AUSTRALIA'S RIGHT TO KNOW

A SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT IN RESPONSE TO THE NATIONAL SECURITY LEGISLATION DISCUSSION PAPER RELEASED IN AUGUST 2009

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Executive Summary:

- ARTK supports the amendments to the treason offences in the Criminal Code Act 1995 to provide that conduct must “materially assist” an enemy, but ARTK submits that in addition, it should be a requirement that a person had “criminal intent” when doing so.
- ARTK is of the view the crime of sedition should be abolished but considers the proposed new “urging force or violence” provisions are a considerable improvement on the current law.
- The current “good faith” defence to urging force or violence should be repealed and replaced with the specific wording proposed by the ALRC.
- s101.4 of the Criminal Code Act relating to “possessing a thing” related to a terrorism act is too broad and vague and should be reviewed. ARTK is concerned the provision could jeopardise a journalist’s ability to do his or her job properly by potentially criminalising information acquired innocently in the course of their usual work.
- s102.1(1A) which proscribes an organisation that “praises” a terrorist act, threatens free speech and should be repealed.
- s3UEA of the Crimes Act which provides for a warrantless search in the case that a police officer suspects a “thing” connected with a terrorist act may be on the premises is too vague and could threaten a journalist undertaking their usual work. Warrantless search should not be permitted.
- The ASIO Act continues to threaten journalists whose job involves investigating terrorism activities and the activities of security agencies. The ability to detain citizens not suspected of a crime and the restrictions on the ability to disclose information regarding warrants and questioning should be re-examined as a matter of urgency.
- The definition of national security information in the National Security Information Act should be narrowed to ensure it only applies to genuine national security information.
- Telecommunications Act 1979 gives broad powers to police and security agencies to intercept communications which could threaten a journalist’s confidential communication with sources.

Introduction:

ARTK welcomes the opportunity to comment on the important issues of national security legislation given its impact on freedom of speech and political discourse in Australia.

Australia's Right To Know is a coalition of 12 major media organisations formed in 2007 to address increasing restriction on freedom of speech in Australia.

ARTK notes the Government's comment in its discussion paper that it is seeking:

> "to achieve a balance between the Government's responsibility to protect Australia, its people and its interests and instilling confidence in the community that the national security and counter-terrorism laws will be exercised in an accountable way, protecting key civil liberties, and the rule of law."

ARTK appreciates that the Government is dealing with competing interests but submits that the essential democratic elements of freedom of speech and the ability of the media to report on issues in the public interest go beyond "key civil liberties" and are central elements of our democracy. While we appreciate the need for balance, in their decision making, lawmakers must not lose sight of these fundamental principles.

During the period immediately following the terrorist attacks of September 11, 2001 and the federal election of November 24, 2007, the Howard government introduced 44 pieces of legislation, or amendments to existing legislation governing national security.

While badged with the impeccable objectives of deterring, detecting, disrupting and ultimately punishing terrorism, ARTK remains concerned that 9/11 and threats to terrorism should not be "used" as a way to expand laws which dubiously justify infringements of free speech and other civil liberties. We have seen novel departures from the presumption of innocence, trial by jury and freedom of association. But in terms of the healthy functioning of the democracy such laws purport to protect, one of the most serious consequences has been on the news media's capacity to report on terrorism-related stories.

In Australia, Professor Mark Pearson has summarised these effects as follows:
• leaving reporters exposed to new detention and questioning regimes;
• exposing journalists to new surveillance techniques
• seizing journalists' notes and computer archives;
• closing certain court proceedings, thus leaving matters unreportable;
• suppressing certain details related to terrorism matters and exposing journalists to fines and jail if they report them;
• restricting journalists' movement in certain areas where news might be happening;

• exposing journalists to new risks by merely associating or communicating with some sources; and
• exposing journalists to criminal charges if they publish some statements deemed to be inciting or encouraging terrorism.[1]

In the course of the comprehensive Independent Audit into the State of Free Speech in Australia, undertaken on behalf of ARTK, former privacy commissioner, Irene Moss wrote as follows:

"Australian anti-terrorism laws have been designed to significantly reduce the judicial watch on the executive power inherent in their operation. Even where such oversight is permitted, the laws restrict the media's ability to report and curtail the ability of people to communicate with journalists and others."[2]

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[1] Mark Pearson: *The Journalist's Guide to Media Law* (3rd ed 2007) p314
[2] Irene Moss: *The report of the Independent Audit into the State of Free Speech in Australia*, p173 http://www.abc.net.au/news/opinion/documents/files/20071105_righttoknow.pdf

Proposed amendments to national security legislation

ARTK appreciates the positive steps taken by the Government to respond to the recommendations of various reviews of the legislation of the past few years and now to take steps to bring about reform.

For the purposes of this submission ARTK will focus on those aspects of the national security legislation which we consider threaten or in restraint of free speech in Australia.

1) Criminal Code Act 1995 (Criminal Code Act)

a) Division 80 - Treason

ARTK supports the proposed amendments to the treason offences in Division 80 of the Criminal Code Act to provide that conduct must "materially" assist an enemy. We are strongly of the view it must be clear that rhetoric or expressions of dissent are not sufficient to constitute a treasonable offence.

However, we submit that any such provisions should also include the "criminal intent" element of the Criminal Code Act . Rather than it being a possibility that conduct can breach the law, it must be shown that this was the intent of an action.

b) Division 80 - Sedition

Media concerns

Since their extensive amendment in 2005, the media has been very concerned about the sedition offences in the Criminal Code Act which replaced the previous provisions in the Crimes Act 1914. Members of the media have made a number of submissions to the previous and current governments and the ALRC to this effect.

The discussion paper proposes the replacement of the sedition offences with a new set of offences of:

1) Urging violence against the constitution,
2) Urging interference in Parliamentary elections or constitutional referenda by force or violence
3) Urging violence against groups, and,
4) Urging violence against members of groups.

By way of preliminary comment, we consider there is a broader debate to be had as to whether there needs to be "urging force or violence" offences at all. It is arguable that existing offences including the criminal offence of incitement are sufficient. We are concerned that the existence of such

offences on the statute books have the potential to have a deleterious "chilling effect" on free speech and expression in Australia.

However, we appreciate that the government is proposing modification rather than abolition of sedition/urging violence laws at this point in time.

ARTK strongly supports the proposal to adopt the ALRC recommendation to remove the term "sedition" from the Criminal Code and replace it with an offence of "urging". We do not think the word "sedition" should continue to be used.

Media activity

However, ARTK has been and continues to remain concerned that any sedition/urging law does not inadvertently catch legitimate activities of the media. We remain wary that a comment made, letter or advertisement published, wire service story or interview reproduced, factual report carried, video-tape footage published, editorial opinion expressed, or feature film or documentary screened could by reason of its subject matter, prominence, content, tone, wording, manner of promotion and ultimate authorship be thought capable of being held be a jury to amount to "urging" of a proscribed kind (and to give rise to an inference that the publisher was at least reckless as to the consequential resort by those so "urged" to the use of force or violence), particularly if it were perceived to form part of an ongoing campaign.

Accordingly it is vital the offence is effective in ensuring legitimate free expression is not inhibited.

In its Review of Sedition Laws in Australia, the ALRC recommended that the existing "good faith" defence should be repealed and replaced with a provision providing that" in determining whether a person intends that the urged force or violence will occur, the trier of fact must have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done:

- in the development, performance, exhibition or distribution of an artistic work
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest
- in connection with an industrial dispute or an industrial matter, or
- in the dissemination of news or current affairs.

We note the discussion paper does not propose adopting the ALRC recommendation but instead proposes expanding the current "good faith defence" to expressly allow a court to consider such matters in considering whether the defence has been made out. The paper appears to support the

ALRC proposal in principle but believes the ALRC recommendation would overly complicate the urging violence offences but this concern is not expanded upon.

ARTK is concerned that the government appears to have rejected the ALRC recommendation without providing sufficient explanation or reasons.

It is important that such an offence does not inhibit free speech and genuine media activity. But ARTK is concerned that the "good faith" defence as proposed by the paper will in practice by difficult to rely on. We consider it necessary that the court look at these innocuous factors when deciding if the elements of the offence have been made out rather than relying on a subsequent defence.

ARTK submits that the defence should be repealed and replaced with the wording recommended by the ALRC.

c) <u>Division 101</u>

S101.4 of the Criminal Code Act prohibits the possessing of a "thing" connected with preparation for, the engagement of a person in, or assistance in a terrorist act"

We are concerned regarding the broad vague nature of this offence and in particular the lack of a connection between the "thing" and the terrorist act. This may in appropriately include documents or information held by journalists, including interviews with people thought to be terrorism suspects or contact information obtained by a journalist in the normal course of his or her duties.

Section 101. 5 provides that it is not an offence if the possession was not intended to facilitate preparation for, the engagement in or assistance in the terrorist act. But this undermines the presumption of innocence with the defendant required to disprove an element of the offence whereas the prosecution should be required to show the persons intention. We are concerned that a journalist may be found guilty where he or she has in their possession a document that he or she knows is connected with a terrorist act although they themselves may not be involved in the terrorist act itself.

ARTK believes this provision is unsafe and should either be reviewed as to whether the offence effectively targets threats of terrorism.

d) <u>Division 102</u>

Section 102.1(1A) provides that an organisation may be proscribed if it "directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person

(regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act".

ARTK submits that despite inclusion of the word "substantial" on the recommendation of the Security Legislation Review Committee in 2006 [3], this provision remains vague and could be wide-ranging with a consequent chilling act on free speech and freedom of expression. We note at the time the Committee recommended the provision be repealed and only that amendment be a fall back position.

We are also concerned that the phrase "regardless of his or her age or any mental impairment" is also wide-ranging.

We are concerned that the breadth of this provision may inadvertently apply to legitimate reporting or commentary of the media. Commentary or opinion sincerely expressed which praises the activities of liberation movements such as those headed by Nelson Mandela or Mahatma Gandhi could be found in breach of the legislation as proposed.

We are of the view the provision should be repealed.

2) Crimes Act 1914

Section 3UEA of the Crimes Act 1914 provides that:

A police officer may enter premises in accordance with this section if the police officer suspects, on reasonable grounds, that:

(a) a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred;
(b) It is necessary to exercise a power

.

This is a new provision which allows entry without warrant in emergency situations.

We would be extremely concerned if the government gave the AFP the power to conduct warrantless searches in these circumstances.

We appreciate the intention is that officers be able to enter premises to secure them rather than undertake law enforcement. However, firstly we are concerned the distinction between the two is not clear and secondly we are strongly of the view, entry to the premises should only be taken with the safeguards offered by a warrant.

[3] Report of the Security Legislation Review Committee, June 2006, p5

Given the broad nature of the provision and in particular the vague reference to "a thing" and the low test that the officer need only" reasonably suspect" and the ability of officers to obtain warrants on short notice, we do not support this new provision.

Given the potential application of this provision to a journalist who may have such "a thing" in their possession but in no way be connected to a terrorism offence we strongly advocate that a warrant be required.

3) Australian Security Intelligence Organisation (ASIO) Act 1979

There are a number of provisions in the Australian Security Intelligence Organisation Act 1979 (ASIO Act) of grave concern to ARTK.

a) Issue of warrants

The ASIO Act provides for the issue of warrants to question and detain people if it is reasonably believed the warrant *"will substantially assist the collection of intelligence that is important in relation to a terrorism offence".*

Whilst we appreciate the need for ASIO to obtain information to combat terrorism, detention is a serious restriction on a persons individual liberty and must be moderated accordingly.

Our primary concern is that the person detained does not need to be suspected of any offence, they need not be charged and there may be no prospect they will be charged at a later date.

No other comparable jurisdiction has laws permitting the detention of citizens not suspected of a crime.

ARTK is particularly concerned that given the nature of the work undertaken in relation to terrorism activities and the prospect of having information that is relevant to a terrorism offence, there is a grave risk that a journalist may be subject to these provisions.

The provisions enable a person to be detained up to seven days, limit a person's right to challenge the lawfulness of his or her detention, limit the ability of the person to access a lawyer or other people (in the case of a journalist, their employer) and undermines their right to silence and freedom from self-incrimination.

Whilst we acknowledge there may be instances where a journalist may have information which is relevant to a terrorism offence, we are concerned the

vague warrant provisions may have a serious impact on the liberty of journalists and the free flow of information.

We strongly urge the government to review this power as a matter of urgency.

b) **Section 34VAA – Disclosure of ASIO information**

Section 34VAA of the ASIO Act contains two offences of concern to journalists. These offences relate to secrecy relating to warrants and questioning.

The first offence prohibits the disclosure of any information relating to an ASIO warrant for a period of 28 days after it has been issued (section 34VAA (1)).

Whilst we appreciate there is information surrounding the warrant which should not be disclosed, in practice, this restriction stops those who have been questioned by ASIO and/or their lawyers from talking to the media, in all circumstances. This prohibition exists in relation to material that is not a threat to national security and will apply to information that it may be clearly in the public interest that it be publicly available information. For example the subject of the warrant might have been arbitrarily arrested or maltreated by ASIO officials.

The "permitted disclosure" provisions in s34VAA (5)) provide little comfort. This is little more than an internal authorisation mechanism for ASIO and the subject's lawyers who may need to disclose certain details to arrange the subject's defence. Public interest never comes into consideration where permitted disclosures are concerned.

The strict liability provision (34VAA (3)) makes clear that it is the subject and his/her legal representatives which are present during the questioning who are the most vulnerable to a five-year jail term for unauthorised disclosures of ASIO information. But the final sentence of section 34VAA (3) opens the liability up to anybody who fulfils the *Criminal Code*'s definition of 'recklessness' in disclosing the information.

The existence of the fault element of recklessness, may at least, offer a defence for journalists who unwittingly discloses information which relates to a warrant or is 'operational information'. Recklessness requires both an awareness of the results that an act will bring about and the disregarding of those results.

It is unclear however, how a journalist is able to make a judgement that disclosing "operational information" is in the public interest, and therefore, justified and not reckless. A journalist disclosing information about an ASIO

warrant which, for example, he/she believes to have been illegally issued and enforced in contravention of international human rights conventions, is a disclosure which, technically, is designed to disrupt ASIO operations and therefore could be regarded as "reckless".

ARTK is concerned that knowingly disclosing this information for the purpose of informing the public and stimulating debate about ASIO's activities is not clearly supported by a public interest test under the Act. We are concerned a journalist may be highly vulnerable to a five-year prison term for doing his/her job. This is an unacceptable legal framework for Australian journalists to work in.

The second offence is essentially a broader extension of the first. Section 34VAA (2) states that for a period of two years after the expiry of the warrant, it remains an offence for anyone to disclose any 'operational information' that ASIO has or had relating to this warrant.

The aim of the offence is to protect ongoing investigations that are linked to an initial warrant . However, as there is no limit on the number of warrants that may be issued in a particular investigation, a long series of back to back warrants would mean that the two-year banning period will not start until the final warrant has expired. The period of prohibition could span a considerable number of years.

ARTK is concerned that the definition of "operational Information" in section 34VAA (5) is unreasonably broad so as to include almost anything that ASIO has done or is doing, or has known or knows.

The definition is:

> *(5)* ***Operational information*** *means information indicating one or more of the following:*
>
> > *(a) information that the Organisation has or had;*
> > *(b) a source of information (other than the person specified in the warrant mentioned in subsection (1) or (2)) that the Organisation has or had;*
> > *(c) an operational capability, method or plan of the Organisation.*

It is hard to see what information or plans that ASIO has that would not fall under this definition of 'operational information'. Accordingly, this section effectively gags any debate about ASIO's activities, which ARTK finds an untenable situation.

The ASIO Act implies that any disclosure by a journalist of ASIO "operational information" will be punishable by five years imprisonment.

ARTK acknowledges the safeguard provisions in the Act in Section 34NB. This section is designed to keep a check on ASIO staff acting under the authority of a warrant. The safeguards stipulate that an ASIO official who *knowingly* contravenes a condition or restriction that the warrant places upon him/her faces a two-year jail term. It hardly seems appropriate however, that journalists who tell the story of this abuse of ASIO power in an effort to foster healthy public debate into counter-terrorism, risk five years in jail.

ARTK urges the government to review the offences relation to disclosure of ASIO powers as a matter or urgency.

4) **National Security Information(Criminal and Civil Proceedings) Act 2004**

The National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act) sets out the mechanisms to protect national security information during court, tribunal and other proceedings.

The Act deals with disclosure of information during court proceedings likely to prejudice national security (defined in s.17 as *"likely to prejudice national security if there is a real and not merely a remote, possibility that the disclosure will prejudice national security"*). If the prosecution or defence thinks a witness will reveal such information at a hearing, the prosecution or defence must notify the court, and the court will hold a closed hearing (s.25).

The Attorney-General must be notified if it is thought criminal proceedings will lead to the disclosure of information sensitive to national security. The Attorney-General can issue a certificate preventing disclosure of the information by relevant people or can issue a certificate preventing a witness from giving evidence. The Act also contains similar provisions for civil proceedings.

ARTK is specifically concerned that the definition of "national security information" is too broad and vague.

ARTK agrees there needs to be a definition but is concerned that the proposed definition, far from offering more clarity, would create uncertainty and would effectively broaden the scope of information which could be deemed to be "national security information".

The proposed definition is as follows:

> *"national security information means information:*
> *(a) that relates to national security; or*
> *(b) the disclosure of which may affect national security."*

We are concerned that the breadth of "that relates to" and "may"is such that all information presented in a trial for a terrorism offence may fall within the definition whereas the order should only apply to parts of the trial.

ARTK submits that the definition should be narrowed to ensure it only applies to genuine national security information.

But as a broader comment, although we appreciate the need to protect national security information we are concerned that the frequent use of orders under the Act indicate there is a need to have a thorough review of the Act.

ARTK considers it is vital that in the interest of open justice, only information that is truly "national security information"[4] is suppressed. All other information should be available for reporting.

5) **Telecommunications (Interception and Access) Act 1979 (as amended by the TIA Amendment Bill 2007)**

The Telecommunications (Interception and Access) Act 1979 (TIA Act) was substantially amended by the *TIA Amendment Bill* 2007 (dubbed the "track and tap" Bill). The amendments were passed on 20 September 2007—the Senate's last sitting day before the calling of the 2007 federal election. We understand that as a result of the amendments, telecommunications may be intercepted on a near realtime basis without a warrant and without any credibly independent safeguards.

ARTK is concerned that as a result of the changes, a journalist's capacity for any confidential telecommunication with a source can be compromised. Not only is the substance of any telecommunication potentially available to agencies such as ASIO and the AFP, but also the location of both the journalist and the source during the time of the contact.

An attempt in the Senate to amend the 2007 Bill, to require warrants for interceptions as some deterrence to overuse or outright abuse of these new powers, was defeated during passage of the 2007 Bill.

ARTK is concerned that these powers to intercept telecommunications could be used to target journalists whose professional roles require them to have contact with suspects of serious crime, though they themselves are not suspected of anything.

[4] The most recent Australian definition of "national security" is in the Prime Minister's inaugural National Security Statement, delivered on December 4, 2008. The Prime Minister said: "What is meant by national security? Freedom from attack or the threat of attack; the maintenance of our territorial integrity; the maintenance of our political sovereignty; the preservation of our hard won freedoms; and the maintenance of our fundamental capacity to advance economic prosperity for all Australians."

Unfortunately as a result of the TIA Act, journalists must assume their conversations with sources will be intercepted. If they are in contact with a terror suspect for the purposes of a story they may have their phone tapped, giving authorities access not only to conversations with the suspect but those of other unrelated innocent sources. At any time police could be listening, obliterating any professional right and ability the journalist may have to protect the confidentiality of their source.

The level of telecommunications interception in Australia is concerning. Australia issues 75 per cent more telecommunications interception warrants than the US translating per capita to 26 times more warrants than the US. Adding to the concern, In Australia, non-judges issue 93 per cent of all warrants, whereas in the US only judges can issue warrants[5].

We are concerned that the powers to deter confidential sources have a "chilling effect" on free speech as they inevitably lead to a culture of self-censorship. Without public faith in a journalist's promise to protect sources, much crucial information in the public interest would not come to light.

ARTK believes that warrants to intercept telecommunications must be issued by a judge, as in the US.

[5] ***Telecommunications (Interception and Access) Act 1979*** **Report for the year ending 30 June 2007, p53**