

'Chilling attack on democracy': proposed Asio powers could be used against journalists

Daniel Hurst – *The Guardian* - 20 October 2020

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A government bill to expand Asio's powers could target anyone seen as a threat. 'That means journalists, activists, members of civil society groups like GetUp, or anyone who holds government to account,' GetUp's general counsel Zaahir Edries says.

Journalists and advocacy groups could face compulsory questioning by Asio as part of a proposed expansion of the spy agency's powers, according to external legal advice prepared by leading barristers.

With senior officials of Asio due to give evidence to Senate estimates hearings on Tuesday, the new advice seen by Guardian Australia argues a bill before parliament to [extend the reach of questioning powers](#) could have a "chilling effect" on the willingness of people to speak to journalists.

It also argues some of the work of civil society organisations – especially those involved in environmental and human rights advocacy – may be caught by the broad definition of "acts of foreign interference" because it includes clandestine acts that "are otherwise detrimental to the interests of Australia".

Members of civil society groups could face potential questioning and the use of tracking devices, according to the advice commissioned by progressive group GetUp and prepared by Sydney-based barrister [Dominic Villa SC](#) - an expert in public and administrative law – and fellow barrister [Diana Tang](#), both of New Chambers.

The government's bill – which is currently being scrutinised by parliament's intelligence committee – would expand the range of matters that are subject to compulsory questioning powers beyond terrorism-related matters.

The changes would allow the agency to question adults over espionage and foreign interference, [amid warnings from Asio](#) that there are now more spies and proxies operating in Australia than at the height of the cold war.

Asio regards the compulsory questioning power as "another tool in our toolbox" to target espionage and foreign interference and argues its activities are subject to strong safeguards, including oversight of the inspector general of intelligence and security.

So far, most of the attention of public debate on the bill has been focused on [lowering the minimum age](#) for compulsory questioning from 16 to 14 years, with minors only allowed to be questioned if they themselves were believed to be involved in politically motivated violence.

But the external legal advice argues the scope of what adults could be questioned about is “exceptionally broad” and it was “easily foreseeable” that a journalist may be questioned.

“A journalist would then be obliged to provide information pursuant to the warrant, where the failure to do so would be a criminal offence punishable by five years imprisonment,” says the advice, released on the eve of estimates committee hearings.

“Despite well-recognised professional and ethical obligations of a journalist to maintain anonymity and confidentiality of a source, if so questioned under a warrant, a journalist would be required to disclose the identity of a confidential source.”

The advice says there is no exception or exclusion provided for in the bill that would enable a journalist to refuse to answer a question on the basis it would reveal a confidential source.

“There may therefore be a chilling effect on the willingness of people to speak to journalists about issues of political significance, including security matters and foreign relations.”

The advice does not take a position on whether aspects of the proposed law could be successfully challenged before the high court as unconstitutional, but says it is “conceivable” that in a particular case “the scheme proposed by the bill may operate so as to exceed the implied constitutional guarantee” on freedom of political communication.

Villa and Tang argue the proposed laws may also “undermine the important role played by civil society organisations in holding government to account”, partly because a “foreign power” is defined to include “a foreign political organisation”.

The advice argues civil society organisations operating in Australia may “collaborate with or receive support from a foreign political organisation that shares a common interest or objective, in their advocacy campaigns”.

“The phrases ‘affecting political or governmental processes’ and ‘otherwise detrimental to the interests of Australia’ are so broad as to capture any range of matters that may challenge or question government decisions, policies or institutions,” the advice says.

“Somewhat innocuous examples may be civil society organisations who advocated to legalise same-sex marriage or those who advocate for refugee rights.”

Even though the bill limits the focus to “clandestine or deceptive” activities, Villa and Tang contend that “conducting activities in a clandestine way, or with some element of deception, is a tool in the armoury of some civil society organisations” including environmental groups.

GetUp’s own general counsel Zaahir Edries, who did not prepare the advice, said the law was “a chilling attack on our democracy and should send a shiver down people’s spine”.

Edries called on politicians from across the spectrum to “listen to legal experts and block these dangerous changes from becoming law”.

“These laws could target anyone seen as a threat. That means journalists, activists, members of civil society groups like GetUp, or anyone who holds government to account,” Edries said.

At a hearing in July, [intelligence chiefs sought to allay fears](#) Asio could use expanded compulsory questioning powers to target Black Lives Matter protesters, arguing the agency's overarching legislation prevented it from limiting the right of a person to engage in lawful advocacy, protest or dissent.

Mike Burgess, the director general of security, said the agency only got involved in protests "if they have intent to promote acts of violence and unlawful harm at the higher end".

Burgess is expected to face questioning at the Senate estimates hearing on Tuesday over a range of issues, including his [warnings about the growing threat](#) posed by right-wing extremists, which now [comprise as many as four in 10](#) domestic counter-terrorism investigations.