 'who' the person is, or who is the target of the offence, that is committing the crime by 'publishing' the advertisement or news item.

  Subsections 119.7(2) and 119.7(3) could apply – and not be limited – to the following separately, or a combination of any or all:
  - Persons associated with a media company's advertising arm or agency, including people responsible for advertisement bookings; and/or
  - Persons associated with a media company's newsroom or production; and/or
  - A director of a company; and/or
  - Editors, producers, journalists; and/or
  - Other persons that may be a party to any of the publishing/broadcast functions associated with (i) and (ii) of 119.7(2) and 119.7(3) and the above.

- Serious risk to innocent publication of advertisements and news items

  We have concerns regarding 119.7(2) and (3) and the implications for publication of legitimate advertisements and news.

  This is particularly the case when the advertisements or news items may, on face value, be benign and indeed legitimate, and also lack 'reckless' conduct in their publishing.

  Further, the relevant information (such as location or travel information) or purpose (such as recruitment) of such advertisements or news items may only be known after the fact – and possibly still not known by the advertiser, or the person taking the ad booking, or the journalist or the editor. That is, it may only be known some time afterwards that the purpose of, or information contained in the ad or news item, or the location or place indicated in the ad or news item, or the travel information in an ad or news item, was instructive about or related to, serving in any capacity in or with an armed force in a foreign country.

[18] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s976_first-senate/toc_pdf/1420720.pdf;fileType=application%2Fpdf, p91

To illustrate, if a broadcaster or publisher was to run an advertisement or a news item about a prayer meeting or a picnic, and it comes to pass that the event – which may or may not have been central to the advertisement or story – was used as cover for a recruitment drive or to disseminate information about, or direct people to another source of information about possible opportunities to serve in armed forces in foreign countries, then it is possible that any or all people involved in broadcasting or publishing the advertisement or story would be imprisoned for 10 years. This would be the case even if the conduct was not 'reckless.'

Such measures will almost certainly impact on the free flow of information in society – especially when the parties to the advertisements and news items are acting in good faith and communicating in the public interest. The serious implications of such a broad provision for news gathering and reporting, and also for legitimate business interests, cannot be overstated.

- Lack of an exception

A new subsection (3A) should be incorporated to include an exception for good faith reporting, commentary and advertisements.

An exception is essential to differentiate the potential role of persons who may be inadvertently implicated in 'publishing recruitment advertisements' – recklessly or not – caught by the offences in undertaking their legitimate jobs in good faith and /or in service of the public interest in a democratic society.

We suggested that such a provision could read:

> *(3A) Subsections (2) and (3) above do not apply to a person:*
> *(a) who publishes in Australia:*
> *(i) an advertisement in good faith; or*
> *(ii) a report or commentary about a matter of public interest in good faith.*

- Inconsistent penalties

We also noted that the penalty for all three provisions at section 119.7 is imprisonment for 10 years. Specifically:

- Subsection (1) – Imprisonment for 10 years for someone that recruits another person to serve in any capacity in or with an armed force in a foreign country;
- Subsection (2) – Imprisonment for 10 years for someone that publishes an ad or news item – both of which may be legitimately procured – that is for the purpose of recruiting persons to serve (in any capacity) with an armed force in a foreign country; and
- Subsection (3) – Imprisonment for 10 years for someone that publishes an ad or news item – both of which may be legitimately procured – that contains information about how to serve (in any capacity) with an armed force in a foreign country.

The lack of 'sliding scale' in the application of penalties seems disproportionate, particularly in the application to subsections (2) and (3) where the penalty applies to the indirect persons that may indirectly be associated with the 'reckless' conduct of publishing an ad or news item (at subsection (2)) and without 'reckless' conduct (at subsection (3)) relative to the same penalty applying to those directly responsible for recruiting foreign fighters (at subsection (1)).

- Low threshold of subsection 119.7(2)

  We are concerned with the low threshold of subsection 119.7(2), in that it would only need to be proved that a person – including but not limited to a director of a company, an editor, a journalist, a person responsible for advertisement bookings, a combination of any or all of these people, and possibly additional persons that may be a party to an advertisement or a news item; where 'consideration' was provided – was 'reckless' as to the purpose of the advertisement or news item (that being to recruit persons to serve in any capacity in or with an armed force in a foreign country).

  We recommend that 'reckless' be replaced with 'intention' at subsection 119.7(2)(b).

  It would therefore read: *'the person intended the publication of the advertisement or item of news to be for the purpose of recruiting persons to serve in any capacity in or with an armed force in a foreign country.'*

- The breadth of 'procured by' and 'or any other consideration' infringes on legitimate news gathering

  Both 119.7(2)(a)(ii) and 119.7(3)(a)(ii) stipulate that an element of the offence is that the person publishes in Australia *'an item of news that was procured by the provision or promise of money or any other consideration.'*

  It is unclear from whom the promise of money or any other consideration needs to come from. For example, a news item that is licensed or purchased by a media organisation from a news agency and subsequently broadcast could be captured by this provision.

  'Any other consideration' could be satisfied by buying a source, confidential or otherwise, a cup of coffee, or paying a taxi fare or train ticket – all of which are legitimate aspects of news gathering.

  Also, and similar to comments made above, it is unclear what behaviour this qualification is targeting.

  In the absence of clarity, combined with the breadth of the element and the fact that it would apply to legitimate news gathering, in our view the proposed element overreaches and infringes on legitimate news gathering processes.

  We recommend that 'any other consideration' be deleted from 119.7(2)(b) and 119.7(3)(b).

We include suggested drafting to amend section 119.7 of the Criminal Code Act at **Appendix B** of this submission.

APPENDIX A – RECOMMENDED LEGISLATIVE AMENDMENTS

For each of the unauthorised disclosure of information sections (at section 35P of the ASIO Act, and sections 15HK, 15HL and 3ZZHA of the Crimes Act) we recommend the following principled exception be included at the *Exceptions* subsections:

> *'made in good faith for the purpose of the information being published in a report or commentary about a matter in the public interest.'*[19]

However, if, as the Government has raised, there are concerns regarding the scope of such an exception, the following drafting could be considered:

> *'made in good faith in a report or commentary published about a matter of public interest by a person engaged in a professional capacity as a journalist where the report of commentary does not disclose, directly or by inference, the identity of a security officer.'*[20]

Recommended marked-up drafting is included on the following pages.

[19] MEAA is the union and an advocate for Australia's journalists. It has 6000 journalist members of which 1500 are freelance journalists. All MEAA journalist members are bound by MEAA's Journalist Code of Ethics.
The digital transformation affecting the media industry is seeing fewer journalists employed on a full-time basis and an increasing use of freelance journalist contributors commissioned to provide editorial content for media outlets.
MEAA believes that 'professional' journalist does not reflect the nature of the craft of journalism as it is evolving; and therefore this recommended amendment is a truer reflection of how the media and journalism is practiced.

[20] Note – this drafting is not supported by the MEAA for the reasons outlined at Footnote 19 above.

35P Unauthorised disclosure of information

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.

Note: ~~Recklessness~~ **Knowledge** is the fault element for the circumstance described in paragraph (1)(b)—see section 5.6 of the *Criminal Code*.

Unauthorised disclosure of information—endangering safety, etc.

(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.

Penalty: Imprisonment for 10 years.

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

Exceptions

(3) Subsections (1) and (2) do not apply if the disclosure was:

(a) in connection with the administration or execution of this Division; or

(b) for the purposes of any legal proceedings arising out of or otherwise related to this Division or of any report of any such proceedings; or

(c) in accordance with any requirement imposed by law; or

(d) in connection with the performance of functions or duties, or the exercise of powers, of the Organisation; or

(e) for the purpose of obtaining legal advice in relation to the special intelligence operation; or

(f) to an IGIS official for the purpose of the Inspector-General of Intelligence and Security exercising powers, or performing functions or duties, under the *Inspector-General of Intelligence and Security Act 1986*; or

(g) by an IGIS official in connection with the IGIS official exercising powers, or performing functions or duties, under that Act**;or**

Add:

(h) made in good faith for the purpose of the information being published in a report or commentary about a matter in the public interest.

OR ALTERNATIVE LANGUAGE

(h) made in good faith in a report or commentary published about a matter of public interest by a person engaged in a professional capacity as a journalist where the report of commentary does not disclose, directly or by inference, the identity of a security officer.

Add:

(4) Without limiting the generality of subsection 3(h), a disclosure is *about a matter of public interest* for the purposes of that subsection if it is or relates to:

(a) A matter that increases the ability of the public to scrutinise issues of national security, including security activities or Government policy; or

(b) A matter that contributes to the public debate on national security matters or related issues.

(c) Conduct that, but for the provisions of this Act:

a. contravenes a law of the Commonwealth, a State or a Territory;

b. contravenes a law of a foreign country;

c. perverts, or in engaged in for the purpose of perverting, or attempting to pervert, the course of justice;

d. involves, or is engaged in for the purpose of, corruption of any other kind;

e. constitutes maladministration;

f. is an abuse of public trust;

g. involves, or is engaged in for the purpose of, a public official abusing his or her position as a public official;

h. could, if provided, give reasonable grounds for disciplinary action against a public official.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the *Criminal Code*.

Extended geographical jurisdiction

(4) Section 15.4 of the *Criminal Code* (extended geographical jurisdiction—category D) applies to an offence against subsection (1) or (2).

(5) Subsection (4) does not, by implication, affect the interpretation of any other provision of this Act.

15HK Unauthorised disclosure of information

(1) A person commits an offence if:

(a) the person discloses information; and

(b) the information relates to a controlled operation.

Penalty: Imprisonment for 2 years.

Exceptions—general

(2) Subsection (1) does not apply if the disclosure was:

(a) in connection with the administration or execution of this Part; or

(b) for the purposes of any legal proceedings arising out of or otherwise related to this Part or of any report of any such proceedings; or

(c) for the purposes of obtaining legal advice in relation to the controlled operation; or

(d) in accordance with any requirement imposed by law; or

(e) in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency**; or**

Add:

(f) made in good faith for the purpose of the information being published in a report or commentary about a matter in the public interest.

OR ALTERNATIVE LANGUAGE

(f) made in good faith in a report or commentary published about a matter of public interest by a person engaged in a professional capacity as a journalist where the report of commentary does not disclose, directly or by inference, the identity of a security officer.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the *Criminal Code*.

Exceptions—integrity testing controlled operation authority

(2A) Subsection (1) does not apply, in the case of a controlled operation authorised by an integrity testing controlled operation authority (granted on the basis that an integrity testing authority is in effect), if the disclosure was:

(a) in any of the circumstances mentioned in paragraphs (2)(a) to (e); or

(b) in connection with the administration or execution of Part IABA, or the *Law Enforcement Integrity Commissioner Act 2006*, in relation to the integrity testing authority; or

(c) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, the controlled operation; or

(d) in relation to the integrity testing authority:

(i) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, an integrity testing operation authorised by the authority; or

(ii) to an authority of the Commonwealth, a State or a Territory, if the disclosure relates to the misconduct of an employee or officer of the authority.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the *Criminal Code*.

Exception—misconduct

(3) Subsection (1) does not apply if:

(a) the person (the ***discloser***) discloses the information to the Ombudsman or the Integrity Commissioner; and

(b) the discloser informs the person to whom the disclosure is made of the discloser's identity before making the disclosure; and

(c) the information concerns:

(i) a corruption issue within the meaning of the *Law Enforcement Integrity Commissioner Act 2006* (see section 7 of that Act) in relation to a controlled operation; or

(ii) misconduct in relation to a controlled operation; and

(d) the discloser considers that the information may assist a person referred to in paragraph (a) to perform the person's functions or duties; and

(e) the discloser makes the disclosure in good faith.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the Criminal Code.

15HL Unauthorised disclosure of information—endangering safety, etc.

(1) A person commits an offence if:

(a) the person discloses information; and

(b) the information relates to a controlled operation; and

(c) either:

(i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a controlled operation; or

(ii) the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation.

Penalty: Imprisonment for 10 years.

Exceptions—general

(2) Subsection (1) does not apply if the disclosure was:

(a) in connection with the administration or execution of this Part; or

(b) for the purposes of any legal proceedings arising out of or otherwise related to this Part or of any report of any such proceedings; or

(c) for the purposes of obtaining legal advice in relation to the controlled operation; or

(d) in accordance with any requirement imposed by law; or

(e) in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency**; or**

Add:

(f) made in good faith for the purpose of the information being published in a report or commentary about a matter in the public interest.

OR ALTERNATIVE LANGUAGE

(f) made in good faith in a report or commentary published about a matter of public interest by a person engaged in a professional capacity as a journalist where the report of commentary does not disclose, directly or by inference, the identity of a security officer.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the *Criminal Code*.

Exceptions—integrity testing controlled operation authority

(2A) Subsection (1) does not apply, in the case of a controlled operation authorised by an integrity testing controlled operation authority (granted on the basis that an integrity testing authority is in effect), if the disclosure was:

(a) in any of the circumstances mentioned in paragraphs (2)(a) to (e); or

(b) in connection with the administration or execution of Part IABA, or the *Law Enforcement Integrity Commissioner Act 2006*, in relation to the integrity testing authority; or

(c) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, the controlled operation; or

(d) in relation to the integrity testing authority:

(i) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, an integrity testing operation authorised by the authority; or

(ii) to an authority of the Commonwealth, a State or a Territory, if the disclosure relates to the misconduct of an employee or officer of the authority.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the Criminal Code.

Exception—misconduct

(3) Subsection (1) does not apply if:

(a) the person (the ***discloser***) discloses the information to the Ombudsman or the Integrity Commissioner; and

(b) the discloser informs the person to whom the disclosure is made of the discloser's identity before making the disclosure; and

(c) the information concerns:

(i) a corruption issue within the meaning of the *Law Enforcement Integrity Commissioner Act 2006* (see section 7 of that Act) in relation to a controlled operation; or

(ii) misconduct in relation to a controlled operation; and

(d) the discloser considers that the information may assist a person referred to in paragraph (a) to perform the person's functions or duties; and

(e) the discloser makes the disclosure in good faith.

Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the Criminal Code.

(4) An offence against this section is an indictable offence.

3ZZHA Unauthorised disclosure of information

(1) A person commits an offence if:

(a) the person discloses information; and

(b) the information relates to:

(i) an application for a delayed notification search warrant; or

(ii) the execution of a delayed notification search warrant; or

(iii) a report under section 3ZZFA in relation to a delayed notification search warrant; or

(iv) a warrant premises occupier's notice or an adjoining premises occupier's notice prepared in relation to a delayed notification search warrant.

Penalty: Imprisonment for 2 years.

(2) Each of the following is an exception to the offence created by subsection (1):

(a) the disclosure is in connection with the administration or execution of this Part;

(aa) the disclosure is for the purposes of obtaining or providing legal advice related to this Part;

(b) the disclosure is for the purposes of any legal proceeding arising out of or otherwise related to this Part or of any report of any such proceedings;

(c) the disclosure is in accordance with any requirement imposed by law;

(d) the disclosure is for the purposes of:

(i) the performance of duties or functions or the exercise of powers under or in relation to this Part; or

(ii) the performance of duties or functions or the exercise of powers by a law enforcement officer, an officer of the Australian Security Intelligence Organisation, a staff member of the Australian Secret Intelligence Service or a person seconded to either of those bodies;

(da) the disclosure is made by anyone to the Ombudsman, a Deputy Commonwealth Ombudsman or a member of the Ombudsman's staff (whether in connection with the exercise of powers or performance of functions under Division 7, in connection with a complaint made to the Ombudsman or in any other circumstances);

(e) the disclosure is made after a warrant premises occupier's notice or an adjoining premises occupier's notice has been given in relation to the warrant;

(f) the disclosure is made after a direction has been given under subsection 3ZZDA(4) or 3ZZDB(4) in relation to the warrant**;**

Add:

(h) made in good faith for the purpose of the information being published in a report or commentary about a matter in the public interest.

OR ALTERNATIVE LANGUAGE

(h) made in good faith in a report or commentary published about a matter of public interest by a person engaged in a professional capacity as a journalist where the report of commentary does not disclose, directly or by inference, the identity of a security officer.

Note: A defendant bears an evidential burden in relation to a matter in subsection (2)—see subsection 13.3(3) of the *Criminal Code*.

119.7 Recruiting persons to serve in or with an armed force in a foreign country

Recruiting others to serve with foreign armed forces

(1) A person commits an offence if the person recruits, in Australia, another person to serve in any capacity in or with an armed force in a foreign country.

Penalty: Imprisonment for 10 years.

Publishing recruitment advertisements

(2) A person commits an offence if:

(a) the person publishes in Australia:

(i) an advertisement; or

(ii) an item of news that was procured by the provision or promise of money ~~or any other consideration~~; and

(b) the person ~~is reckless as to the fact that~~ **intended** the publication of the advertisement or item of news is ~~for~~ **to encourage** the ~~purpose of~~ recruiting persons to serve in any capacity in or with an armed force in a foreign country.

Penalty: Imprisonment for 10 years.

(3) A person commits an offence if:

(a) the person publishes in Australia:

(i) an advertisement; or

(ii) an item of news that was procured by the provision or promise of money ~~or any other consideration~~; and

(b) the advertisement or item of news contains information:

(i) relating to the place at which, or the manner in which, persons may make applications to serve, or obtain information relating to service, in any capacity in or with an armed force in a foreign country; or

(ii) relating to the manner in which persons may travel to a foreign country for the purpose of serving in any capacity in or with an armed force in a foreign country**; and**

(c) the person intended the publication of the advertisement or item of news to encourage persons to make such applications, obtain such information or undertake such travel.

Penalty: Imprisonment for 10 years.

(3A) Subsections (2) and (3) above do not apply to a person who published in Australia:

(a) an advertisement in good faith; or

(b) an item of news about a matter of public interest.

Facilitating recruitment

(4) A person commits an offence if:

(a) the person engages in conduct in Australia; and

(b) the person engages in the conduct intending to facilitate or promote the recruitment of persons to serve in any capacity in or with an armed force in a foreign country.

Penalty: Imprisonment for 10 years.

Exception

(5) This section does not apply in relation to service of a person in or with an armed force in circumstances if a declaration under subsection 119.8(2) covers the person and the circumstances of the person's service in or with the armed force.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (5): see subsection 13.3(3).

Note 2: For conduct for the defence or international relations of Australia, see section 119.9.

Armed forces that are not part of the government of a foreign country

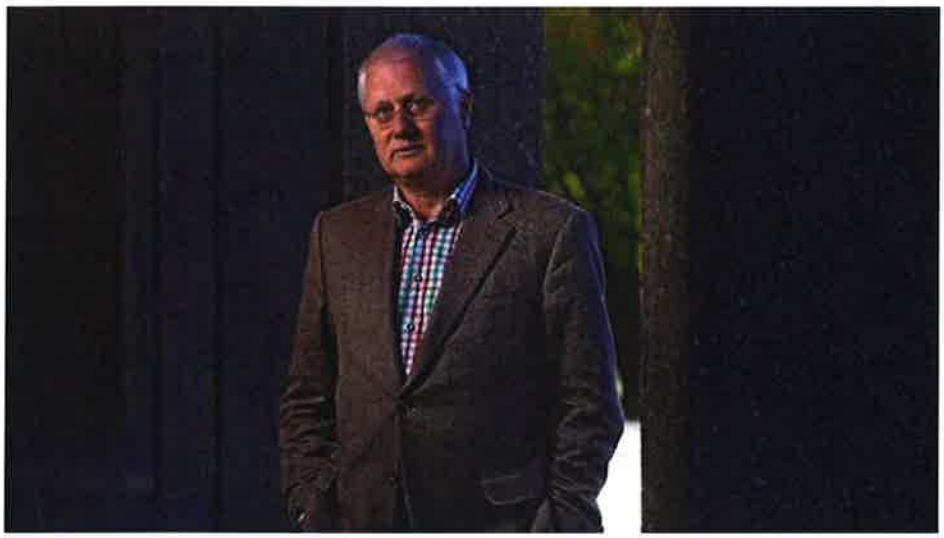
(6) A reference in this section to an armed force in a foreign country includes any armed force in a foreign country, whether or not the armed force forms part of the armed forces of the government of that foreign country.

(7) Without limiting this section, a person recruits another person to serve in or with an armed force in a foreign country if the other person enters a commitment or engagement to serve in any capacity in or with an armed force, whether or not the commitment or engagement is legally enforceable or constitutes legal or formal enlistment in that force.

APPENDIX B – OTHER COMMENTARY AND OPINION

Oct 4 2014 at 5:18 AM | Updated Oct 4 2014 at 5:18 AM

George Brandis's security law too costly for many



George Brandis has copped flak from across the board, including from Bret Walker, pictured, who said the new law engenders genuine concern about freedom to discuss certain subjects. Photo: Andrew Meares

When Attorney General George Brandis got to his feet in the National Press Club this week, high on his agenda was what he saw as the imperative of facing down criticism of a flying wedge of security legislation now making its way through parliament.

But if he believed a combative press club appearance would dampen widely-held - reservations about measures being proposed to deal with a new generation of security threats, he is almost certainly mistaken.

The Attorney-General is facing a wall of criticism not simply from a news media concerned about constraints on the reporting of security issues, but from the his own profession aghast at the overreach demonstrated in legislation either enacted or under review.

Conservative critics, led by the Institute of Public Affairs, have excoriated the Brandis legislation. "Draconian" is a word not absent from much of this criticism, not simply from lawyers on the left like Ron Merkel – the QC who appeared for the plaintiffs in the case against Andrew Bolt under 18C of the Racial Discrimination Act – but leading counsel who might not be regarded as antagonistic to a conservative government.

Brandis clearly has a problem with his own profession in his efforts to persuade people the most far-reaching suite of intelligence and security laws in a generation are both necessary and proportionate.

Initial signs are the AG has faltered in these endeavours. Inevitably his controversial

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handiwork will be tested in court, as Victorian Supreme Court judge Lex Lasry told a small gathering in Melbourne this week.

Arguments about the wearing of the burqa – or even its banning because of security concerns – form an unhelpful backdrop to a reasonable consideration of measures that will inevitably fall most heavily on members of the Muslim community.

DISTURBING

In the meantime, credible witnesses have raised a plethora of objections to the first tranche of legislation that cleared parliament this week. They are now setting their sights on a second, the so-called "foreign fighters bill", that is due to be dealt with by Parliament by the end of October.

The Labor opposition, which is engaging in its own soul-searching about its decision to wave through the first tranche of the Brandis intelligence and security laws, will not be so accommodating to the second, AFR Weekend has been told. A third bill, relating to data retention, will be considered either later in the year or next year.

Simon Breheny, director of the legal rights program at the free market IPA – sometimes described as the Abbott government's "think tank" – is outspoken in his criticism of the new laws, especially those threatening a free press.

"I think it's disturbing the government would seek to make it an offence with such serious ramifications for journalists [to publish unauthorised material in the national security space]," he says.

Breheny argues section 35P of the National Security Legislation Amendment Bill (NO.1) 2014, subsections 1 and 2, be dropped altogether.

In summary, the provision makes it an offence, punishable by up to five years jail, to discloses information about a security intelligence operation, and up to 10 years for doing so recklessly. It jacks up penalties for unauthorised disclosures way beyond provisions in the Crimes Act.

Bret Walker, SC, who served as the Independent National Security Legislation Monitor since the position was created in 2011, speaks with considerable authority on legislation, enacted and proposed.

Until his term expired mid-year his task was to review government legislation in the intelligence and security space to ensure these laws were consistent with other statutes and were faithful to principles laid down in the constitution.

Walker has no argument with the proposition that government intelligence and security agencies involved in covert activities need to do so under the cover of secrecy; but he has significant reservations about those sections journalists fear will have a chilling effect on their ability to report on operations that may involve human rights abuses, illegalities, including murder, and whether, in fact, the operation itself may have been botched.

"This kind of law engenders real concerns," he tells AFR Weekend. "While there are good reasons to maintain the secrecy of covert operations, it's also important that illegalities be discussed openly."

China, experts say

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KAFKAESQUE SITUATION

He objects to provisions that would prevent reporting of such operations indefinitely. Walker also laments the absence of robust whistleblower protection in the new laws.

He is joined in his criticism by fellow prominent figure in the New South Wales Bar, Anthony Whealy. Like Walker, Whealy brings a weight of experience and knowledge to his observations of the Brandis legislation, having presided over a high profile terrorist trial and having chaired the Council of Australian Government committee's review of counter-terrorism legislation.

Whealy can't be described as someone who is soft on terrorism. To the contrary: he has criticised the Kevin Rudd and Julia Gillard governments for downplaying dangers posed by returning home grown jihadists.

It was Whealy who sentenced Sydney man Khaled Sharrouf to five years jail after he was convicted of involvement in a terrorist plot to attack targets in Melbourne and Sydney.

But Whealy is unsparing in his criticism of provisions in a bill that will make it highly problematical for journalists to report in the intelligence and national security space, especially in the event that things go wrong in a covert operation.

"You have a Franz Kafka-like situation," Whealy says.

Simon Breheny of the IPA says it is "deeply concerning" an "open and honest debate" is absent from discussion of the new security laws.

"It's unfortunate the change made in the context of a heightened terrorist threat means legislation does not get the scrutiny it deserves," he says. Ron Merkel, who devotes much of his time these days, to pro bono human rights cases, including those involving asylum seekers, is scathing of the Brandis legislation.

"It's the mood of the times." Merkel tells AFR Weekend. "Governments today create a mood, capture it, and act on it."

"It's all quite divorced from reality."

Merkel's fear is the new laws will facilitate an overarching abuse of executive power.

He draws attention to a scholarly paper he prepared on that subject in which he quotes both former Chief Justice Gerard Brennan of the Australian High Court, and the former Lord Chancellor in the United Kingdom, Lord Hailsham.

Hailsham observed in his 1976 Dimbleby lecture that Britain was living under what he described as an "elective dictatorship, absolute in theory if hitherto thought tolerable in practice".

COURAGEOUS AND FREE PEOPLE

In words Brandis may subscribe to in theory, but not necessarily in practice, Brennan, CJ, made this observation about executive power:

"An important check on possible misuse of executive power – indeed, on the exercise of any power – is publicity. Misuse of power flourishes in the dark; it cannot survive

the glare of publicity."

The quotes from Hailsham and Brennan might be viewed against the central - proposition in Brandis's NPC speech – Securing Our Freedom in the Age of Terror.

This was expressed thus by the AG as justification for laws he himself intimated – in a question and answer session – might test his own liberals instincts.

"The Abbott government," he says, "is determined to deal with the threat of domestic terrorism resolutely and unrelentingly. Our decisions will be based on our understanding the paramount duty of any government is to keep our people safe."

This should go without saying, but the process by which a government keeps its people safe involves checks and balances, and trade-offs between individual rights and the greater good.

As Simon Longstaff of the St James Ethics Centre in Sydney puts it: "Governments - routinely assert they have no higher duty than to keep us safe. But is this true?

"It is on the basis of this assertion that governments curtail our general liberties while exempting others from the rule of law.

"The government's assumption is that the Australian people lack the courage and - commitment to choose liberty over security; that we are not brave enough to defy the terrorists' threats and accept the cost of our freedom.

"Perhaps it is time that we sent our politicians a message: we are a courageous and free people wishing to live as equals under the rule of law. Defend this ideal and you defend us."

The Australian Financial Review

Security legislation being pushed through with undue haste

Australian Broadcasting Corporation
Broadcast: 30/10/2014
Reporter: Tony Jones

Former NSW Supreme Court judge Anthony Whealy QC discusses the government's new security laws which he says are being rushed through without adequate debate and scrutiny.

Transcript

TONY JONES, PRESENTER: As internet freedom fighters, lawyers and journalists take a step back to contemplate the implications of the new anti-terrorism laws which have gone so swiftly through Parliament with little debate, some politicians and senior legal figures have come to the conclusion the Government has gone too far, too fast.

Another critic joins their ranks tonight and he's far from a usual suspect. Anthony Whealy QC was the judge who presided over the marathon terrorism trials that followed Operation Pendennis, the biggest counter-terrorism operation in Australia at the time. After retiring from the bench, he headed the COAG review of anti-terrorism laws. He joined me in the studio just a short time ago.

Anthony Whealy, thanks for joining us.

ANTHONY WHEALY, FORMER NSW SUPREME COURT JUDGE: My pleasure.

TONY JONES: What concerns do you have about these new anti-terror laws?

ANTHONY WHEALY: Well I have concerns about several areas. The first I would go to immediately is the one that's creating a lot of fuss in the media, and that is the issue of creating an offence that would directly target journalists who reveal information about a special operation.

TONY JONES: With a 10-year - potential 10-year jail sentence.

ANTHONY WHEALY: Yes, yes. That's true. And so it's a very serious offence with very serious consequences, but it has a great deal of impact on what I would regard as the right of the media to report matters in the public interest.

TONY JONES: Let's concentrate then on that first of all. That's in the National Security Amendment Bill. The possibility exists that if journalists report on secret intelligence operations, they could face this jail term. Senator Brandis said today, "There is no practical or foreseeable possibility that in our liberal democracy a journalist would ever be prosecuted for doing their job." Is that really the way the law works?

ANTHONY WHEALY: Well it certainly shouldn't. I think you've got to look at the laws themselves. You've got to just look at them in their ordinary terminology and how far they can reach. One could never foresee what might happen. And when the police or ASIO take the view that a journalist has revealed something they didn't want revealed, why wouldn't they bring proceedings against that journalist?

TONY JONES: Well Senator Brandis again says he's instructed the Director of Public Prosecutions the DPP must obtain the consent of the Attorney-General before considering any prosecution against a journalist. Is that a genuine legal safeguard, in your view?

ANTHONY WHEALY: Well it's often used in legislation and it looks very imposing, but I think it's not really a safeguard, because in a situation like this where the police or ASIO come to the Attorney-General and say, "We want to bring proceedings against this journalist for what he did," it's highly unlikely the Attorney-General would do other than consent. After all, he's only heard one side of the story. He doesn't really know what the journalist's position is at all.

TONY JONES: So what defence or safeguard do you believe there should be?

ANTHONY WHEALY: Well I think there should be some type of defence centring upon the public interest. It can often be in the public interest that, for example, a botched operation, one that was wrongly targeted, should be revealed. There can't be any doubt about that. We required it with the Mohamed Haneef case, the case of Ul-Haque, who was, according to the judge who dealt with the matter, kidnapped by ASIO operatives. Perhaps a harsh ruling, but nevertheless, that's the sort of thing that the public need to know.

TONY JONES: Are there dangers in pushing through much more stringent legislation at times like this when the public is concentrating on the fear of terrorism?

ANTHONY WHEALY: There's always a danger in that situation. I believe that the worst time to push through legislation of this kind and to push it through urgently is when there is a supposed air of panic around the place, and no doubt there is that at the moment. That's nobody's fault, perhaps, but the timing of it all is unfortunate. And there's not the slightest doubt that this is being pushed through without adequate debate and discussion.

TONY JONES: Do you agree then with News Corporation's Lachlan Murdoch, who says the danger here is the gradual erosion of our freedom to know and to be informed?

ANTHONY WHEALY: Well I don't know that it's all that gradual. I think with legislation like this, it's quite a significant, a major erosion of our liberty. I agree with the concept, however.

TONY JONES: Do you see any reason at all why secret intelligence operations against terrorists need to be protected against media scrutiny? And we should bear in mind here too that under the law, the protection is permanent.

ANTHONY WHEALY: Well I certainly believe that there needs to be protection that focuses on national security matters. But this type of protection seems to me to be too severe and it should yield to a public interest defence.

TONY JONES: Let's look now at the foreign fighters bill. This has also gone through. And it goes beyond the existing offence of incitement to violence. It creates a new offence of advocating terrorism. Do you see any problems about this broadening of the definition?

ANTHONY WHEALY: Yes, I think there are some problems with it. First of all, the intention that's necessary with the incitement offence is an intention that the person who's being incited will engage in a violent terrorist act. That is not necessary under this legislation. The mental element is recklessness. It's a very different concept. And so the person who's promoting, encouraging, counselling or urging terrorism notions doesn't have to intend that anybody do anything with it. So that seems to me to be very strange. Secondly, I think that once you move into this area, you are certainly trespassing mightily upon notions of communication, free speech, free discussion in society and the like.

TONY JONES: Well, I mean - the critics actually say that this bill, this particular provision could have the effect of criminalising free speech or what we now know as free speech. Do you think that is the case?

ANTHONY WHEALY: Well I think that language that's used in the section is so broad that that must be so - even if we knew what these words meant, and we don't, they're not properly defined. Also I think it drives underground those people who are on the fringe of bringing their encouragement into something more dangerous. And when underground, it's harder to detect.

TONY JONES: So better and smarter to have them making these comments out in the open as free speech where it can be dealt with and debated - is that what you're saying?

ANTHONY WHEALY: Exactly.

TONY JONES: There is a five-year jail term attached to this new offence. As a former judge, would you be concerned if you had to sentence somebody for making what otherwise, in the previous period, would've been regarded as a kind of hot-headed remark that had no intention attached to it to make someone else commit an act of terror?

ANTHONY WHEALY: Well we have to honour the law, so I imagine that no matter what my private feelings were, I would have to impose in most cases a custodial sentence on a journalist who breached that law. I would take into account his or her good character and all the rest of it. But, in the end, I couldn't ignore the fact that Parliament has put a fairly substantial prison sentence as the maximum sentence.

TONY JONES: In this case we're talking not about journalists, but about someone who may have committed the offence of advocating - yeah.

ANTHONY WHEALY: Oh, I'm sorry; in the advocacy of the offence, yes, yeah.

TONY JONES: What about the notion that someone - a hothead who makes remarks not intended to to make someone do a - not inciting someone to do a terrorist act could still be jailed?

ANTHONY WHEALY: Yes. Well, as I say, the mental element there is recklessness and it's not as serious as having a direct intention. But, we're still stuck with the fact that the penalty for the advocacy offence is a pretty substantial one and we couldn't just shelve that.

TONY JONES: And going back to the idea of jailing a journalist, would you - could you have contemplated doing that?

ANTHONY WHEALY: No, not under our present system of freedoms in Australia. I couldn't have imagined that at all - if the public interest was demonstrated in the article being published.

TONY JONES: Now, 2013, you chaired the COAG committee which reviewed counter-terrorism legislation. You were already concerned at that time about the activities of foreign fighters or jihadists and how to deal with them when they return to Australia. Did you feel and did your committee find there was a need for new laws to deal with this?

ANTHONY WHEALY: Well, that wasn't our task. We had to look at the existing laws and see whether they were effective, amongst other things, and we certainly felt that this was a problem that was emerging in Australia: foreign fighters likely to come back to Australia, radicalised and hell-bent on carrying out some type of terrorist act here in Australia. We thought, in that context, that the use of control orders would be certainly a fairly effective deterrent on such a person misbehaving upon their return to Australia.

TONY JONES: And what about the idea of protective detention orders? Because your review actually recommended they be abolished.

ANTHONY WHEALY: Yeah, preventive detention was one we looked at very carefully. I know Bret Walker, the Monitor for National Security, looked at it as well, and we were of one mind on that. We had different views about control orders. But our view was that preventive detention was really unnecessary. We spoke to police forces around Australia, and with the exception of the Australian Federal Police, they were of one mind. They said, "We wouldn't use this legislation. It's too cumbersome. It's too complex. If you arrest somebody and detain them for 48 hours, you're not allowed to question them. What's the point of that?" And that's the view we took. We thought, "If you've got enough information to actually arrest someone, charge them, why not do it?"

TONY JONES: Now, what did you make of Senator Leyonhjelm's comments that those foreign fighters, particularly the ones he saw on television, were "just dickheads" whose activities don't warrant stringent new anti-terror laws?

ANTHONY WHEALY: I in some ways agree with him that some of these people are not very smart. But they're still dangerous and if they come back to Australia with the dangerous ideas in their head and they happen to work out how to put together a bomb, which is not that hard with information on the internet and stroll down to Wynyard Station, they could be very dangerous, even if stupid.

TONY JONES: What do you make of the 17-year-old who finds his way to Syria, is used as a propaganda tool for Islamic State terrorists? Should that strictly speaking be defined as terrorism?

ANTHONY WHEALY: Well, what he's doing of course under our existing laws would be an offence, punishable by many years' imprisonment if he were to return to Australia. So, I suppose you have to say that even though he's not a great terrorist risk where he is - probably no risk at all to Australians - the very fact that he's breaching our laws at the present time means that were he to return to Australia, we would have to treat him as a criminal.

TONY JONES: Now, one of the men you actually sent to jail in one of the big anti-terror trials which you conducted was Khaled Sharrouf, who was - when released actually became one of the most reviled of the foreign fighters after pictures were published of his small son holding a severed head. Did something fail here in our system, in the jail system or in the whole notion that people like that should be de radicalised?

ANTHONY WHEALY: As matters stood at the time, he would've been released on parole. I would've thought that proper supervision on parole at the time should have revealed, although it may be difficult at times, that he was still radicalised. And it may be of course that he was improved upon his release and then later on fell into bad company again and renewed his radicalised notions at that stage. We don't know enough about it to be truthful.

TONY JONES: But back in 2005, you were able to sentence quite a number of men to long jail terms for effectively planning a terrorist act or acts, even though it wasn't put into evidence what their targets were, what the actual plan was for terrorism. Did that investigation and the trial suggest to you that the laws in place were

plenty stringent enough?

ANTHONY WHEALY: I thought they were perfectly adequate to deal with a terrorist plot in Australia and I don't think that we needed to improve them. The corollary to that though is the Syrian problem raises some issues where we, I think, legitimately have had to introduce new laws to cope with the particular and specific problem. Those situations were not the same as were involved in Operation Pendennis.

TONY JONES: But in essence you think in spite of the fact that new laws were necessary, they've gone too far - is that correct?

ANTHONY WHEALY: Well I think some of them require further debate and discussion and ...

TONY JONES: Is it too late for that, once they've gone through?

ANTHONY WHEALY: Well, I think there'll be plenty of debate and discussion, whether they've gone through or not. We can't - it's unlikely the Government would want to see them rolled back. But the debate and the discussion will continue and at least that's one good thing. We can all express our opinions and those opinions I think will raise a variety of issues that over the coming months require very careful consideration.

TONY JONES: Anthony Whealy, we thank you very much for coming in to join that debate on Lateline tonight. It was good to see you.

ANTHONY WHEALY: Pleasure.

Do you have a comment or a story idea? Get in touch with the Lateline team by clicking here.

OPINION

Intelligence operations are not above the law

TOM BLACKBURN

Changes to the ASIO Act are a clear and present threat to Australian democracy

There has been a recent change to the Australian Sec-urity Intelligence Organisation Act, under which ASIO operates, which is deeply flawed and potentially dangerous.

It makes it a crime for all time for anyone, including the media, to expose conduct that may be highly illegal, entrenched and corrupt — if the information revealed relates to a "special intelligence operation".

Anyone who exposes such activities could face up to 10 years in jail.

Last year the Parliamentary Joint Committee on Intelligence and Security recommended reforms to Australia's national security legislation. The committee's terms of reference contained 18 specific reform proposals containing 44 separate items across three broad areas.

One of the issues addressed was the need for protection for ASIO officers and sources who, in the course of secret operations, might be forced to engage in unlawful conduct.

The committee recommended the creation of an "authorised intelligence operations scheme", of a kind similar to the "controlled operations" regime that applied to the federal police.

The result was an amendment to the ASIO Act that permits an ASIO officer to apply to the minister for permission to conduct a "Special Intelligence Operation" — an SIO. Fundamentally, a participant in an SIO has a limited civil and criminal immunity for conduct done in the course of an SIO.

The immunity does not cover death or serious injury, torture, conduct that causes significant loss of, or serious damage to property, or that induces another person to commit an act that he or she would not otherwise have done. Many, probably most, Australians would see the sense in this.

Police officers must from time to time go undercover and become involved in criminal operations. They may be technically caught up in criminal conduct in the process and they deserve to be protected from incidental criminal or civil liability.

The security risks that confront Australia today require covert operations by ASIO officers and associates. They should have the same sort of limited immunity. Those involved in such operations could be exposed to danger and such operations would be rendered useless if exposed. There should be an appropriate regime of secrecy in place.

It's already a serious offence for someone connected with ASIO to disclose secret information that has come to them during their duties. After the latest round of national security legislation amendments, the maximum jail penalty for doing so has been raised from two years to 10 years.

But those penalties cover only ASIO employees and affiliates. It's not an offence under the act to publish such a disclosure and, although technically a newspaper company or journalist may be liable as an accessory in such an exposure by ASIO personnel, it has rarely happened and may not be easy to prove.

And, as some journalists have pointed out in this debate, it is not uncommon that sensitive or secret information involving crime or national security that has come into possession of a journalist is voluntarily and responsibly kept confidential, after consultation with the appropriate authority.

This leaves open a vital means of exposure of deeply corrupt or unlawful conduct.

Executive governments are notoriously unwilling to permit such conduct to be exposed, and the whistleblower role has usually been assumed by the press, whose critics are generally unwilling to acknowledge the unpalatable fact that, for all their imperfections, the independent news media are indispensable to the health of a democratic society.

Don't take it from me. Milton said it 360 years ago.

In my field, some of Australia's greatest judges, including Sir Owen Dixon and Sir Frederick Jordan, have recognised the importance of a free press in cases such as McGuinness v Attorney-General and the Bread Manufacturers case.

No sensible person would want to live in a "managed democracy" where the independent news media were reduced to impotence.

Journalists seeking to expose corrupt intelligence operations could face 10 years in jail.

> **"No sensible person would want to live in a 'managed democracy' where the news media were reduced to impotence.**

It's a delicate balance, but while the law has always criminalised the unauthorised exposure of secret information by ASIO personnel, it has stepped back from the imposition of a general regime criminalising the exposure of activities by anyone, and for all time.

This is precisely what the new section 35P of the ASIO Act does.

The section criminalises the intentional exposure, by anyone and forever, of any information that merely "relates to" an SIO, in circumstances where the person making the exposure either knows the information relates to an SIO, or is "reckless" about it — that is, he or she knows that there is a substantial risk that the information relates to an SIO.

Up to five years in jail for that one. Under section 35P(2)(c), it's 10 years in jail if you intend to endanger the health or safety of someone involved in an SIO, probably few would argue with that, or if you intend to "prejudice" its effective conduct.

Note the sleight of hand here. It's one thing to intentionally endanger the health or safety of someone actively involved in an SIO.

But this is lumped together, in the same section, with the prospect of 10 years jail for doing anything that "prejudices" the effective conduct of such an operation, which is a very different matter. Let it be assumed that, during an SIO, some very serious criminal conduct has taken place or is taking place that is not covered by the terms of the immunity conferred on the participants.

The potential for lawful exposure of that conduct is extremely limited. The Public Interest Disclosure Act, which gives limited protection to whistleblowers, does not apply to this situation.

A concerned ASIO employee or affiliate could approach the Inspector-General of Intelligence and Security, an independent officer, who could investigate, but he or she reports confidentially to the minister and if necessary to the prime minister.

And, of course, the question is begged whether an ASIO employee or affiliate would blow the whistle at all.

Let's say the information, in sketchy form, comes into the hands of a journalist whose remit is national security. And, in the course of the journalist's investigation he or she becomes aware, or suspects, that the conduct occurred during an SIO.

The journalist is neatly prevented from breathing a word of it, and, delightfully for the government, if upon discreet inquiry the journalist is told that what is being inquired about involves an SIO, the journalist is conveniently fixed with the knowledge that section 35P requires.

Few would argue, and I certainly do not, that undercover security personnel ought not to have protection from violent and dangerous criminals, or that surveillance operations should freely be able to be frustrated.

But 35P is a deeply flawed provision. It criminalises the exposure by anyone, and for all time, of conduct that may be highly illegal, entrenched, and in the long run dangerous for Australian democracy. It is self-evidently no answer to say that the exposure of abuses and misconduct might not attract the full force of the law, or that the risk is removed by the discretion given to the attorney-general not to prosecute under the section.

These are very uncertain incentives and it's more likely that the information would remain concealed.

It's difficult for most people to put their civic duty ahead of the possibility of a prison term.

Neither is it of the remotest significance that a somewhat similar regime of punishment has applied (only since 2010) to the exposure of "controlled operations" run by the federal police under the Crimes Act.

So what? In any event, the possibility of exposure of abuses under controlled police operations are significantly greater, both because of the different agencies involved and better statutory protections.

And the fact a prosecution under the section must be authorised by the attorney-general is of no real comfort.

We are to assume that the wise and benevolent holders of the office would see to it that no one was prosecuted for the exposure of an abuse.

No doubt the current Attorney-General and his shadow counterpart would act appropriately. However some future holder of the office (perhaps only an SC), with a taste for managed democracy and with an embarrassed government and a vengeful cabinet on his or her back, might have less firmness of mind.

Tom Blackburn SC is a prominent media law and defamation barrister