

Executive Summary

Division three of part III of the *Australian Security Intelligence Organisation Act 1979* poses a threat to freedom of speech and has a significant potential to obstruct the ability of the media to ensure that government agencies are held to public account for their actions. The Australian Press Council calls on the government to allow division three of part III to lapse in accordance with s 34Y of the Act. If the government is unwilling to abolish division three, the Australian Press Council calls on the government to make the following amendments be made to the legislation:

1. Section 34G should be amended so as to remove from the defence the onus proof and to place upon the prosecution the onus of proving that a defendant does or did have information in his/her possession.
2. The strict liability provisions should be removed from sections 34G and s 34VAA.
3. The definition of “operational information” in s 34VAA(5) should be narrowed so that the only information which is protected from disclosure is that which would pose a significant threat to Australia’s security or defence.
4. Section (5) should be amended so that a penalty can only be imposed where disclosure would result in a threat to national security.
5. Section 34VAA(2) should be deleted or amended so that the prohibition on disclosure ceases when the operation to which the warrant relates has been concluded.
6. Section 34VAA(12) should be expanded to include defences for disclosing information where the public interest in disclosure outweighs any threat to national security.

Australian Press Council Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD Inquiry into Division Three of Part III of the *Australian Security Intelligence Organisation Act 1979*

In December 2003 the Australian Press Council, together with several other media organizations, made a submission to the Commonwealth Attorney-General in which we raised concerns with regard to proposed amendments to the *Australian Security Intelligence Organisation Act 1979*. At that time the Press Council made a number of criticisms of the legislation concerning its impact on the media's role of informing the public on matters of public interest. In spite of these objections, these amendments ultimately became division three of Part III of the Act.

The Press Council reiterates its concerns with regard to division three of Part III of the *Australian Security Intelligence Organisation Act 1979*. This division includes a number of provisions that have the potential to restrict freedom of speech and to act as a significant impediment to the ability of journalists to perform the task of keeping government accountable to the public. These provisions go far beyond what is required in order to facilitate the investigation and prevention of terrorism. Division three should be either allowed to lapse in accordance with s 34Y, or modified in order to mitigate its impact on freedom of speech.

Section 34G of the Act imposes a five year penalty on a person subject to a warrant who fails to disclose information in accordance with the warrant. Although the person is exempt from this penalty if they do not possess the relevant information, the defendant bears the onus of proving that they do not have the information. Further, the offence is one of strict liability. It is foreseeable that any person, including a journalist, may find themselves subject to this penalty without any viable defence, even though they have done nothing to breach the Act. Apart from the obvious risk that innocent individuals may be incarcerated, this section creates significant ethical problems for journalists who may have undertaken to respect the confidentiality of their sources. If journalists do comply with the Act the result is likely to be a reluctance to confide in journalists. This would have the effect of limiting journalists' ability to investigate and report upon matters of public interest involving Australia's security organizations. At minimum, the section should be reformulated to remove the onus of proof from defendants and the strict liability provision.

The definition of "operational information" set down in s 34VAA(5) is far too broad. This definition is significant, since it determines the scope of restrictions on disclosure set down in ss 34VAA. As currently defined, "operational information" includes **any** information which indicates information which the organization has had, or any source of information, or any operational capability of the organization. This definition has the potential to quarantine ASIO, ASIS and DSD from any public scrutiny. While the Press Council concedes that it may be necessary to protect some information for security reasons, this definition is excessively broad and should be narrowed so that the only

information which is protected from disclosure is that which would pose a significant threat to Australia's security or to a current and ongoing investigation.

A person who discloses operational information in contravention of s 34VAA may be subject to five years' imprisonment. This prohibition would impose penalties on both those who disclose operational information to journalists and upon journalists who pass that information on. These penalties apply regardless of whether or not there is any threat to Australia's security posed by the disclosure and, in some circumstances, strict liability applies. At the very minimum it should be required that there be a proven threat to national security resulting from the disclosure before the penalty is applicable. The Press Council also objects to the imposition of strict liability for this type of offence.

The Press Council submits that a ban on disclosure lasting two years from the date of expiry of a warrant as set down in s 34VAA(2) is oppressively long and presents a significant encroachment on freedom of speech. The prohibition on disclosure should be lifted as soon as the operation or investigation to which the warrant relates has been concluded, unless there are extenuating circumstances whereby the disclosure of the information would jeopardise Australia's security.

While the constitutional guarantee of freedom of political communication is an important safeguard against intrusions into freedom of speech, the reference to it in s 34VAA(12) appears to do no more than make a token gesture and offers no real protection. The scope of any protection available under the constitutional guarantee is unclear and cannot be relied upon until the sub-section has been interpreted by the courts. The Act should include tangible defences where a disclosure was made without any significant threat to national security or where the public interest in disclosure outweighs any risk to ASIO operations.

Division three of Part III of the *Australian Security Intelligence Organisation Act 1979* is an oppressive piece of legislation which has the potential to have a pernicious effect on the ability of Australia's media to perform their role of scrutinizing government organizations and maintaining their accountability to the Australian public. Under s 34Y of the Act, division three of Part III of the *Australian Security Intelligence Organisation Act 1979* ceases to have effect three years after commencement. The Press Council calls upon the government to retire the division and, if it is felt necessary, draft a new division which is less hostile to free speech.