

20 April 2015

The Hon R Gyles AO QC
Acting Independent National Security Legislation Monitor
PO Box 6500
CANBERRA ACT 2600

By email: INSLMsubmissions@pmc.gov.au

Dear Mr Gyles

INQUIRY INTO SECTION 35P OF THE ASIO ACT

The Law Council of Australia is pleased to provide the following submission for your inquiry into section 35P of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act).

The Law Council acknowledges the assistance of its National Criminal Law Committee, the Bar Association of Queensland and the Law Institute of Victoria in the preparation of this submission.

The Law Council appreciates the importance of protecting participants in covert intelligence operations and the safety of participants or the effective conduct of such operations. It is also confident of the integrity and professionalism of our security agencies, including the Australian Security Intelligence Organisation (ASIO).

However, the Law Council is concerned the section may inappropriately capture legitimate reporting by journalists and others in the public interest. This concern can be addressed as set out below.

A number of the Law Council's observations about the operation of s35P are set out in our [submission](#) to the Parliamentary Joint Committee on Intelligence and Security about the National Security Legislation Amendment Bill (No. 1) 2014 and in Law Council's [public fact sheet](#) on section 35P.

Special Intelligence Operations

The *National Security Legislation Amendment Act 2014* (Cth) (NSLA Act) established a special intelligence operation (SIO) scheme. Its introduction was based in part on a recommendation by the former INSLM.¹

The SIO scheme permits the Attorney-General to authorise the carrying out of otherwise illegal activity during ASIO undercover operations.²

¹ See the Independent National Security Legislation Monitor's [Annual report 2014](#).

² *Australian Security Intelligence Organisation Act 1979* (Cth) s35C(2)(c).

The provisions grant participants of an SIO – including ASIO officers and affiliates – protection from civil and criminal liability.³ The type of illegal activity that may be permitted is far-ranging and is limited only by extreme criminal activity.⁴

Section 35P offences

Section 35P of the ASIO Act contains two offences for unauthorised disclosure of information relating to SIOs, to ‘protect persons participating in an SIO’ and to ‘ensure the integrity of operations’.⁵

Under subsection 35P(1) a person will commit an offence, punishable by a maximum of five years’ imprisonment, if he or she discloses information and the information relates to an SIO.

Under subsection 35P(2), a person will commit an aggravated offence, punishable by a maximum of ten years’ imprisonment, if he or she engages in the above conduct and either:

- intends to endanger the health or safety of any person or prejudice the effective conduct of an SIO; or
- is reckless as to whether the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of an SIO.

These offences can apply to any person, including for example, participants in an SIO, or any other persons to whom information about an SIO has been communicated, such as a lawyer or a journalist, should he or she engage in any subsequent disclosure. That is, there is no exception for where the information has already been disclosed publicly.⁶

Public Interest Disclosures

The section 35P offences apply where a person knows or is aware of a substantial risk that information relates to an SIO. Accordingly, it is unlikely that a person would be found guilty of one of these offences for disclosing information that he or she had no idea related to an SIO.

However, in practical terms, it may mean that journalists may be disinclined to report on potentially criminal or corrupt conduct rising out of ‘ordinary’ operations by ASIO out of trepidation that they were aware of a risk that the information may relate to an SIO.

There may also be occasions where a person, including whistle-blowers, lawyers, journalists and others, knows or is aware of a substantial risk that information relates to an SIO, but believes it is in the public interest to make the disclosure.

³ Ibid s35K. ‘Participant’ in a SIO means a person who is authorised under Division 4 of Part III to engage in special intelligence conduct for the purposes of the SIO. ‘ASIO affiliate’ means a person performing functions or services for ASIO in accordance with a contract, agreement or other arrangement, and includes a person engaged under section 85 and a person performing services under an agreement under section 87, but does not include the Director-General of Security or an ASIO employee – see section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

⁴ Paragraph 35K(1)(e) of the *Australian Security Intelligence Organisation Act 1979* (Cth) provides that the conduct must not cause death, serious injury, amount to torture or a sexual offence, or cause significant loss of, or serious damage to, property.

⁵ Revised Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2014 (Cth) 22.

⁶ Similar offences apply to the unauthorised disclosure of information concerning controlled operations and delayed notification search warrants, both of which are carried out by law enforcement agencies. Sections 15HK and 15HL of the *Crimes Act 1914* (Cth) (Crimes Act) contain existing unauthorised disclosure offences relating to controlled operations. However, the lower-level offence for controlled operations contains a 2 year maximum penalty (subsection 15HK(1) of the Crimes Act) compared to the section 35P(1) offence, which has a 5-year maximum penalty. Part 1AAA contains the delayed notification search warrant scheme and includes an unauthorised disclosure offence at section 3ZZHA of the Crimes Act.

The effect of the provisions is that nothing can be disclosed *publicly* about a SIO, including if it has been conducted illegally, or an innocent person is killed or tortured. For this reason, section 35P should be amended to ensure that, in extreme circumstances, journalists, lawyers, SIO participants and the public, are permitted to reveal illegal activity, misconduct or corruption that occurs in relation to an SIO.

Subsection 35P(3) sets out limited exceptions to the disclosure offences, for example, where the disclosure is in accordance with: a legal requirement; in connection with the performance of ASIO's functions or duties; legal proceedings and legal advice; or to the Inspector-General of Intelligence and Security (IGIS) or his or her staff for the purpose of the IGIS's performance of powers or functions.

However, there is no exemption for public disclosures made in the public interest by persons such as journalists or lawyers. The possible options for such people might be to refrain from making the public disclosure – even if they believe it is in the public interest; rely on the IGIS's processes to deal with the alleged conduct; or make the disclosure and hope that the Commonwealth Director of Public Prosecutions (CDPP) will not prosecute on public interest grounds⁷ and/or, in the case of journalists only, that the Attorney-General would not consent to a prosecution under section 35P.⁸

Current or former public officials who make a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) (the PID Act) would be protected. However, disclosures containing 'intelligence information' may only be made internally to authorised persons or to the IGIS. Intelligence information may relate to an SIO when it includes information about, or that might reveal 'operations that have been, are being, or are proposed to be, undertaken by an intelligence agency'.⁹ Broader public disclosures in the public interest are arguably not permitted under the PID Act scheme.

Potential amendments for improvement

Subsection 35P(2) provides a more appropriate model for a non-disclosure offence of this nature than subsection 35P(1). The difference between these offences is that subsection 35P(2) requires either:

- an intention to endanger the health or safety of any person, or to prejudice the effective conduct of a SIO; or
- that the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a SIO.

⁷ The CDPPs' [Prosecution Policy of the Commonwealth](#) provides that before the CDPP can commence a prosecution there must be a reasonable prospect of a conviction being secured (paragraphs 2.5–2.7) and the prosecution must be in the public interest (paragraphs 2.8–2.10).

Paragraph 2.10 of the *Prosecution Policy of the Commonwealth* sets out a list of factors which may arise for consideration in determining whether the public interest requires a prosecution to take place and includes the manner, form and timing of such disclosure, being in the public interest (as opposed to being merely of public interest).

⁸ On 30 October 2014 the Attorney-General issued a Ministerial Direction to the Director of Public Prosecutions pursuant to s.8(1) of the *Director of Public Prosecutions Act 1983*. The Attorney directed the Director not proceed with a prosecution of a person for alleged contravention of a relevant unauthorised disclosure offence without the written consent of the Attorney 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.

⁹ The lack of comprehensive protection for intelligence officers in relation to public interest disclosures was discussed by AJ Brown, Professor of Public Policy and Law, Griffith University, in his submission of 6 August 2014 to the Joint Parliamentary Committee on Intelligence and Security regarding the National Security Legislation Amendment Bill 2014 (Cth). In particular, Professor Brown noted that the protection available to intelligence officers was lesser than that which is available to law enforcement officers for public interest disclosures under the *Public Interest Disclosure Act 2013* (Cth).

Subsection 35P(1), by contrast, requires simply the intentional disclosure of information which relates to an SIO, regardless of the likelihood of it harming individuals or prejudicing the conduct of the SIO. Therefore, one means of alleviating concern about these offences may be to remove subsection 35P(1), and retain subsection 35P(2).

Alternatively, an additional legislative defence to the SIO offences could provide greater protection for those who, in *good faith*, make public interest disclosures. Such a defence would need to be framed in a manner which provides sufficient clarity, while still ensuring that information which is genuinely likely to result in serious harm to individuals, is not publicly disclosed.

In this context, the Law Council notes that paragraph 80.3(f) of the *Criminal Code Act 1995* (Cth) (Criminal Code) provides a good faith defence for treason offences where a person publishes in good faith a report or commentary about a matter of public interest.

In terms of a disclosure of information relating to a SIO, the Law Council considers that the defence would need to be broader and include situations where a person discloses – not only publishes – about a matter of public interest. This would ensure that individuals who make a legitimate public interest disclosure to a media organisation before the organisation publishes a report or commentary about the matter, will be protected in addition to journalists who may publish the matter. Similar to the good faith defence in paragraph 80.3(f) of the Criminal Code, the court would then be empowered to determine whether the matter was in the public interest.

A specific legislative exception that permits disclosures relating to an SIO, where the information is already in the public domain, could also provide greater certainty.

Consideration should also be given to permitting legitimate whistle-blowers to publicly disclose the fact of illegal activity but not the content of an SIO.

Such changes, which may also require consideration of comparable amendments to the PID Act, would accord with fundamental rule of law principles that the law should be certain, and not subject to executive discretion¹⁰ – such as relying on the discretion of the CDPP or the Attorney-General not to prosecute individuals for such offences.

Please contact Dr Natasha Molt, Senior Policy Lawyer 02 6246 3754 or natasha.molt@lawcouncil.asn.au should you require further information.

The Law Council looks forward to further engagement with you during your examination of the operation of section 35P.

Yours sincerely



MARTYN HAGAN
SECRETARY-GENERAL

¹⁰ See Law Council of Australia, [Rule of Law Principles](#), 19 March 2011.