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TRANSCRIPT OF PROCEEDINGS

**INDEPENDENT NATIONAL SECURITY LEGISLATION
MONITOR**

**AUSTRALIAN NATIONAL UNIVERSITY
ACTON, AUSTRALIAN CAPITAL TERRITORY**

**THE HON ROGER GYLES, AO, QC
Acting Independent National Security Legislation Monitor, Presiding**

PUBLIC HEARINGS

9.38 AM MONDAY, 27 APRIL 2015

MR GYLES: Good morning, all. Roger Gyles is my name and Christina Raymond, my adviser, is with me. I'll declare these public hearings open and welcome everybody who has come along to participate or to observe.

5 I was asked by the Prime Minister to review the impact on journalists of
section 35P of the *Australian Security Intelligence Organisation Act 1979*,
as introduced by the *National Security Legislation Amendment Act (No 1)*
2014, as my first inquiry in my role as Independent National Security
10 Legislation Monitor. This hearing is part of that inquiry and is being
conducted pursuant to section 21 of the Independent National Security
Legislation Monitor Act.

In addition to these public hearings, which will take place over two days, I
will be having private hearings in relation to that material which it is not
15 appropriate to be heard in public. I have called for written submissions, as
you know, or most of you know, and I have received 30 submissions. The
hearing part of the inquiry is an information-gathering session, to be
conducted in a non-adversarial and flexible way. I'm not conducting my
inquiry in the way that one might if there were a court case or even an
20 administrative proceeding against somebody. It's not a case of affording
natural justice; it's a matter of me receiving the benefit of the views of
people who have an interest in the field. It is an opportunity for me to
identify the key issues and understand the key stakeholders' views upon
them.

25 I will be asking for an opening statement. You're perfectly free to, in
addition to saying what you wish about your own position, comment,
critically or otherwise, on the submissions of others which have been
made public and are on the website. Having said that, I don't wish it to
30 get into an adversarial situation but people should be free to put on the
record what they would wish to say about what some others have said.

Each day, or the two days, will be divided into three sessions, organised
according to key groups of participants, based upon the written
35 submissions that I have received. Today's sessions are allocated, first of
all, to the media, with also an interloper from Parliament. The second
session, which will run from about 12.30 till 2.30, will be essentially the
legal profession, and the last session, from about 2.45, will be the human
rights and civil liberties sector. We'll adjourn for lunch at 12.00. That
40 program may turn out to be flexible. Either more time or less time may be
required. So be it.

We have scheduled people to speak because of arrangements which are
made in advance. If people who have made a submission, but have not

notified us wish to say something, they can always ask to do so, if there's time.

5 I would ask each of you who wish to speak to introduce yourselves, stating who you are and who you represent, and we can then decide what order we do things in. For those who are present and would wish to say something in the opening session, perhaps if they can come forward now and we can start the process.

10 I will ask some questions, of course. Some of the answers you may have at the fingertips. To the extent that you don't, take the question on notice but I would be grateful if you would let us have the reply within, say, seven days or so. As you will see, we are taking a transcript and that will be placed on the website and made public. If you would, in your own
15 order, announce who you are, who you appear for and whether you have a view about the order of contribution.

MR SUCKLING: My name is Adam Suckling. I work for News Corp and I appear for News Corp but also as a signatory to the joint media
20 companies' submission.

MR REID: I'm Campbell Reid. I'm Group Editorial Director for News Corporation.

25 MR MURPHY: Paul Murphy. I'm the CEO of the Media, Entertainment and Arts Alliance, appearing for them, and also a signatory to the Joint Media Organisations' submission.

30 MS SCHUBERT: Georgia-Kate Schubert. I'm the Head of Policy and Government Affairs at News Corp Australia, appearing for News Corp and also as a signatory to the Joint Media Organisations' submission.

35 MS FAIR: Good morning. I'm Bridget Fair. I'm the Group Chief of Corporate and Regulatory Affairs at Seven West Media. I'm appearing on behalf of Seven West Media and also as a signatory to the joint media submission.

40 MR GYLES: The joint media submission probably is a logical first step, isn't it, first place, I'd imagine?

MR SUCKLING: Would you like us to make some opening remarks?

45 MR GYLES: Yes, I would. I've read your submissions but I've also got 30 others I've had to read, too. I don't wish to pretend that I've got it all in my head at the moment. Obviously, some major strands are clear

enough but I'd be grateful if you were to draw my attention to those matters that I need to have in my mind that will also remind me when I read the transcript later.

5 MR SUCKLING: Of course. My colleagues have very kindly nominated me to make the opening statement, so I will proceed. I think, at the outset, what we would like to say is that, as joint media companies, we completely support the security agencies having the powers they need to fight terrorism and serious crime. However, in our view, the three Bills
10 the government has recently passed on national security all work together to have a chilling effect on reportage. There's the national security Bill that you mentioned, Mr Gyles, which prohibits us from reporting on special intelligence operations and matters relating to them for all time. Then there's the Foreign Fighters Bill, which potentially puts us in breach
15 of some provisions for reporting, even in news items, on matters that relate to the recruitment of people to fight overseas. Then there's the third Bill that was passed earlier this year, the Telecommunications (Interception and Access) Amendment (Data Retention) Bill, which undermines the ability of journalists to get information from sources. In
20 our view, those three Bills work together to have a chilling effect on our ability to cover important matters and matters that are in the public interest.

We understand, as you said in your opening, that at the moment your
25 reference from the Prime Minister is for 35P but you will have seen in our submission from the Joint Media Companies that we have urged you to have a look at the other pieces of legislation too. We have specific concerns about 35P but, before I go into them, I'll just make two comments by way of context.

30 We don't want to report on SIOs in a manner that would endanger the life of an ASIO agent but we may want to report on SIOs where, for instance, an agent is acting illegally or where an SIO was completed, is finished, and we want to talk about it once it's well-past. There are many other
35 examples, hypothetical examples, of instances where you might want to cover things in relation to an SIO but those are the sort of broad parameters.

40 In that light then, I guess, our concerns break down into three related parts.

The first is that the great uncertainty in the Bill means that there will be a chilling effect on reportage. A journalist cannot report on information they know relates to an SIO but they also cannot report on information
45 that they should know relates to an SIO. We said in our statement, in the

5 Joint Media Companies' submission, that our legal advice was that, even if we called up the Attorneys-General or the security agencies to seek confirmation or comment, they couldn't confirm to us whether one was or was not an SIO. We know that the Attorney-General's Department said that's not true and that officers of the security agencies would be covered by the exceptions but, even still, there's great uncertainty around what an SIO is and that we could be in breach of the law for reporting on one.

10 The second thing is, in our view, and Campbell can elucidate this further, having been a journalist for more than 30 years, that the government could use the legislation to close down reporting. You can imagine a circumstance in which one of our journalists calls up a senior officer in ASIO to receive comment on something and they may well say, "Well, listen, if I was you, I wouldn't cover that"; we wouldn't know whether it was an SIO or just an ordinary operation.

15 The third concern that we have is that the legislation is drawn very, very broadly. As the Seven West Media advice says, the phrase "relates to" is intrinsically broad and it's very difficult for us to see, as we look at the legislation, the outer bounds of activity that could relate to an SIO. It means that - I think Seven West covered this as well - many people sort of distantly related to an operation could be covered. I guess our fourth concern is that it's covered for all time, so there's no sunset clause on covering an SIO.

20 That's put, very broadly, our concerns.

MR GYLES: I invite anybody else to add postscripts that concern them.

30 MR REID: From a journalist's point of view, from the outset, we should stress that this is not about journalists wanting to get a story. The important people in this equation are the people who have information to relate to journalists and bring matters of public interest to the broader public's attention. The net effect of all of the commentary and discussion of this legislation is that if you are a whistleblower or a member of the public or, as in most stories of any kind of an investigative nature, a series of people with pieces of information, the situation we're in now is that every piece of this information simply makes it too dangerous to talk to a journalist. The knowledge that, if you are an agent or a whistleblower within government, there's a 10-year gaol penalty hanging over your head, that the foreign fighters legislation could mean that a relatively innocent public gathering could actually be a guise for recruitment activity that you may have some information about but you can't share, and then, if you contact a journalist, the metadata legislation means that, no matter if you are - conversations recorded or not, the trail of events of where you were

at a certain time will lead you to a position where the contact between you and a journalist is there to be completely exposed.

5 The overwhelming fear that I have is that, at a time of unprecedented
terror activity within our own suburbs, targeting children as young as, we
now know, 14 years of age, the legislation is in response to an
unprecedented set of circumstances. In my view, on behalf of the
profession's right to keep the public informed, the Australian public has
10 an overwhelming need and right to know what is going on in our society
at this point. The fear that I have is that important information that could
help parents understand the threat that their children could be placed under
is now shut down, and potentially shut down for ever. So this
extraordinarily dangerous episode in Australian society could effectively
be censored for all time.

15 As Adam said, we're not trying to reserve the right to catch agents out
doing the wrong thing but the fact that there is no ability to report, even
positively, how a perfectly-conducted SIO took place, unfolded and
caught or shut down a terrorist activity in society, I think, is a very
20 dangerous place for us to find ourselves in. Thank you.

MR GYLES: Any other comments?

25 MS FAIR: I just wanted to add one point, which is that a number of the
submissions to you, Mr Gyles, have highlighted the fact that there
shouldn't be different treatment for journalists and other classes of people.
That's a point that, I think, is worth addressing. We do feel very strongly
that the media plays a critical role in the proper administration of our
democracy, and it's a role that we take very seriously. It's for that reason
30 that we do feel that these issues require special consideration. Journalists
and - reporting on matters of public administration is a key way that
governments can be held accountable.

35 As Campbell said, we're not seeking the right to just willy-nilly report on
every possible misdeed but at some point we have to have a way for both
the executive arms of government and for people in government
themselves to be accountable. We feel very strongly that that's one of the
most important roles that the media play in this country and it's why we
have fought so hard on these issues.

40 MR GYLES: The point has been made already that a principal effect is on
the source anyway. That's part of the chain, to the journalist, of course.

45 MS FAIR: Yes.

MR SUCKLING: Yes. I think it's also worth adding, Mr Gyles, to that point, that the submissions also imply that there's nowhere else in the statute that journalists are treated differently, which is not true. I mean, the Privacy Act has a different treatment for journalists, there are shield laws, which recognise the place of journalists and, indeed, the amendments that the government made to the metadata bill also said, "Well, the sources of journalists should have a special status because - - -"

MR GYLES: Yes, I noticed that.

MS FAIR: And the High Court has recognised the special need to report on matters relating to government, as you would be well-aware.

MR GYLES: Yes. I should just say, as to the other matching or similar sections in other statutes - the point that you made has been made by a number of people. From the point of view of this inquiry, it's entirely appropriate for me to take into account the other pieces of legislation. I, of course, can, of my own motion, look at all these things. My own preference would be to wait until I was a bit more experienced before I did that. At the moment I am not disposed to, as it were, have a parallel inquiry to this one. That's still open to me to do and I'll think about that but I will take into account, when I'm looking at 35P, the fact that these other provisions exist and that similar arguments may run in relation to them. I won't shut my eyes to them, even if I don't decide to inquire into them.

Are there any other opening remarks?

MR MURPHY: I just wanted to echo the comments of my colleagues and say that our organisation has about 6000 journalist members in Australia, who are all bound by our Journalist Code of Ethics, which has been in place since 1944 and covers various aspects of the requirements on them to be independent and fair in the way that they do public-interest reporting. It's certainly our concern that this legislation, along with other, recent, pieces of legislation that have passed the Parliament - in our view, seriously undermine public-interest journalism and the lack of any public-interest consideration or defence is of serious concern to us.

We have one slightly divergent view from the rest of our colleague organisations in this submission, which is around the definition of a journalist in coming to some form of public-interest defence or exception. It's our view that any drafting needs to recognise the changing nature of the industry and the increasing number of journalists who are freelancers, who are occasionally engaged in legitimate journalistic practices but not fully employed in a professional capacity as journalists.

5 MR GYLES: Yes. I note that problem; it's obviously an issue for such a public-interest defence. I haven't closely looked at the metadata legislation but I gather that there is a journalists' exception there which is tied to, as it were, employment.

MR MURPHY: That's right. It's even more restrictive than the definition, for example, in the shield legislation.

10 MR GYLES: Yes. Certainly I'm aware of that point and thank you for drawing attention to it.

15 Those who are experienced in inquiries will know that anything I say in the course of these exchanges is purely to help me get my thinking straight, rather than expressing any view or hinting at any view. One thing I'm having a bit of trouble getting my head around is the - much of the debate doesn't really focus on - I'll put it another way. Much of what is said about SIOs could apply to any ASIO activity. I'm not quite clear in my own mind yet as to - I can see a basis for having a special regime for the SIO and I can see a basis that, in relation to such a situation, you may want to be careful about preserving and limiting because in at least a category of that, or a potential category, you've got people who are at serious risk of death or injury, either for themselves or close that they're associated with, by virtue of being undercover. That's what one thinks about. There's a strong interest in protecting those people.

20 An SIO I don't think has to be of that character because you can have your legal activity, which doesn't involve embedded, covert operatives, where the argument may not be quite so powerful as it is with the undercover operative.

25 First of all, there will not be much time to have many SIOs and I would have thought that there would be a limit to the number that you would be having because the breaching of laws isn't a necessary feature of these operations, but, as I understand your argument, anything which is said about what might be an ASIO operation, once that's on the table, you have the problem that you don't know whether it's an SIO or not. I follow that problem and I'll come back to it but what if it were simply an ASIO operation, what are the inhibitions at that point? If the source is an officer, the source would be caught by various secrecy provisions, I would imagine. I haven't studied this closely but I'm just wondering whether any of you have any thoughts that may help me about this.

30 MR SUCKLING: Is your point, sorry, that - - -

45

MR GYLES: My point is a bit diffuse at the moment, Mr Suckling.

MR SUCKLING: I guess, I think a number of things. One is, it does seem to be that to treat these operations completely differently is odd, so
5 some things just don't - not an SIO but as an ASIO operation - my understanding is, we can report on that, although we can't identify the identity of an agent because under the ASIO Act that's prohibited. I think our concern, and Campbell can add to this, in relation to - there is an argument - the government says, "Well, why are you worrying about this?
10 It's unlikely that it's going to be used often; there are only some circumstances in which we will need to make sure that undercover agents are protected by an SIO."

I guess, our concern is twofold. One is, we have been told by people in
15 government that, increasingly, because terrorist organisations are becoming more and more sophisticated and very, very aware of the way in which they're monitored, you've got a return to what used to happen at a much, much earlier time where you can't electronically eavesdrop on people and you need to have agents in the field working undercover. That, I think, gives us the view that, actually, this might expand out rather than contract because of the nature of intelligence work. The second thing is what Campbell alluded to, that in the course of doing journalism, if you're covering an operation like this, you will - certainly in our case, as a professional media organisation - always seek comment from senior
20 officers in ASIO about a thing like that; it's just something you do as a matter of course. Our concern is, in that instance, it can be used to stop reportage on an SIO, or even on something which isn't an SIO, simply by the senior officer saying, "Listen, I wouldn't cover that if I were you."

30 In the kind of coverage of these security matters, it really is a constant tension between what government and agencies want reported and what media companies want to report.

MR REID: To maybe just expand on that, and without speaking ill of
35 anybody, the conflict between journalists who want to tell stories and officials who don't want stories to be told is manifest and daily. So, therefore, again, the cumulative effect of this legislation is that it actually becomes kind of dangerous to make the inquiry in the first place because if you make the inquiry and then are hinted at that, "Actually this is an
40 SIO and therefore the threat of a gaol term is hanging over your head," the very legislation that is encouraging good behaviour actually inadvertently encourages recklessness.

45 If my experience with police media units is anything to go by, if they have the opportunity to tell you not to cover a story, as opposed to encourage

5 you to cover a story, they're going to go with the first option almost instinctively. It's not a situation where they're likely to say, "Yep, that's fine. You go ahead and cover it." You're more likely to run into the initial kind of stonewalling response, which leaves the journalist in a very precarious position.

10 MR GYLES: Is there any solution to that - let's say you were in charge, what would you do? Would you have a regime where there was an obligation to respond?

15 MR REID: I think that there has to be - I think it goes back to that original point, that the fundamental principle is that the public has a right to know and the role of professional journalism has to be acknowledged in the relationship between the journalist and the person who is asking the question, and there has to be the same level of shield law and whistleblower protection that applies in other areas applying here. In that environment, you can get to the situation we have now, where an inquiry that leads very close to an area where an operation could be imperilled if it's disclosed or a life put at risk - the way that that happens at the moment is that - usually what happens is that the inquiry escalates up to a pretty senior level very quickly and there is often a telephone conversation or a face-to-face conversation which goes along the lines of, "Look, you're right on the money, there is an inquiry underway," or, "There's about to be an operation", "Please don't say anything because, for the following reasons" and all of that conversation currently happens well out in the open between the questioner and the agencies.

30 I would say there has never been a case where an Australian media organisation has done the wrong thing and yet there have been innumerable cases where we've done the right thing, going all the way down to people holding people hostages and kidnapping inquiries which have been conducted through coded messages and classified ads in our own newspapers, where we simply haven't reported, or the Herron case, where there were contaminated tablets put on supermarket shelves. The media has always been brought into the tent, the reasons for why disclosure would imperil that operation have been frankly put and in every case the media has done the right thing.

40 The current legislation prevents, in my mind, that level of open conversation.

45 MR GYLES: Without going into whether you would prefer to have no 35P at all, if you do have that sort of regime, would it help to have an obligation upon ASIO to answer the question? Is it or is it not?

MR SUCKLING: I think the problem with that is that - I mean, I think they always will answer it if we ask them but they can - you see - but they'll answer it in a way, in our view - or they will potentially answer it in a way which is designed to close it down. So that an obligation to answer something within the framework of 35P, I think, gets us back to the problem that there's often an incentive on agencies to close down reportage, and in this instance they - I mean, in some instances it may be completely legitimate, as Campbell is saying, and in other instances it may be because they want to stop the reportage of something that arguably should be reported, like an agent acting illegally, for example.

MR GYLES: Illegally but outside the authorisation.

MR SUCKLING: Outside the authorisation of the SIO, yes.

MS FAIR: The lack of any defence means that, even if there is an obligation for ASIO to respond, you're not able to make an independent assessment of whether you should nevertheless still publish a story.

MR GYLES: No, that's true. If the answer is "Yes, I can identify that as an SIO," then you publish at your peril. That's clear enough but that's the intention of the legislation.

MS FAIR: Of course.

MR GYLES: At least it would help the uncertainty aspect.

MS FAIR: But the effect of that, just to sort of reiterate, I think, what's already been said, is that it leaves open a course of action for people involved in agencies and in government to suggest that they can't respond to inquiries because it may relate to an SIO. We obviously won't be in a position to know whether there is one or not, or whether the matter we're asking about is an ordinary ASIO matter or an SIO, and we have no ability to make a decision that, "Despite that information, this is of such a serious nature that we ought to proceed with publication." So, just the suggestion means that the effect of the legislation and the lack of any defence - means that it goes much broader than, I think, what would have been originally intended.

MR GYLES: Yes. What I'm asking you to think about is, if, rather than the present sort of wink-and-a-nod arrangement, there was an obligation upon the agency to state whether or not the information related to an SIO - it's not in the legislation at the moment, of course, but, if it were, would that be a way forward or a way backwards?

45

MR REID: Instinctively, I don't know the answer to that because - if you are told that it is, you've only asked the question because you know something, so then you are in possession of a whole bunch of information which - I guess, now you've asked the question, ASIO - I'm thinking out
5 loud here - ASIO has confirmed that it's an SIO; therefore, they now know that you know that an SIO was afoot, so "Who told you?" brings in the metadata legislation. You're still in a position of quite a lot of peril.

MR SUCKLING: I agree with Campbell. What that does is gives some
10 clarity on not being able to - - -

MR GYLES: On the recklessness defence.

MR SUCKLING: That's true, but you still have the problem, as
15 articulated in some of our examples, of the agent, say, for example, who is acting outside the scope of it - if we are specifically told it's an SIO, then we can't cover that. I think we would all argue that there may be circumstances, and it's very difficult to be completely - it depends on the specific circumstances. There may be circumstances where it is in the
20 public interest to report on something that's an SIO, either after it's occurred or because it's gone off the rails, let's say.

MR GYLES: That's the big question, I suppose, isn't it?

MR SUCKLING: Yes.

MR GYLES: As I glean from what's said at the time the legislation was passed, and since, in the submissions - it's said that, so far as time is concerned - and indeed it is said that any material which is published
30 about it could well identify either particular individuals or groups of people or methods of investigation and so on, which may appear innocent on their face and very minor but may enable the dots to be filled in, so that the terrorist organisation can identify either the ASIO officer or the authorised person, and there will be repercussions or they can identify that a particular modus operandi was used in that particular case. They say, even - I'm presuming that they would say, it hasn't quite been said, that, even if it goes astray and there are ways in which that operation could be legitimately criticised, that yields to the protection of the individuals and the modus operandi. That's the big collision.
40

MR SUCKLING: That is the collision but I guess we would say two things to that: (1) to Campbell's earlier point, it is - and I can't make this as a completely definitive statement but it is currently an offence to identify an ASIO agent, under the ASIO Act, and we - certainly in the
45 case of News - have reported on lots and lots of ASIO operations and I

5 don't think - I'd have to check this but I don't think you can point to an instance where we have identified an agent. Then, in the drafting we suggested for the exception, we were very clear that, in reporting it, you couldn't identify an ASIO agent. I know you could argue, "Well, perhaps inadvertently you would do it," but - - -

MR GYLES: Yes. That is said, I think.

10 MR SUCKLING: Exactly, but I think, if you look at the history of it, we haven't done that.

15 MR GYLES: I suppose the other element that's got to be taken into account, at least, is put forward, is that there is a means of redress, namely, the Inspector-General of Intelligence and Security - inspector-general - I get all these acronyms mixed up - the IGIS - - -

MR SUCKLING: IGIS, I think, they call him or her.

20 MR GYLES: Her at the moment. The statutory remit there is wide enough to - I would have thought, without having studied it closely - pick up the botched operation, the operation that goes too far, the operation where individuals act in their own interests, et cetera, the examples that have been given.

25 MS SCHUBERT: I think we could probably observe that that would be more likely classed as an internal disclosure, where the whistleblower laws, the Public Interest Disclosure Act, are limited in external disclosures anyway but, certainly, reporting to IGIS would be keeping it in the tent, so to speak, notwithstanding the fact that that is an independent position. It is still within the government, so there is still this limited or zero ability to actually have that material brought to the public's attention.

35 MR GYLES: Yes. That's true but the argument is, inherently, that anti-terrorism and counter-espionage, which is part of ASIO's function, are, of their essence, to be done in secret and have the secrecy protected. The normal exposure doesn't apply but you have the ability to - the person who has that knowledge has the ability to go to an independent statutory officer and have matters looked at at that level, which is similar to a citizen going to the Ombudsman and so on.

40 The question I'm asking is, what's wrong with that? That's put forward as an answer, so what's wrong with it, I suppose, is my question.

45 MR SUCKLING: Listen, I think - sure, it is a protection but I guess, you know, as media companies, so long as we're not imperilling national

5 security or - our view would be, sunlight's the best disinfectant and that
there are many instances over the course of reportage where you keep
something within a tent or within government and it doesn't, in our view,
often lead to the best scrutiny. I'm not in any way suggesting that the
10 current IGIS wouldn't do a fantastic and exemplary job but I think, as
media companies, just the idea that everything is kept within government,
or within the bureaucracy, and is not exhibited to external assessment and
analysis is something that leaves us very uncomfortable and, we think, can
be used in a way of stopping the public learning things that they should
learn.

15 MR REID: Even to the extent of - and I'll trip up on the right description
of these people but, when the invitation or the opportunity for media
companies to argue why 35P should be lifted, the special advocate, I think
that's the phrase, is invited to make representations on behalf of the media
companies - - -

MR GYLES: That's in relation to the metadata.

20 MR REID: That's the metadata, but the point I'm trying to make is that,
at every step in all of this legislation, nobody from outside the machinery
of government is invited in to - at any stage, even people representing us,
we hope are representing us, are not appointed by us or briefed by us in
any way. So, the underlying philosophy is "It's a closed shop."

25 MR GYLES: Yes. The counter-argument, of course, is that there's a
world of difference between the government of the day and an
independent statutory officer. That's the argument against that. That
statutory officer has the role - answerable to the Parliament. I haven't
30 studied exactly who can make complaints and so on, but I have to do that
more carefully than I have today.

35 Another issue that's been raised, and I'm not sure what you say about it, is
that, if an operation does seriously go amok and people are carrying out
illegal acts going beyond those which are authorised - I've seen a
suggestion somewhere that that may not be relating to the operation
because it's a frolic of their own. That would no doubt be a legal question
to be answered, I think.

40 MS FAIR: I think the Seven West advice that's included with our
submission directly address that point because it was a point made to us,
that if somebody was murdered in the course of an SIO you couldn't
report it because it would be relating to an SIO. The view that was put to
us was, "Well, that would be - if it was outside the scope, then it's not
45 relating to the SIO. Therefore it isn't - there's no issue," but I think our

5 advice on that point was that in fact it is potentially a problem because, if
an SIO is in place, when something goes off the rail, you still would be
reporting something. “Relates to” is such a broad concept that, you know,
even reporting things that shouldn’t have happened and were even illegal
in relation to the SIO, you’d be disclosing something that relates to the
SIO.

10 MR SUCKLING: They say specifically - and I hope you don’t mind me
quoting your very fine advice.

MS FAIR: No. Go for it.

MR SUCKLING: The advice says that:

15 *Although the outer meters and bounds of 35P cannot be stated
comprehensively, it could encompass acts outside the scope of an
SIO, including illegal acts by ASIO agents covered by an SIO.*

20 MR GYLES: Yes. Are there any major issues that we haven’t touched on
that you would like to explore more?

MS FAIR: I did want to raise a point, if it’s the appropriate time,
Mr Gyles, about a couple of matters that were raised in submissions from
the Attorney-General’s Department and ASIO.

25 MR GYLES: Yes. One of the purposes here is - if you wish to do that,
I’d be grateful.

30 MS FAIR: There was one major issue in particular, which is that, in the
submission from the Attorney-General’s Department and ASIO, the policy
rationale for some of these provisions has been described as being that:

35 *The very disclosure of the existence and conduct of an SIO
creates an unacceptable risk that the operation may be
compromised and that the safety of participants, and potentially
their family or associates, may be jeopardised.*

They go on to support that:

40 *Support for this policy rationale is found in the ALRC report on
Secrecy Laws and Open Government in Australia.*

45 In particular, it’s stated in the submission that the ALRC concluded that
secrecy offences in respect of intelligence-related information did not
need to include an element of requiring proof of harm or intent to cause

5 harm in making a disclosure on the basis that the harm is implicit, but it's
our view that a proper reading of the ALRC report doesn't support that
approach. As you would know, section 35P criminalises disclosure by
any person. The ALRC report, in the respect identified by the
Attorney-General's and ASIO's submission, was dealing expressly with
10 offences of disclosure by intelligence officers. That report stated that:

10 *The ALRC considered that a prohibition on the disclosure of
information obtained or generated by intelligence agencies is
justified by the sensitive nature of the information and the special
duties and responsibilities of officers and others who work in and
with such agencies -*

15 I won't go on to read the rest of it.

When the ALRC considered different secrecy provisions which reached
all persons, it was prepared to accept offence provisions that were
narrowly tailored. With reference to examples in the Witness Protection
Act and the Crimes Act, the ALRC said:

20 *While these offences cover disclosures by any person, they are
limited to particular information, the disclosure of which causes,
or is likely to cause, harm.*

25 Section 35P(1) lacks any element of harm but does relate to a broad class
of persons, not specifically people working in intelligence agencies. It's
therefore, we say, the combination of the two broad-reaching mechanisms
which takes 35P well beyond what was envisaged in the consideration of
these matters by the ALRC. We're happy to put these matters to you in
30 writing but it was a very important point that we thought we should raise
today.

MR GYLES: If you would just follow up with a reference to those
paragraphs, that would be good.

35 MS FAIR: Great. Sorry, the other point I'd like to raise is that it's also
been put a number of times that similar provisions in relation to the AFP
and the lack of any prosecutions in relation to those matters is evidence
that there's no problem with these kinds of laws. We would in fact say
40 that it's probably evidence that they're working in the way that we fear,
which is that it's impossible to examine any of these matters. We also
would say that the fact that there are already laws in relation to the AFP,
which may not have come under the same amount of scrutiny in these
laws, isn't a good reason just to broaden their scope; we would in fact see

the same concerns ought to be ventilated in relation to those laws as in relation to these ones.

5 MR GYLES: Yes. I suppose a possible use that could be made of those would be to say, "Well, let's assume there have been a number of controlled operations" - the fact that there are no prosecutions doesn't tell you much, I think we could agree with that, but it hasn't stopped reporting of general police activities. That would be used by those countering what you're saying to say, "Well, it hasn't chilled general police reporting - the risk that you might be reporting a controlled operation." That's worth 10 thinking about, worth just putting it in the mix about that. Do you have any immediate reaction to that?

15 MR SUCKLING: My immediate reaction to that is that - and it has been consistent in our conversations with people throughout this process - it's been said to us often, "You guys, the media, accept that these laws and the law we're putting in place either reflects that or is similar to that," to which - our response to that is, "That was then, this is now and maybe we should have been more active at that time," but, in my mind, it's nonsense 20 to cast this discussion about these new laws in the light of what has gone before. To go back to my opening remarks, we were in an unprecedented situation, so, of course, our radar and our responsibility to keep the public informed is at a higher level than the previous laws, which were kind of in the course of what we might - you know, normal events of a society that 25 has been turned on its head since the war on terror and we should be responding to fix this legislation and not be burdened with "Well, you accepted that, so therefore that's okay." Times have changed.

30 MS FAIR: I think it would also be fair to say that we should have made more of a fuss at the time.

MR SUCKLING: Yes, we should have.

35 MS FAIR: We didn't and that's, you know, something that should - these issues should have been ventilated similarly in relation to the passage of those laws.

40 MR GYLES: There has been some experience, that's my point. I don't know what one takes from it. It depends which way you look, I imagine. There's been very little experience, as far as we know, with the SIOs as yet.

45 MR SUCKLING: I would completely support what my colleague said but we can - can we look again at that sort of - - -

MR GYLES: Yes.

MR SUCKLING: I think your point is, "Well, you've had experience of this. Has that had a chilling effect?"

5

MR GYLES: Has it chilled general police reporting? I don't know, I have no idea, so any responses would be - any response will be put on the record in some way, in the same way that the transcript is put on the record.

10

MR SUCKLING: That's fine. We have no problem with that.

MR GYLES: Any other comments that anybody has about other submissions or anything else we need to do?

15

MR SUCKLING: I think that covers it. Do you have anything more?

MS FAIR: No. I think you've raised a couple of important questions for us to come back to on this morning, particularly in relation to the role of the IGIS, and we certainly will do that in a timely manner.

20

MR SUCKLING: Seven days, I think he said.

MR GYLES: If that's possible. I don't want to be silly about it but we do have to start actually doing something.

25

MS FAIR: Yes, moving things. I think it's also important to consider why similar rules, and this was addressed also in some of the submissions from government, around section 34ZS of the ASIO Act, which does have at least sunset provisions for some of these matters - whether the arguments that are drawn to distinguish the considerations there from the considerations in relation to SIOs really have the weight that they're given in those submissions. We'd certainly like to come back to you those matters.

30

35

MR GYLES: Thank you. One general comment, and I'll say this to other people if I remember it, is that I am interested at least in the position overseas and, if there's anything you wish to contribute in that respect, I'd be happy to receive it. That may include not just the legislation but practices as to what protocols exist and so on. That's probably - - -

40

MR SUCKLING: Thank you for your time.

MR GYLES: Not at all. Thank you for your time.

45

MS FAIR: Thank you for the opportunity.

MR GYLES: We might just take a five-minute break.

5

ADJOURNED

[10.36 am]

10

RESUMED

[10.44 am]

MR GYLES: I welcome Senator Xenophon and Dr Clinton Fernandes from the University of New South Wales to speak to their submission.

15

SENATOR XENOPHON: Thank you. If I may commence and Professor Fernandes will go into much more detail about the technical aspects of this and broader issues.

20

MR GYLES: Thank you.

25

SENATOR XENOPHON: Can I just make mention to your remark that I'm the interloper from Parliament, yes, I'm here. I'm here because Parliament has voted on this. There has now been some concern amongst some of my colleagues about the scope of this. My colleagues won't necessarily listen to me but I expect they may well listen to you, Mr Gyles, in terms of what you determine as to the scope of this legislation and in the context of this review. I make the following brief opening remarks - - -

30

MR GYLES: May I say, I welcome your appearance very much.

35

SENATOR XENOPHON: Thank you. It's unusual for me to be at this side of the table but it's a good thing. I make the following brief opening remarks before handing over to Professor Fernandes, who has a particular expertise and depth of knowledge in matters of national security, intelligence operations, whistleblower protection, metadata retention and the protection of journalist sources, all of which, I submit, are inextricably linked with a consideration of section 35P. The central tenet of our submission is that section 35P imposes a disturbing, indeed, dangerous, constraint on the ability of a democratic society to scrutinise and expose the actions of the executive, and, further to the submissions that you've just heard, the evidence you've just heard, particularly in the absence of laws governing free speech and protection of journalists more broadly.

40

Sir Gerard Brennan CJ made this observation about executive power back in 1997, which is even apposite today:

5 *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.*

10 We suggest that section 35P, combined with a lack of whistleblower protection laws and the impending metadata laws, will create a perfect storm that will inevitably lead that to the glare of light that should be focused on the executive being dimmed, if not extinguished, in such matters. I fear it will lead to a darkness that will allow misuse of power to flourish. In particular, the aggravated offence provision in section 35P, in
15 the absence of any real or effective safeguards, goes well in excess of what is needed to protect the safety of ASIO officers because it also acts to gag any reasonable disclosure of a special intelligence operation. We agree with the Joint Media Organisations' submissions that you ought to consider, in the context of this review, the implications of what are
20 essentially concomitant provisions in the Crimes Act, namely, sections 15HK, 15HL and 3ZZHA.

25 Before I hand over to Professor Fernandes, I wish to raise my concerns at the apparent tardiness of the Attorney-General's Department, ASIO and the AFP in providing their submissions to you beyond the nominated deadline of 20 April. I find it extraordinary for these three organisations who are the fulcrum of this legislation, with their enormous resources, or it appears enormous in comparison to those of my office and Professor Fernandes, who has no supporting staff, to put their submissions in late. I
30 question whether those organisations have cynically put their submissions in late in order to have the last word with the submissions that were already provided to by the deadline.

35 I respectfully suggest that three things should arise out of this: firstly, there ought to be an explanation sought for the delay; secondly, those who have already made submissions within time should have the opportunity, in turn, to make supplementary submissions to the matters raised - and I know that you've given an invitation today which I think will deal with that; and, finally, insofar as you have been provided with confidential
40 submissions, I urge you to release those parts of those submissions, or a summary thereof, provided, of course, it does not compromise either the identity of ASIO agents or jeopardise any current or future operation by ASIO or indeed the AFP.

5 In summary, section 35P is presented as an attempt to protect ASIO officers but its effect will be to shield the executive branch from media scrutiny. There are already laws to protect ASIO officers, a public-interest defence, however robust - and I have put one up in the Parliament, which was rejected - is still only a second-best option to the repeal of section 35P.

10 My colleague, Professor Fernandes, will now elaborate on this and related matters.

15 MR GYLES: I can make one small comment. I think part of the delay by those authorities was that I asked them for information, not just their opinion about things, and that may have contributed to the delay. I'm not speaking for them but I think it's fair to point out that we gave them a shopping list to provide us with - - -

SENATOR XENOPHON: Mr Gyles, I would much rather blame ASIO, the AFP and the Attorney-General's office than you. Let's leave it at that.

20 MR GYLES: Yes.

25 DR FERNANDES: Good morning. My background is: I spent 15 years in the Australian Army, I was an intelligence officer - since these are public hearings, I won't go into details of various operations or specific areas of expertise; I now teach in the International and Political Studies Program at the Defence Force Academy campus of the University of New South Wales; and I'm also a researcher at the Australian Centre for Cyber Security at the same university campus.

30 My core proposition is that 35P is presented as an attempt to protect intelligence officers but it's really an attempt to shield the executive branch of government from the media and, by extension, from the public. Section 92 of the ASIO Act already makes it an offence to disclose or identify the identity of officers. Parliament could repeal 35P and ASIO officers and their identities would still be protected. The Intelligence Services Act also contains offences in terms of disclosing intelligence-related information.

40 What 35P does is impose unprecedented new restrictions. Even the Archives Act has a 20-year rule for most records and a 30-year rule for Cabinet notebooks, but 35P represents total executive overreach. The way 35P is framed and the Commonwealth Director of Public Prosecutions' advice to you show that it is designed to be hugely problematic for journalists. I'll give two examples. One, it will require them to give up the exclusive. As the prosecutor has said, when deciding whether to

5 prosecute, he's going to take into account any measures the journalist took to report the alleged criminal misconduct by appropriate avenues; in other words, forcing the journalist to give up their exclusive. Two, it will intimidate them into writing stories with low credibility, because the other thing that the prosecutor is going to take into account is whether the journalist has revealed names, dates, locations and other specifics; it will force journalists to say things in the most general and abstract form.

10 Supposing a journalist discovers that a special intelligence operation has been ordered, not for national security reasons but in order to advance the profits or share price of a company. Supposing the operation goes well, nobody is corrupt, nobody is hurt. It's still in the public interest for the story to be reported but section 35 will prevent this forever. As such, it shields the executive branch of government from the media.

15 MR GYLES: Can you give me a closer scenario than that? What did you have in mind there; how would it - can you think of an example where the company might be - somebody might be - - -

20 DR FERNANDES: Sure. I can give you a real-world example, rather than hypothetical, except it involves ASIS rather than ASIO. What level of privilege are we covered by here?

25 SENATOR XENOPHON: That's an interesting question.

MR GYLES: We're covered by qualified privilege; that is, provided there's no malice - - -

30 DR FERNANDES: Sure. There's a real-world example involving ASIS, in which the former director of all technical operations for the Australian Secret Intelligence Service complained that he had been ordered to bug the premises of the Timorese Government and then he was alleged outraged, at the end of that, when the Secretary of the Department of Foreign Affairs and Trade then resigned and took an appointment as part of the board of directors of Woodside Petroleum and this person, known as Witness K, is reported to have felt that that operation was ordered not for the national security of Australia, because Timor presents no threat to Australia, but, rather, for the share price and the financial interests of a particular corporation. I'll give an example which relates to what I said earlier about this kind of law that will require journalists to give up the exclusive and intimidate them into writing stories with low specificity.

40 The story is from Fairfax on 1 March 2015. It is significant, it's a matter of public interest, rather than something that the public might find interesting, and it's also credible because of the way it was reported.

Section 35P would kill it. The significance of the story is that the former director of all technical operations complained that the bugging operation was immoral and wrong, quoting him, because it served not the national interests - - -

5

MR GYLES: This is still the Timor matter, is it?

DR FERNANDES: That's right. It's credible because of the following details. The reporter in question, Dr Philip Dorling, wrote that the listening devices were activated by a microwave beam directed from an external location - in this case an upper-level suite at the Central Maritime Hotel, which is a floating hotel moored off the Dili foreshore - with a direct line of sight to the government offices about 500 metres away. Digital recordings were hand-delivered to the Australian Embassy and transmitted to Canberra for analysis. No ASIS or ASIO officer's name was identified, nobody was put in danger for it, but the details in that story are what made it credible; yet the Commonwealth Director of Public Prosecutions' advice is that one of the things he would take into account in deciding whether to prosecute is details of dates, locations and other specifics. In other words, it forces journalists to write stories with low credibility.

I'll just close my opening remarks by saying that the terrorist emergency after September 11, 2001 has lasted longer than both World Wars combined and provisions of the counter-terror laws that have not been used may be unnecessary. I'm quoting from the very first report made by your predecessor:

The necessity of any law curtailing personal liberty should appear from demonstrations or arguments that make their operation concrete. A law introduced to meet a need presented by urgent or grave circumstances should be explicable by reference to cases or situations in which the law can reasonably be envisaged to operate. If no such cases or situations have occurred for, say, a decade, then it is a reasonable approach for the Independent National Security Legislation Monitor to question any further need of the law.

Has the media actually been irresponsible, has the situation deteriorated to the point where section 35P is necessary? According to the advice that you have sought from the Commonwealth Director of Public Prosecutions, nobody has been prosecuted or referred to for prosecution for analogous offences under the Crimes Act, like, controlled operations, assumed identities, witness protection for law enforcement operations, questioning and detention warrants, publication of identification of ASIO

officers, delayed-notification search warrants. Nobody has actually been prosecuted for these things, so what is the necessity for this law, other than to shield the executive, in perpetuity, from media scrutiny?

5 MR GYLES: There is one interesting question arising from that, I suppose, that's crossed my mind. One explanation may be that to prosecute will force more disclosure than the article complained of or the disclosure complained of. That's a dilemma. If you've got a breach of a secrecy provision and you prosecute it, then you may well be in a position
10 where more is disclosed than - - -

DR FERNANDES: Not necessarily, and I'll tell you why, because there are precedents for this, for shielding and issuing non-publication orders on classified material. In the INSLM's earlier reports, they talk about the
15 Simon Lappas case from DIO, where a Defence Intelligence Organisation analyst was convicted of leaking material, and the material itself remained hidden from the public, or the media. There are other cases which are from the AAT, in fact, the cases are *Fernandes v National Archives* [2011] and *Fernandes v National Archives* [2013] - I am the Fernandes in
20 question - where they have issued a section 36 certificate to prevent everybody, including the applicant, from finding out the details of what it is they are contesting. So there are precedents for how prosecutions could be done, such that more information is not released.

25 MR GYLES: I appreciate that, but, it's just a point, it does create a risk. It depends on the Judge and what disclosure or non-disclosures are made and so on.

DR FERNANDES: Yes.

30 SENATOR XENOPHON: It's a risk that could well be managed by the non-disclosure or by the orders.

MR GYLES: Yes, possibly.

35 SENATOR XENOPHON: Yes. Can I just address briefly the issue of IGIS, the Inspector-General of Intelligence and Security?

40 MR GYLES: Yes. It's a fairly basic point, isn't it, because that's said to be the avenue for legitimate complaints?

45 SENATOR XENOPHON: May I suggest, respectfully to the Inspector-General, that - if I can forward to you some of the interchanges I've had with the Inspector-General during Estimates - they are not an independent statutory office as such but they are subject to coming to Estimates to

5 answer questions. I think the questions that they've answered in the last two Estimates have amounted to five minutes because of timing constraints, not the Inspector-General's problem. I suggest that the level of scrutiny, the level of transparency is woefully inadequate. I'm not criticising the Inspector-General herself for that but I am suggesting that it does not provide a robust mechanism for scrutiny and I respectfully suggest - you can read the Hansard, I'll forward that to you, and you can make up your own mind as to whether you think it's an adequate level of scrutiny.

10 DR FERNANDES: Yes. It's a function of the office, rather than the person.

15 SENATOR XENOPHON: Yes.

MR GYLES: Yes, of course it is.

DR FERNANDES: Yes.

20 MR GYLES: Is the criticism the effect of the legislation or the way it's being construed or - - -

25 SENATOR XENOPHON: It could be a combination. I think there are arguments for the legislation to be even broader and I think there are arguments, that your predecessor suggested, that the legislation that governs your functions ought to be broader. I would heartily support that in terms of the way that you can conduct inquiries and even perhaps that absolute privilege be afforded to those that appear before you.

30 MR GYLES: Yes. That's a problem. I think some of the comments about the Timor matter are obviously quite sensitive, and qualified privilege has its limitations.

35 SENATOR XENOPHON: Yes, and I can feel some amendments coming on in respect of that. That's something - - -

MR GYLES: If you're going to have a public hearing, it makes it a bit difficult.

40 SENATOR XENOPHON: Yes, it does.

DR FERNANDES: If there's a sensitivity - we can take, say, two hypothetical scenarios.

5 Supposing a government orders ASIO to conduct an operation targeting
visiting members of the United Nations, the Secretary-General of the
United Nations, or the International Committee of the Red Cross, for
example; to a certain extent that would be in violation of the Vienna
10 Convention on Diplomatic Relations because you're not supposed to
target certain people, the Secretary-General of the United Nations and
maybe parts of the International Committee of the Red Cross. If the
operation goes well and no ASIO officer is corrupt, nobody gets hurt, if
it's still in the public interest some years later for a newspaper, or media
15 of some sort, to report it, under 35P, it's banned forever.

Another example. What if, in order to - - -

15 MR GYLES: Let's just tease it out.

DR FERNANDES: Sure.

20 MR GYLES: What would be the need for a special operation in that case,
though?

DR FERNANDES: The ICRC has access to refugee information in
Northern Syria, Northern Iraq which may hypothetically give them
insights into the operations of the Islamic State.

25 MR GYLES: Yes, but what's the illegality which would need to be dealt
with? That's the point.

30 DR FERNANDES: It's perfectly legal. That's the point. The scandal is
not necessarily always what's illegal. The story and the matter of public
interest may be what's legal. The fact that a government has ordered this
five years from now - why shouldn't the media be allowed to report it?

MR GYLES: If it's not an SIO - - -

35 DR FERNANDES: Suppose it's called an SIO.

MR GYLES: You mean just to cover it?

40 DR FERNANDES: Yes.

MR GYLES: Without the need for any of the authorisation of illegalities?

45 DR FERNANDES: Yes. There is a convention in which the next
government will never find out what the previous government ordered. I
don't know exactly what I'm allowed to say on this but I would be very

5 surprised if the three foreign ministers that were foreign ministers during the Labor Government of 2007-2013 were fully briefed about the bugging operation against the Timorese. The normal convention is that the Cabinet Secretary will not tell the next government what the predecessor ordered. The media are the only institution that can shed light on this kind of question.

10 SENATOR XENOPHON: There's also the issue that former New South Wales Supreme Court Justice Anthony Whealy has stated publicly in terms of this particular legislation. He expressed concerns about the so-called safeguard of the Attorney-General having to authorise a prosecution under section 35P. He said that 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
15 unlikely the Attorney-General would do other than consent; after all, he's heard only one side of the story - he doesn't really know the journalist's position at all. It's interesting that Mr Whealy says that there should be some type of defence centring upon the public interest. Our position is that you don't need 35P because of all the other protections in section 92
20 but the fall-back position is that former Whealy J suggested the public interest ought to be considered at the centre of this, but he also said that:

25 *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.*

30 That was in an interview late last year. I'm suggesting, I wonder whether the Parliament did its job in appropriately scrutinising legislation.

MR GYLES: That's not for me. It's in and now I've got to look at it.

35 SENATOR XENOPHON: It is not for you directly but it is for you in the context of, if the Parliament did not appropriately scrutinise the intended or even unintended consequences of the legislation, then your statutory remit provides you with that opportunity to closely and forensically examine the legislation and its potential effects.

40 MR GYLES: Yes. I'm not constrained either way, really.

SENATOR XENOPHON: No, not at all.

45 MR GYLES: As to the public interest defence, how would that work; would there be a definition of the public interest in this field or - - -

DR FERNANDES: It's a joint submission that I myself just want to see 35P repealed.

5 SENATOR XENOPHON: Can I say it is a joint submission and that is our first position but a fall-back position - - -

MR GYLES: Position B.

10 SENATOR XENOPHON: Position B - position A is get rid of it. You don't need it, for the reasons that Professor Fernandes has set out. Position B is that, if 35P does exist, there ought to be appropriate safeguards in 35P and I'd suggest - - -

15 MR GYLES: Sorry to interrupt you but you say either limb of 35P or both limbs should go?

DR FERNANDES: I do, yes.

20 SENATOR XENOPHON: Yes.

MR GYLES: The second limb of 35P, dealing with intentional harm, would not be covered as such by the existing legislation, would it?

25 DR FERNANDES: I haven't got the thing in front of me but I think it's 35P(2)(c)(ii).

MR GYLES: Yes.

30 DR FERNANDES: That, to me, seems particularly egregious; 35P(2)(c)(ii). I haven't got it in front of me.

35 SENATOR XENOPHON: It is quite broad. There is no suggestion, I think, in our submission - in our submission we made it very clear that our intelligence agencies ought to be able to do their work in the national interest, for national security purposes, and also that ASIO agents, those who may be informers for ASIO, ought to be protected. There is no question of that but the issue is that, if 35P stands, there ought to be at least a robust public-interest defence in respect of that. I think the point that Professor Fernandes is making is that there are already safeguards in place.

40 DR FERNANDES: Yes. I'm sorry, I've found it; just cancel what I said before about 35P(2)(c). 35P(1), definitely I would like to see that repealed.

45

MR GYLES: Yes. I understand that.

5 DR FERNANDES: 35P(2), it's where they say "either they intend to endanger the health or safety of any person or prejudice the effective
conduct". To me, they are binding in two things. If you intend to
endanger the health or safety, or even if it will endanger the health of any
person, that's not a good thing, of course, nobody wants to see that, but
where they say that it will prejudice the effective conduct of a special
10 intelligence operation - that happens as a very fact of disclosure, unless it
happens post hoc. For example, if you were to report on a special
intelligence operation, say, a year after it was finished, it wouldn't
prejudice the effective conduct of that special intelligence operation, but
the whole thing is illegal under 35P.

15 MR GYLES: Yes, but 35P(2) - at least, 35P(2)(c)(i) - would not be - it's
not as offensive, on your premise, I wouldn't have thought, as the others.

DR FERNANDES: Yes.

20 MR GYLES: I don't know that it's covered by the existing - I don't think
it would be covered by the existing secrecy provisions. I think many
people would see an intentional disclosure to harm or to effectively - - -

25 SENATOR XENOPHON: If I may address that.

MR GYLES: Yes.

30 SENATOR XENOPHON: It's something that I made very clear on the
Parliamentary record as well. There is no question that any intentional
harm or even a reckless causing harm to jeopardise the life of a security
officer is something that must be avoided. What we're suggesting is that
35P is so broad in its remit, so wide-ranging and all-encompassing, with a
whole range of consequences intended and unintended, that it ought to be
repealed. I have no issue and Professor Fernandes has no issue that there
ought to be a provision, a safeguard, for ASIO officers and their
informants, so that they are protected. We're talking about all sorts of
operations.

40 DR FERNANDES: The first element of our submission made it very
clear that we were not questioning that at all; we're completely supportive
of it - in fact, the only thing that is the national interest.

45 SENATOR XENOPHON: Yes. 35P is so deeply flawed in its current
form that there ought to be a specific clause that protects those officers
engaged in operations, we need to start again, although it is so broad that,

5 forever and a day, we cannot look into it. We've just been through Anzac Day and the 100th anniversary, and I re-read on the weekend Lachlan Murdoch's oration just last year about his grandfather, Sir Keith Murdoch; if the events at Gallipoli were a special intelligence operation, it never would have seen the light of day. If Sir Keith Murdoch couldn't have provided a memo to the Prime Minister to report on what had occurred, the loss of life may well have been much greater. I think that that is a poignant and telling example, an extreme example, if you like, but it goes to show that the media's role in bringing to light some of these operations is manifestly important and, also, what a special intelligence operation is can be anything that, I think, the Attorney designates it to be, consistent with - - -

15 MR GYLES: Yes. I think that one needs to look at 35P. You can't look at 35P without looking at what it operates on. If a redrafting of some of those provisions could assist, I will certainly be having a look at that. I haven't got a view at the moment. It is quite broad, obviously.

20 SENATOR XENOPHON: I apologise for not directly responding to your question earlier about what would be considered in that public interest defence. I have appended to our submission the Hansard and the amendment that I put up, which - - -

25 MR GYLES: Yes. I confess I haven't read that. I have read the submission but I haven't read the - - -

SENATOR XENOPHON: Sure, but it is not dissimilar - - -

30 MR GYLES: I will.

35 SENATOR XENOPHON: Thank you. It is not dissimilar to the submissions made by media organisations, and in fact I consulted with some media organisations, major media organisations, in respect of it. I'm not particularly wedded to, or fixated on, the wording but the principles ought to stand that: it is a matter of public interest if it increases the ability of the public to scrutinise and debate issues of national security, a matter that would promote the integrity and accountability of the organisation, ASIS or the Inspector-General of Intelligence and Security, in relation to national security; it ought to look at conduct that contravenes the law of the Commonwealth or of a foreign country - that would go to the issue of the Witness K example that Professor Fernandes has referred to; whether there has been any engaging for the purpose of perverting, or attempting to pervert, the course of justice, corruption, maladministration; an abuse of public trust involves an official or a public agency abusing his or her position as an official of that

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agency; could it give reasonable grounds for disciplinary action against an official or public agency; again there are - with the safeguard that it's about a journalist disclosing it in their professional capacity, published in good faith.

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The primary issue is that it's about promoting the robustness and the integrity of our intelligence services, without in any way compromising their ability to carry out operations that are clearly for the protection of Australians.

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MR GYLES: Yes. I'm just looking for the definition of "special intelligence operation". You were saying it was very broad and it was really what the minister - - -

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SENATOR XENOPHON: Yes. If I can read to you the definition:

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in relation to which a special intelligence operation authority has been granted, that is, carried out for the purpose relevant for the performance of one or more special intelligence functions that may involve an ASIO employee or an ASIO affiliate in special intelligence conduct -

but I think it's fair to say that it is very broad and I suggest that the executive arm of government can stretch the breadth of that definition.

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MR GYLES: It's certainly discretionary.

SENATOR XENOPHON: Yes.

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MR GYLES: And depending upon a ministerial satisfaction.

SENATOR XENOPHON: That's right.

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MR GYLES: As I was endeavouring to say before, and I'm still not quite clear in my own mind about it, a special intelligence operation is marked out because it leads to the authorisation of illegal activity. You simply do not have to have such a thing in relation to covert operations or other intelligence-gathering; it's not necessary to do so because you have warrant provisions and all the rest of it that enable you to do all sorts of things without breaking the law. There has been no such authority possible until now and, if it breaches the law, being authorised, one imagines that they should be fairly sparing. You have the whole of the rest of the activities of ASIO uncovered by 35P.

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DR FERNANDES: Yes. Our objection is not to special intelligence operations but to the criminalisation of the media reporting on them, even years after the fact. We have no problem with ASIO doing what's necessary and lawful to protect the community. Our objection is not to that; it's to the restrictions on disclosure, even later on. This is exacerbated by the fact, as I say, that the next government will never know what its predecessor ordered, whether it was legal or not, whether it was done for the right reasons or not. As I say, I'm not sure what I'm allowed to say but I doubt whether - - -

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MR GYLES: No. I'd be careful because it's - - -

DR FERNANDES: Sure. I doubt whether the Attorneys-General Robert McClelland, Nicola Roxon and Mark Dreyfus were fully briefed on everything that their predecessors did as Attorneys-General. That's not the way the system works. Once the government loses an election, the next government comes in, the notebooks are sealed and that's it; they're never told. The media provides that last guarantee that, maybe, just maybe, if this gets out - a policy-maker will think, "Maybe, if this gets out, I'm in trouble." So the media remains that last bit of security for the public.

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MR GYLES: Yes. As to time, what is put, as you will know, is that in both counter-terrorism and counter-intelligence - and in counter-espionage, for that matter - terrorists groups are likely to exist for many, many years and, certainly, foreign powers exist for a long while, and the identification of people 15 to 20 people years after an operation may be quite significant.

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DR FERNANDES: Yes. Other jurisdictions seem to resolve this problem without any great difficulty. In the United States, the press is not prevented from anything other than the Intelligence Identities Protection Act, which is analogous to section 92 of the ASIO Act. They recognise, there, that it's the government's responsibility to keep its information secret and it's the media's responsibility to report. Our own media, I know this for a fact, are very responsible, they consult, they do what they can to make sure that there is no backlash against them, in the first place, for saying things that they shouldn't, they report very responsibly on matters of kidnappings, of a whole range of other crimes; it's only on this particular thing that the executive is trying to prevent them from ever reporting on. That's the problem. We have no problem with special intelligence operations but it's the restrictions on the media that we have a problem with.

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5 SENATOR XENOPHON: I just want to emphasise that the example that
you posit - of course, if in 10 or 15 years' time the publication of
information would mean that a former ASIO officer, his or her life or the
life of that person's family - could in any way be exposed to danger, then,
10 of course, it shouldn't be published but this legislation, and 35P in its
current form, goes way beyond that and it does have a chilling effect on
the media to do their work, to shine a light on any abuses, on the executive
arm of government, and in the absence of safeguards for the media which
other countries have which we do not have, then, 35P in its current form is
15 very problematic and, indeed, dangerous.

MR GYLES: In your submission, I noticed that you make the point that
you've just made, that there are not, here, certain guarantees as you may
find elsewhere. As I indicated earlier in the morning, I do have an interest
15 in the position overseas in comparable places. If there's anything more
that you wish to say about that, that's fine. I've got the point that you've
made so far but, if there's anything more you wish to say about how these
matters are dealt with overseas, I'm happy to receive it.

20 DR FERNANDES: May I provide you with a written submission, so I
can get the precise committee names and so on correct?

MR GYLES: Yes.

25 DR FERNANDES: Thank you. I'll do that.

30 SENATOR XENOPHON: In the context of metadata laws, and it's a
point that I laboured during the Senate debate on this, in the United States,
with metadata, which I think is linked to how section 35P would operate,
there, the protocols are that the media organisations are consulted by the
Attorney-General's office, that it's a two-way street, so they actually
know in advance whether an order is being sought in respect of metadata.
I know the Attorney-General unkindly made reference to a chorus from
35 the Mikado about idiots following what others do but I think that the
United States is - I don't have the verse in front of me, sadly, but I suggest
that the United States' approach is much preferable to our approach,
where the special interests of the public interests - - -

40 DR FERNANDES: Yes. In the United States there is full judicial
oversight, unlike here, where we have no judicial oversight. Also, the
members of the Senate Intelligence Committee and the armed forces
committee are briefed on the details of operations; I mean, they're actually
called into the viewing rooms and shown the drone strikes, they're shown
the videos of drones. That doesn't happen here, so - - -

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MR GYLES: I think you made this point in your submissions.

5 DR FERNANDES: Yes, sorry. So, for that reason, the only check we've got in Australia is the media, and this 35P is bad for that reason. I won't say any more.

SENATOR XENOPHON: We can provide some further information to you, and I'll - - -

10 DR FERNANDES: A comparative jurisdictional sort of study.

SENATOR XENOPHON: Yes, and I'll send you some interchanges with the Inspector-General - - -

15 MR GYLES: Yes. Thank you. I've taken on board what you've said about the ability to respond further to the agencies' submissions. If that is done in a prompt fashion, I'm very happy to see it.

20 SENATOR XENOPHON: Within, say, seven days?

MR GYLES: Seven days is what I would prefer but, obviously - - -

SENATOR XENOPHON: If we could have perhaps 14 days.

25 MR GYLES: Yes, all right.

SENATOR XENOPHON: Is that all right?

30 MR GYLES: Yes. I won't have completed anything by then.

DR FERNANDES: Thank you.

MR GYLES: Thank you. Anything else that you wish to - - -

35 SENATOR XENOPHON: No.

DR FERNANDES: No. Thank you for the opportunity.

40 MR GYLES: Thank you very much for coming along; much appreciated.

SENATOR XENOPHON: Thank you.

45 MR GYLES: We'll now adjourn until the legal profession come along at 12.30.

ADJOURNED

[11.24 am]

5 **RESUMED**

[12.30 pm]

MR GYLES: I'll declare the second session open for the day. Perhaps if you could state for the record your names and who you represent.

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MR KEIM: Thank you, sir. My name is Stephen Keim. I'm a member of the Bar in Queensland and a member of the Law Council of Australia's National Human Rights Committee. Today I'm appearing with Matthew Dunn, the director of policy, and Natasha Molt, senior policy lawyer, criminal and national security law of the Law Council for the Law Council.

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MR GYLES: Thank you.

20 MR BRADLEY: Michael Bradley, the managing partner at Marque Lawyers. I'm here as a solicitor and I've written about this subject.

MR GYLES: Thank you. I won't give you the full sort of opening spiel. But I'm conducting an inquiry. These public hearings are part of it. I will, in addition to these public hearings, have some private hearings with some of the agencies where there's material that's not appropriate to be dealt with, at least in the first instance, in public. I'll be making my own inquiries about things as well.

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30 I have called for submissions and you have responded to that call. The submissions have been made public on the website. I have read each of your submissions. I wouldn't pretend that amongst the 30 I've read recently that I have every line in my mind. I, therefore, do encourage you – I do not discourage you from taking me through them as you would see fit. We've got ample time to deal with what we need to deal with.

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Also, if you have any comments to make about other submissions, then you're perfectly free to do so. I'm not going to run this as an adversarial proceeding. I'm not giving natural justice to everybody, but it's an occasion where any comments which you think are appropriate in relation to those other submissions can be made. I will have some questions, of course, but if you need to supplement what you say, generally speaking, I'm happy to receive that. But it needs to be done fairly promptly and will probably be placed upon the public record as well.

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Having said that, over to you.

MR KEIM: I'm happy to start, sir.

5 MR GYLES: I don't mind who starts.

MR KEIM: We've prepared an opening statement which doesn't per se go through our submission but it does repeat some of the main points.

10 MR GYLES: Yes.

MR KEIM: We have read some of the agency's submissions. I thought we might leave any responses to that to the question and answer period, but we take on board what you've said about being activist in responding to those if we so choose. As you would be aware, the Law Council is - - -

MR GYLES: Can I just say I read some time ago the Law Council submission to the Joint Parliamentary Committee. But that covered a range of things. It wasn't a 35P submission as such. I don't retain all of that by any means.

MR KEIM: Also, there were those changes which ultimately were adopted, the recommendations which were adopted. So our submission to you, our written submission to you, and this does take into account those changes - - -

MR GYLES: I understand that.

MR KEIM: The ability now to, for example, disclose matters for the purpose of gaining legal advice. So that's a change that we are responding to. As you would be aware, the Law Council is the peak national body representing the legal profession in Australia.

MR GYLES: I was a member of it.

MR KEIM: Absolutely. You've probably served on committees. You probably served on the executive. I think you were president of the Bar Association in New South Wales.

MR GYLES: I was. I was there at a meeting in Hobart which developed an accord which kept the thing together for a number of years.

MR KEIM: It's an interesting body in terms of - - -

45 MR GYLES: Politics.

MR KEIM: - - - the different interests that different constituent bodies have.

5 MR GYLES: Yes. It'd be more complicated now than it was then I'm sure.

MR KEIM: I think Natasha and Matthew know more about that.

10 MR GYLES: We'll leave that aside.

MR KEIM: We'd like to thank you for inviting the Law Council to appear before you today and we acknowledge what an important inquiry this is into section 35P of the ASIO Act.

15 Section 35P creates two offences in relation to unauthorised disclosure of information relating to a special intelligence operation or SIO conducted by ASIO. These comprise a basic offence carrying a five-year maximum jail term and an aggravated offence carrying a 10-year maximum jail term
20 for cases in which the person endangers or intends to endanger the effectiveness of the SIO or the health or safety of those involved.

As you noted, sir, the Law Council raised a number of issues with section 35P when the legislation was first introduced as part of the National Security Legislation Amendment Bill (No 1) 2014. That was in a
25 submission to the parliamentary joint committee. Some of these concerns have been addressed such as the inclusion of an additional exemption in the offence provisions to explicitly enable the disclosure of information for the purpose of obtaining legal advice.

30 However, problematic features remain, including the lack of a public interest disclosure exemption which would allow the public disclosure of information about an SIO where it has been conducted illegally or an innocent person has been killed or injured or tortured or where the
35 operation is based on corruption. The Law Council considers that section 35P should be amended to ensure that, in extreme circumstances, journalists, lawyers, participants in a special intelligence operation and the public are permitted to reveal illegal activity, misconduct or corruption that occurs in relation to an SIO.

40 The Law Council's concerns are particularly acute in light of the fact that law enforcement and national security agencies are not precluded from accessing telecommunications data to investigate criminal offences involving the unlawful disclosure of information covered by section 35P
45 of the ASIO Act and the official secrets provisions of the Crimes Act

1914, namely section 70, which covers the disclosure of information by Commonwealth officers, and section 79, which deals with the disclosure of official secrets.

5 The newly enacted Telecommunications Interception and Access
Amendment (Data Retention) Bill 2014 permits the keeping of
telecommunications data for a period of two years. The keeping of this
data has the potential to make the ability to identify confidential sources of
journalists transparent to authorities. The difficulty is that having an
10 approach like this may have a chilling effect on any potential
whistleblower that seeks to disclose information about illegal or corrupt
activity. The Law Council sees a real negative synergy between section
35P, on the one hand, and the changes brought about by the Data
Retention Bill.

15 As noted in the Explanatory Memorandum to that Bill, a journalist's right
to protect confidential information derives from the right to freedom of
expression and is a fundamental tenet of an open and unimpeded press.
Without such protection sources may be deterred from assisting the press
20 in informing the public on matters of public interest. As a result, the
ability of the press to provide accurate and reliable information may be
adversely affected.

25 Article 19(2) of the International Covenant on Civil and Political Rights
provides that everyone has the right to freedom of expression, including
the freedom to speak, receive and impart information and ideas of all
kinds, regardless of frontiers, either orally, in writing or in print, in the
form of art or through any media.

30 While the Data Retention Act included safeguards to further protect the
confidentiality of a source by providing a higher threshold for the
authorisation of disclosures of telecommunications data for the purposes
of identifying a journalist's source, concerns remain. For example, a
minister or an independent issuing authority may consider that the public
35 interest in issuing the journalist information warrant outweighs the public
interest in protecting the confidentiality of the identity of the source,
having regard to the gravity of the matter in relation to which the warrant
is sought.

40 The fact that we have these unmitigated offences, that is, unmitigated
without any public interest exemption, will guide whether or not a
journalist information warrant is issued in our view. For this reason, the
Law Council considers that a public interest disclosure exemption to the
section 35P offences is appropriate. This would also have the effect of

creating a relevant consideration against the issuing of a warrant as well as providing protection in appropriate cases where the warrant is issued.

5 Consideration could also be given to permitting legitimate whistleblowers to publicly disclose the facts of illegal activity but not the content of an SIO. 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 and prevent an unnecessary chilling of free speech. And that's a matter where we might say something about what
10 the agencies have said later on.

Such changes, which may also require consideration of comparable amendments to the Public Interest Disclosure Act 2013, would accord with fundamental rule of law principles that the law should be certain and
15 not subject to executive discretion such as relying on the discretion of the Commonwealth Director of Public Prosecutions or the Attorney-General not to prosecute individuals for such offences.

Reliance on the discretion would make it more likely that the chilling effect is acted upon in cases where disclosure should be made to the public, because individuals, including journalists, would not be prepared to take the risk of prosecution and possible jail sentences. And that's an extraordinary sacrifice and risk to ask both whistleblowers and journalists to take in our submission.
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25 Thank you very much, sir, for that.

MR GYLES: I think, having read both submissions, it may be useful to hear Mr Bradley and then we can have a broader discussion perhaps.
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MR BRADLEY: Thank you, Mr Gyles. Yes, I approach this question – well, I approach this problem from the point of view that I was going - - -

MR GYLES: Speak up a little because there are people in the back that can't hear you.
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MR BRADLEY: Two questions. One is to answer the question of, what, if any, impact does this have on journalists? Then, secondly, is this law justified? The answer to the first question seems, obviously, "yes". The section 35P has two direct impacts on journalists and their profession. Whether or not it was designed this way, it certainly in its structure captures journalists in the course of doing their jobs. Secondly, it seems unarguable that there is a chilling effect just in the way that it operates, which I've discussed in my submission.
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But that doesn't really seem to be open to argument. So then the real question is, is this piece of law justified? Rather than addressing questions of bringing in extra defences, I think the starting point has to be the freedom of expression, freedom of speech, that the common law protects. Any time that the legislature wishes to take part of that freedom away, it's incumbent on the legislature itself to justify that. It's not a matter for the public or for the press; it's a matter for parliament and the government to say why, why is this necessary?

Looking at the stated justifications for this particular provision, they go directly to questions of safety and integrity of intelligence operations. Having determined that such a thing as an SIO is necessary, the stated justification for section 35P is, firstly, to protect the lives and safety of individuals, and secondly, to protect the integrity of intelligence operations themselves.

It doesn't really seem to go further than that. If that's as far as the justification goes, then it does call into question or bring into focus the distinction between the two limbs of section 35P, the ordinary offence and the aggravated offence.

If what this provision is designed to do is to protect people's safety and to protect the integrity of operations, then the aggravated offence more than adequately covers that, which leaves section 35P(1) out on a limb with no validly argued justification. So, in my view, a case for 35P(1) simply hasn't been made out at all.

MR GYLES: One comment is that I think it's been said explicitly that what really took place here was transposing the police provisions for controlled operations into the security context. That removes the conspiracy theory, but doesn't really help the justification for it.

MR BRADLEY: I don't think it's particularly helpful to try to interrogate the motivation of this piece of law, whether it was the government's intention to.

MR GYLES: You obliquely said no matter – but the fact is that they are pretty similar in their effect.

MR BRADLEY: Yes.

MR GYLES: We can perhaps come back to that later.

MR BRADLEY: Sure. Yes, I am sure we all have our views on where this came from and why it was brought in. But, again, it's not really for us

to argue about. My point is that if the government wishes to reduce or impinge on our freedoms – and this one is a pretty major one – then it has to make the case. I don't think that on the record in relation to this provision that case has been made.

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I think that if proper focus had been brought in the consideration of this Bill, then perhaps closer attention could have been paid to the aggravated offence which, in my view, it wouldn't be that difficult to make out a case for a form of the aggravated offence, certainly in the case of intentional infliction of harm. The aggravated offence provision has some problems with it in terms of construction, but it wouldn't be that hard to find justification for such an offence provision. That would have been a worthwhile exercise for the legislature. But it has been overborne, I guess, by the more generalised debate and the general offence provision 35P(1) is what's resulted. I can't see the justification. If it exists, then we haven't really been told.

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MR GYLES: You'd take the high ground and say no, 35P(1).

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MR BRADLEY: Yes.

MR GYLES: Do you have any view about a public interest defence or not?

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MR BRADLEY: Well, as a fallback, certainly as a minimum position there ought to be a public interest exemption. I think that would require quite a lot of work to understand the scope of that, which I haven't addressed. But yes, if this offence is to remain in place, then some form of public interest defence or exemption needs to come into existence.

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MR GYLES: All right. Now, are there any aspects of other submissions that you would wish to either approve or disapprove?

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MR BRADLEY: I don't have any specific comment to make.

MR GYLES: Now, as to the public interest defence, I can't recall whether your submission drafts an example or not.

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MR KEIM: No, we don't, but we do - - -

MR GYLES: To what extent do you descend to the principles of - - -

MR KEIM: We talk about good faith so that an element of the offence is good faith. Our submission also indicates, perhaps without saying, is that – without saying it expressly, that the completion of the defence involves

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that at the end of the day – and this is not going into the onus aspects of it. But at the end of the day, public interest is shown to have been present in the disclosure. So there's two aspects. One is the subjective good faith requirement, and the second is that you can't act unreasonably and go out and say, "Well, I thought it was in the public interest," if, at the end of the day, the facts don't justify that.

So certainly I personally, just giving some thought to it now, would be inclined to say that the objective elements of it should be on the facts as they are known at the time of the disclosure. If, for example, a journalist has received information, has checked that information, has acted very responsibly and then, at the end of the day, has been let down by one of her informants, then that shouldn't mean that the journalist doesn't receive that defence.

So they're some aspects of the public interest defence. We've also indicated that some criteria could indicate what we've referred to corruption. So I would be inclined to say that in deciding – the sort of drafting might be in deciding whether the disclosure was bona fide in the public interest, a Court could have attention as to whether the disclosure involved – and then a set of non-closed criteria, which might refer to injury, death, corruption and other matters of the kind which the legislature considers would justify disclosure in the public interest but be open-ended in that regard.

DR MOLT: In our submission we also refer to the good faith defence for treason offences.

MR GYLES: Yes, I saw that. I wasn't familiar with that or I am not familiar with that provision.

DR MOLT: That provision provides a good faith defence for persons who publish in good faith a report or commentary about a matter of public interest. In our submission we've suggested that perhaps the good faith defence would need to be broader, so not just limited to reporting or a commentary, and perhaps, as Stephen has indicated, we would also support specific legislative criteria.

MR GYLES: Of course, the public interest defence you're talking about would apply to the source, would it?

MR KEIM: Yes. Source not being the journalist, yes. I mean, it's a bit like the defamation defence of providing information to somebody who – very different situation between the journalist who has to check their sources and the source who would probably be very loathe to comment or

provide information but probably has a better knowledge of what the harm that justifies the disclosure is. So they're in two different situations. The test might be expressed in similar terms, but it would apply to them in different ways because the facts affecting their situation are different.

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MR GYLES: How does your submission deal with the problem that a public interest defence, if upheld, would – or pursuing, sorry, a public interest defence would necessarily involve scrutiny of the underlying facts I would have thought. How do you avoid the evil of the sections designed to prevent, which is damage to the operatives that might be breaking the law under cover and so on?

MR KEIM: Well, that aspects of the way in which a disclosure is made would go to good faith and the availability of a good faith defence. So if lurid and dangerous detail was published, which was unnecessary to achieve the public interest aspect of it, then that would go to perhaps suggesting a lack of good faith. I mean, if one simply went for the good footage or the good headlines, then that would indicate a lack of good faith.

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It's a problem that everybody in the debate has to face because the agencies say to you, "Well, there'll be no problem with good faith disclosure because we won't prosecute anybody who does." We say, "Well, that's not really good enough because there'll be a lot of people intimidated because they just don't want to go to jail." But the problem exists, whether you take the view that people will be protected by the Attorney-General not giving consent or the Director of Public Prosecutions not issuing the proceeding or whether it's there with the availability of the good faith public disclosure public interest defence.

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But we say with regard to that, that the very fact – and this also goes to something in the Attorney-General's and ASIO joint submission – the very fact that we have special intelligence operations which operate in a very different context to the AFP-approved operations on which it is based and which you referred to earlier – the very fact that we have an open-ended warrant extending over a period of 12 months to commit illegal activity, which is then kept in a complete information bubble, it – for example, makes any reference to the recommendation to ALRC in 2009 which might be seen to be contrary to a public interest defence with regard to this specific offence – irrelevant because when the ALRC was making that recommendation they weren't aware that there was going to be this open-ended 12-month authorisation of illegal activity to be carried out in complete secrecy with no one having the opportunity to blow the whistle when it needed to be blown.

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5 So we say the need for disclosure in appropriate circumstances and the chilling effect on journalists who might otherwise be reporting something with regard to ASIO and not knowing whether it's an SIO or not, the extraordinary chilling effect of the legislation makes a public interest disclosure defence absolutely necessary in our opinion.

MR GYLES: Another person this morning referred to the ARLC report. So I can't avoid looking at that.

10 MR KEIM: No, you can't, because it's raised by the agency. So we thought that we would make some comment with regard to that.

15 MR GYLES: The controlled operation police situation, it does – and I don't know where it points, but there has been a longer period of potential exposure to that than to the current provisions, which have only been in force for a short time. But the police provisions have been, one gathers, used quite a lot. Yet there's been no – and, sorry, there has been no proceedings brought for breach. That may not tell us much. But there isn't any.

20 What's not clear to me – and I asked this question of the press this morning – it doesn't seem that there's been much chilling of reporting of general police operations. Now, it's hard to know that.

25 MR KEIM: Natasha will be able to perhaps go to more detail with regard to this than me. But one of the distinctions that the Law Council drew in its submission to the joint committee was that where police engage in undercover activity, every time they go to trial – and, in fact, every time they make an arrest because of the disclosure requirements associated with
30 any criminal prosecution – they're subjected to an accountability and transparency process.

35 In the case of ASIO, that may never happen. So you wouldn't have the same concern – and this is not talking about the chilling effect, this is a concern about matters not coming to the surface. One of the very rare examples where ASIO was actually involved in a criminal prosecution and less-than-perfect conduct on their part was exposed was the Ul-Haque prosecution which collapsed because of the conduct and the remarks of –
40 it was a prosecution in Sydney. So it was a justice of the New South Wales Supreme Court - - -

MR GYLES: Yes, it's been referred to by several people. I do have a general recollection of it but not anything particularly significant.

45 MR KEIM: But that accountability is not going to be available for SIOs.

MR GYLES: No.

5 MR KEIM: It's not going to result in prosecutions. Even if they do result in prosecutions - - -

MR GYLES: They may.

10 MR KEIM: - - - there's that area between maybe the intelligence which was then provided for the investigation that led to the prosecution. So they may not be – they won't be generally provided the same sort of accountability through a criminal prosecution process. Natasha, did you have anything more to say?

15 DR MOLT: No, I think that sort of answers the distinction that we made in our original submission on the offence.

20 MR GYLES: You'd have to know more about it than I do at the moment. But one of the difficulties which the media put forward and others is that they're put in an impossible position because if they have information about an ASIO activity they can't know whether it's an SIO or not. Therefore, it will have a tendency to suppress or chill the desire to publish because of the risk involved.

25 My point was that doesn't seem on the face of it to happen in relation to the police though. I don't know why that is. Is it that the police are more forthcoming with information? Or is it that – I don't know why it is. Am I making my point clear or not?

30 MR KEIM: I understand what you're saying.

35 MR GYLES: Linked with that – there's another topic, I think, which is linked with it is what should be the position of ASIO when asked, if asked, "If the information we have, does it relate to an SIO or not?" should ASIO be answering or not?

MR KEIM: Two things can happen there. One is the journalist is told that it does relate to an SIO and then she can't legally report it.

40 MR GYLES: Backs off.

45 MR KEIM: If there is activity which should be reported, the easy way for those people who are trying to protect their misconduct being brought is to suggest that there's – that it could have something to do with an SIO, you should be very careful about pursuing that. Even if it doesn't, but then if

ASIO says, “Well, we can’t tell you whether it’s anything to do with an SIO or not,” then the journalist is in no better position. So it’s very difficult for the journalists.

5 MR BRADLEY: There would also be other reasons why the journalist may not wish to talk to ASIO if they’re in possession of sensitive information telling the people who – they are, in effect, investigating themselves. The journalist is investigating ASIO, telling ASIO that “I know something perhaps. Can you tell me if this is an SIO?” may be
10 problematic.

I think that these questions also illustrate a bigger problem with this, which is that this entire chain from the declaration of an SIO through to the prosecution of a discloser is all within the executive realm. There’s no
15 judicial involvement in any part of this in terms of the issue of warrants and the decision to prosecute. So the public and the press deal exclusively with arms of the executive in this entire chain. I think that is problematic in that – it certainly compounds the so-called chilling effect because you’re dealing with the same agency pretty much all the way through.

20 So ASIO self-selects which SIO with the Attorney-General’s approval and then you have – and then it’s suggested you have to go to ASIO to ask them if it’s okay to report. From the point of view of the media, it’s difficult to see how they can obtain any confidence that there’s any kind
25 of genuine oversight being placed on this process.

If, for example, there were a need for a judicial warrant before the declaration of an SIO, then the media presumably I think could have greater confidence in terms of their own decision-making around could
30 this be intelligence or could this be an SIO and what level of risk am I taking in reporting on this. But, as it stands, it’s all in-house.

MR GYLES: Well, that’s not quite true. There’s the ability to elevate or take the matter to the Inspector-General of Intelligence and Security.

35 MR BRADLEY: Yes, although he’s still an arm of the executive.

MR GYLES: Well, not really. It’s a statutory role, statutory body. It’s part of the executive in the very loose sense, I suppose, but it’s not part of
40 the executive government. So I think it’s fair to say it’s outside that net or tent. Whether it’s sufficiently outside is another matter. Obviously some of the people making submissions here don’t rate it highly. But it’s certainly relied upon by those propounding the merits of the legislation.

MR KEIM: The Law Council does support that change and we think that was a significant improvement on the legislation beforehand. But it's not adequate to all circumstances and it's not adequate to all times. I mean, one may have a very robust and independent Inspector-General at the moment. In five or six years' time that person may be widely and legitimately criticised for having been captured by people that they are supposed to be looking after.

You do have that very close – I mean, we keep on recommending that they have bigger and broader roles and be greater resourced to be able to carry out those roles because more and more powers are being allocated. And that's good. But it also has that effect that you have a day-to-day relationship between the regulator and the regulated across a whole range of activities. On its own it's not enough, in our view, to give confidence to the public.

MR GYLES: There's a bit of a conundrum here, isn't there, because – leave aside SIOs for the moment. The policy probably at all times has been that the intelligence community, intelligence organisations, are not subject to the surveillance of the – in the same way that another executive arm of government is. That's always been the case. Even when the Royal Commissions were held and so on – you've now got the IGIS.

But if for the rest of the operations, both in relation to terrorism and espionage, it's good enough to have oversight by the IGIS, why doesn't it apply to special intelligence operations? That's the sort of fundamental question, I suppose.

MR KEIM: And I think the distinction we make is a fine one but it's an important one. That yes, we do want IGIS to be able to provide oversight and supervision, but we don't want it to be the last port of call. In those rare occasions where, for example, an officer of ASIO who is absolutely disgusted with what is going on around her has no confidence in going to the Inspector-General and she needs to have that opportunity to – at some risk to herself, but not absolute risk to herself – disclose in a way which will reach the public.

So we say it is about degrees of protection and because – the public interest good faith defence will operate against the background of disclosure being available to the Inspector-General.

MR GYLES: Why shouldn't that apply to ASIO activities generally if it's right in principle? That's what I'm grappling with.

MR KEIM: Because this is an additional criminalisation of disclosure to that which already exists.

5 MR GYLES: I understand that, but – yes, I understand that’s your point. But I’m going to a rather wider point, that – I’m trying to grasp why it is that special intelligence operations should have a different regime to other ASIO activities.

10 MR BRADLEY: I think you’re right. There isn’t any particular - - -

MR GYLES: It’s a question.

MR BRADLEY: I don’t think there’s any particular reason.

15 MR GYLES: The only distinction is that they involve illegality.

MR BRADLEY: Yes.

20 MR GYLES: Now, that may be enough, but that’s the only point – that’s the only real point of distinction.

25 MR BRADLEY: But it’s difficult to see why that fact alone should justify the imposition of penalties this severe or the complete closing down of the information loop in relation to those matters. Given that the stated justification, as I said, is protection of people and the integrity of the operations themselves, well, that can be protected and oughtn’t to hinge on whether or not ASIO is engaging in illegal activities.

30 As has been pointed out earlier, the identity of ASIO agents is protected already and anyway, regardless of what they’re doing. It makes perfect sense to protect the safety of individuals if they’re involved in some way in intelligence operations. It also makes perfect sense to ensure that properly conducted intelligence operations are not unduly interfered with by publicity at the wrong moment.

35 But where the nexus of illegality comes in is difficult. Why that’s the justifying distinction is difficult to see. I don’t see it. In fact, you could say that it actually elevates the level of risk because if illegal activity has been sanctioned and has been engaged in, it obviously carries a high risk
40 of things going wrong and people exceeding their authority and doing things which really ought to be exposed. So attaching a criminal offence to that seems to be pretty risky.

45 MR GYLES: Can I just explore for a moment what the position is, forgetting – let’s say there’s no 35P. What is the position in relation to an

officer of ASIO who is the source for a journalist's article? Wouldn't there be a breach of the Act and wouldn't the journalist be an accessory after the fact in effect? That's a question rather than a statement, because it's not something I've studied.

5

MR KEIM: We have dealt with it. Natasha, do you want to deal with that, the existing offences? There's 15HK and 15HL of the Crimes Act relate to unauthorised – no, sorry, that the criminal investigation - - -

10 MR GYLES: Yes, that's a different thing I think.

MR KEIM: Natasha, do you know the references?

DR MOLT: No, I don't, sorry.

15

MR KEIM: There's one that carries a two-year maximum.

MR GYLES: Yes.

20 MR KEIM: And one relates to insiders and one tends to relate more to public disclosure.

MR GYLES: Yes.

25 MR KEIM: I think they may have been dealt with in the Gilbert + Tobin submission. I'm just trying to find the reference which I have read recently.

MR GYLES: I'm familiar with some of it too, but I - - -

30

MR KEIM: We've also footnoted to a Law Council factsheet which deals with the other aspect of it, which is the protection and the limits of the protection under the Public Interest Disclosure Act, which also applies to ASIO officers but only gives very limited protection.

35

MR GYLES: See what 93 says. Sorry to take up time, but it's something I want to try and follow. It would certainly be the usual Public Service Act, wouldn't it? Division 1 of Part III of the ASIO Act, about section 18. I'm looking at section 18(2). The carve-outs are public domain with the authority of the Commonwealth, IGIS. Internal communications to the Minister, staff members of the Commonwealth or a state where it's appropriate. The unauthorised dealing with records is another one.

40

MR BRADLEY: That was strengthened as a result of the recent amendments as well.

45

MR GYLES: Yes. Anyway, now is not the time to spend a lot of time on it. But I'm just wondering why it is that – so those provisions relate to the employees of ASIO. Then you'd have to pick up the Criminal Code complicity provisions in relation to the publisher. But I would have thought there's a fair chance you'd be picked up if there was the proof. Anyway, there's no particular point that you wish to make about that?

MR KEIM: No, except it's not as directly directed at the outside publisher, a journalist.

MR GYLES: No.

MR KEIM: We did draw attention to the 80.3(f) of the Criminal Code which provides a good faith defence for treason offences where a person publishes - - -

MR GYLES: Yes, you did.

MR BRADLEY: It wouldn't pick up, for example, a Snowden kind of situation. So if a journalist came into possession of a leak through WikiLeaks or directly from a Snowden character, then they wouldn't be complicit in any crime.

MR GYLES: That's probably correct, yes.

MR BRADLEY: But 35P would - - -

MR KEIM: If they're one step removed, then they're not part of the conspiracy. There were a couple of points we wanted to raise with the regard to the agency's submission. We disagree fairly vehemently with the proposition that courts are not – this was in the context of the subsection (1) offence – that courts are not well placed to determine matters of harm.

We make that point, particularly in light of the knowledge that there are secrecy procedural protections with regard to court hearings which have been used, and used fairly effectively, for all of the terrorism prosecutions which have taken place. So we find it difficult to see why courts would not be well-placed to determine matters of harm.

The submission went further in saying, "Well, we may not be able to point to any harm. Harm may be so slow occurring that we can't point to it." We think that those two justifications of the subsection (1) offence are

matters we disagree with and we'd suggest that they're not very convincing.

5 The other issue is that we thought the submission, so far as it related to saying there shouldn't be a public domain defence, seemed a little bit inconsistent saying that we don't distinguish between the first or the second – if something is the first or second discloser – if something is in the public domain and the harm has already been done, even if it's only been published on an overseas website and if it's only been published by
10 WikiLeaks, we don't really see in that submission at all any convincing justification for saying that a public domain defence should not occur.

15 The only reason which an agency can argue against that public domain defence is not to protect the wicked terrorists from getting information about the way ASIO operates because they will already have it. The only reason why one could be seeking to justify that is because she's seeking to prevent public discussion. That's the inference which we suggest arises from that. Only I personally suggest it arises from that, but - - -

20 MR GYLES: The other inference is that they're wishing to, as I say, set an example to the remaining employees.

MR KEIM: Perhaps.

25 MR GYLES: It's to discourage leaks is what it's really doing.

MR KEIM: But the defence – if something is already in the public domain, that public domain defence only goes to the re-publisher.

30 MR GYLES: Yes.

MR KEIM: It doesn't go to the original leaker. So the original leaker could still be prosecuted and would need to have a public interest disclosure defence.

35 MR GYLES: True.

40 MR KEIM: They wouldn't be able to rely on the public domain defence. There were two aspects of the Gilbert + Tobin submission that we thought were informative and useful. There's a good discussion comparing the law with regard to special intelligence operations and the prohibition of disclosure compared to other countries like us and there's a particular discussion of New Zealand and Canada, which I thought was helpful.

5 This is something that we've already touched upon, but the spreading effect of the chill; that is, the chill operates with regard to reporting whether or not the matter relates to an SIO. If you try and check your sources or check the information, if you're in a position where you can do that before you publish, then, as I mentioned before, that chill is likely to be confirmed in place. But they were two matters that we thought arose out of the Gilbert + Tobin submission were worth emphasising and endorsing.

10 MR GYLES: Thank you. Assuming that – I mean, do you have anything you want to put about if 35P is to stay and if 35P(1) is to stay, are there any suggestions as to changes to 35P(1) that ought be made? I know that's not the primary position.

15 MR KEIM: One of the things we said - - -

MR GYLES: I mean, is it practical to have knowledge instead of recklessness, for example?

20 MR KEIM: One of the things we said in our written submission was that the way in which recklessness is defined in section 5.4 of the Criminal Code means that a person who's completely ignorant of any possible SIOs is hardly likely to – there has to be knowledge of a substantial risk. So we think in that regard that recklessness – the distinction between
25 recklessness and knowledge is not that great.

MR GYLES: Why is that?

30 MR KEIM: Well, in order to be reckless, section 5.4 of the Criminal Codes says that one has to have a knowledge of a substantial risk and act accordingly. But the other thing with regard to that is what I said with regard to the way in which responsible journalists are likely to operate. They are likely to check their sources in ASIO. It is at the point at which
35 they are most reckless that they are most inclined to want to publish. It's when they know that something really bad has happened or is going to happen.

40 Secondly, they've been given at least some indication that it might be an SIO. Changing the framework of the subsection (1) offence is not going to substitute for the need for a public interest disclosure exemption. It's when journalists are most – I mean, when journalists are most likely to need that public interest disclosure defence is when they feel very, very justified in publishing and in those circumstances they've been forced to risk imprisonment in order to bring things to the public.

45

5 So simply playing around with subsection (1) is not going to – or even getting rid of subsection (1) is not going to get rid of the problem. There’s something I wrote for the Queensland Bar Association. I suggested that even – you would think with regard to subsection (2), for example, an intention to – I’m not quite sure what the words – the intention to mess up the operation, you’d think well, that gives you a good protection.

10 But if in fact you know that it’s a corrupt operation, then you’re probably likely to be guilty of that element of the offence, that in publishing you may in fact be trying to prevent a corrupt operation to go ahead. So even restricting it to the most rigorous intention requirement is not going to obviate the need for a public interest defence.

15 MR GYLES: That assumes, of course, that what you call a corrupt operation is entitled to be an SIO or that it would be within the terms of the authorisation, if you follow my point.

20 MR KEIM: Yes, but I don’t know whether misuse of the authorisation of the SIO would be sufficient to give a journalist a defence.

MR GYLES: Well, that’s the question, isn’t it? It’s a question, I should say.

25 MR KEIM: Yes. It would be a nice pre-trial point to take, but it’s only a purported SIO and I’m not sure that I’d like to advise a journalist client that yes, they should go ahead and publish because it’s only a purported SIO.

30 MR GYLES: The Public Interest Disclosure Act, I think you suggested that might need looking at if your position is established.

35 MR KEIM: I suppose the analysis comes like this: we look at the elements of section 35P and we say, “These are the concerns that we have with regard to it. These are the changes that need to be made,” and then we say, “Well, does the Public Interest Disclosure Act make our concerns not operative?” Then when you look at the Public Interest Disclosure Act the ability to make disclosures is so cut around – if you had evidence that the officers in an SIO were about to blow up a dam and going to flood a city, we’d have no problem at all disclosing it under the Public Interest Disclosure Act.

40 Or maybe you would because it goes to the way in which intelligence operates. But what we say is it’s cut about – methodologically you might be able to provide the defences to section 35P when making the changes to the Public Interest Disclosure Act. But I would have thought, from a

drafting point of view, you'd want to attack it both specifically and then look at whether you need to make some further changes to the Public Interest Disclosure Act.

5 It would be a little bit hard, I think, to cover generally or to create a
general disclosure freedom that is necessary to operate with 35P and the
Public Interest Disclosure Act. But what you say is correct. We think that
the realm of the exemptions or the realm of the ability to disclose under
10 the Public Interest Disclosure Act are too narrow in the ASIO area. We
haven't addressed specific ways in which that could be changed.

MR GYLES: Yes, all right. Mr Bradley, anything else that occurs to you
that we should discuss?

15 MR BRADLEY: No.

MR GYLES: Any other - - -

MR KEIM: Nothing more, Natasha?

20

MR GYLES: Speak now or forever hold your peace.

MR KEIM: Thank you very much, Mr Gyles.

25 MR GYLES: If anything does arise occurring out of what we've
discussed that you wish to supplement, please do so, but do so promptly.
I'm not inviting it but I'm happy to accept it.

MR KEIM: We are au fait with the methodology of those; I've been to a
30 parliamentary committee a few times.

MR GYLES: Yes. Thank you very much for coming along and assisting
in the way you have; much appreciated.

35 MR KEIM: Thank you.

MR GYLES: We'll adjourn now until the third session. We'll adjourn
now and we'll resume when it's convenient.

40

ADJOURNED

[1.35 pm]

RESUMED

[2.17 pm]

45

MR GYLES: Thank you all for attending and thank you for your submissions. This is the public hearing section of the inquiry I'm conducting into the effect of 35P, particularly upon journalists. I can say
5 in advance that I note in the submissions that the point is made that 35P should be looked at in the light of other provisions of other Acts, some of which have come into force recently. I think that's certainly so. Although I don't propose to widen the particular inquiry to encompass those other provisions, I will look at 35P in that context.

10 In addition to public hearings, I've got submissions from 30 people now or 30 organisations now. I will, in due course, have some private hearings in relation to matters which are not properly in the public register, at least in the first instance. I'll take all that into account in my consideration of
15 the matter.

I have read each of your submissions. I don't pretend that I have with me now all of the detail of them. I'm very happy to hear your elucidation of the main points that you wish to put before me. Don't hesitate to do so.
20 We've got plenty of time. I'd also invite you, if you would like to do so, to comment upon any aspect of other submissions that you've read, either favourably or unfavourably. As you see, things have been taken down and the transcript will be available in due course.

25 With that in mind, any questions about the procedure? I encourage each of you to give me sort of an opening statement and take me through your submission insofar as you would like to. We can make it interactive at any point we like. I don't mind which order things are done in. Is there a logic to an order that you can think of?

30 MS THOMAS: My name is Laura Thomas, I'm a barrister. I practice in Sydney. I'm also a member of the Australia Committee for Human Rights Watch. That's a group of private individuals who work closely with the Human Rights Watch office in Australia. Human Rights Watch has only
35 had an office in Australia for about 18 months, but it's a large international organisation that does research on human rights issues all around the world and writes reports and does advocacy.

I should add that I previously worked as a researcher at Human Rights
40 Watch. I thought that that was worth mentioning because we have tried to emphasise in our submission – I understand that the inquiry is directed specifically to the position of journalists. But we have tried to emphasise that the considerations and the burden on free speech that the provisions entail also apply to people like Dr Fernandes who appeared earlier today,
45 so to academics and to some people who do work that is very similar to

what journalists do like in some cases researchers working at NGOs like Human Rights Watch.

5 Indeed, we employ a lot of former journalists in that role and what they're doing is very similar to investigative reporting, but just with an eye to advocacy. At the end, that's the main difference to a professional journalist. So I think those examples illustrate the way in which laws that, although I completely understand the reason for trying to limit the scope of certain exemptions to professional journalists, that can be problematic because the types of people who might report on national security situations for very legitimate purposes is not as narrow as professional journalists.

15 MR GYLES: What about a journalist who has a blog in his or her spare time I suppose?

20 MS THOMAS: I think that raises difficult legal questions. Certainly there is room for the credentialing of journalists in some situations, for example, who's going to have the first rights to sit in the press gallery and that type of thing. But when you're looking at criminal offences, I think the justification for credentialing of journalists or trying to limit to journalists is much more problematic.

25 I think that one way in which it's unproblematic to consider the position of professional journalists is that – and this is more as a lawyer speaking rather than particularly from Human Rights Watch's perspective. But that's obviously a fact that could be taken into account by a prosecutor in considering whether to prosecute or in deciding whether someone had made out a public interest defence or a good faith defence, the fact that they were a professional journalist obviously would assist them in that type of situation.

35 I suppose we would start from the position that the offences seem to reflect a policy that there would never be a situation in which reporting about a special intelligence operation would be justified or that the public would never have a right to know any information related to an SIO. That's extremely problematic because of the burden that it places on freedom of speech. In our submission it's not consistent with democratic values or human rights law, particularly because the defining characteristic of an SIO is that it effectively authorises illegal conduct.

40 That very circumstance suggests that there may be some situations in which some reporting on SIOs would be reasonable to inform the public. But furthermore, because that is the defining characteristic of SIOs, it's difficult to understand some of what the government agencies have said

5 about the need for these offence provisions when contrasted to other offences that would apply to ASIO operations, for example, the need for higher penalties. Because, if that's the only difference, there doesn't seem to be a justification for penalties that would apply to journalists or for increased sentence – for higher penalties in the nature of longer jail terms.

10 A common characteristic of national security legislation new powers and also new offences both in Australia and overseas is that the provisions are never used. I know your predecessor has commented on that in several situations where it applies in Australia. Where the provisions burden freedom of speech, they remain extremely problematic, even if the offence provisions are never used or there are no prosecutions. That's because, as the media agencies have been keen to tell you this morning, the fact that there are no prosecutions doesn't stop the laws from chilling their work or
15 from chilling freedom of speech.

20 From a human rights perspective, the mode of analysis is very similar to one that I'm sure you'll be aware of because it's used in Australian constitutional law as well. First, you consider whether the right is burdened. Of course, in this case the right to freedom of speech and the public's right to information communicated by the press is obviously engaged. Then in international law, the test is "necessary and proportionate". So is the law necessary for the purpose of protecting national security?

25 The International Covenant on Civil and Political Rights specifically recognises that there can be laws which burden freedom of speech for the purpose of protecting national security and don't infringe article 19, which is the article on freedom of speech, but they apply that "necessary and proportionate" test.
30

35 In relation to other jurisdictions, I think one thing that's very important to keep in mind when looking at the situation in the United States and the situation in the UK is that both of those jurisdictions do have much broader overarching protection of freedom of speech, obviously the First Amendment in the United States and the Human Rights Act and the whole European human rights system, including the European Court in the UK.

40 Sometimes when you look narrowly at the fact that similar laws exist in those jurisdictions, it can be misleading to the extent that the way the courts – there are other protections on freedom of speech and the way that the courts would apply those laws or the redress that individuals would have has to be taken into account accordingly.

5 In any case, on our view, the offences are far too broad to meet that proportionate test in human rights law. What we would say about that is in fact very similar to what some of the panellists earlier today said, which is that the justification for the laws appears to be, first of all, that the laws are designed to protect covert operations. In our view, the fact that an operation is covert cannot mean that no reporting of it can ever be justified.

10 Secondly, there's those more specific considerations of protection of officers' identity and also protection of the methods of ASIO.

MR GYLES: Operational modus operandi.

15 MS THOMAS: Yes, exactly. We would recognise that laws that seek to protect those two ends certainly can be necessary and proportionate in some circumstances. But the problem with 35P and 35P(1) in particular is that it's not directed specifically to those ends and it's far too broad, so fails the proportionate test.

20 Human Rights Watch has done quite extensive research in the United States about similar laws or specifically about the prosecution of journalists and sources and how, together with mass electronic surveillance, those two types of new laws and practices in the United States have chilled national security reporting.

25 There is a reference in our submission to a Human Rights Watch report that was published last year which is called "With Liberty To Monitor All" and there's a link to it in our submission. But I would be happy to – I haven't brought a copy with me but I can send one through by email. So for that report Human Rights Watch interviewed a lot of journalists, including Pulitzer Prize winners and some of the most prominent national security reporters in the United States about how mass surveillance and also the prosecution of sources and journalists was affecting their ability to do their job.

35 What they said is really very similar to some of the comments made by the media representatives this morning. Human Rights Watch for the purpose of preparing this submission spoke to some journalists that work in this field and they said very similar things; that it's the combined effect of those laws and people's fear of prosecution that tends to shut down reporting. That things like – common themes were that sources often seemed to lack understanding of the scope of the law. So they will express concern about the threat of prosecution in circumstances where there's nothing in particular that would suggest that there is an ASIO operation involved.

40

45

Effectively that means that the law can have a chilling effect that's much broader than the information that it is actually designed to protect. Essentially, sources – things like the fact that a court might eventually find that someone's action was reasonable or that the – there might be some prosecutorial discretion that might be exercised in someone's favour is of really limited assistance to a journalist who has to decide whether to investigate a matter at all or to continue investigation where an issue has been raised and certainly whether to publish, because they have to make that decision prospectively. The safer thing for the journalist and, of course, also for the source is just to say nothing.

In order to comply with human rights law, the ideal approach – and I think this, again, reflects what Dr Fernandes said earlier and what the journalists themselves said this morning – the best approach is just to narrow the scope of the offence for that reason, because that is what gives people the most room to move without being in breach of the offence and thus limits the chilling effect on free speech.

MR GYLES: What particular narrowing do you envisage?

MS THOMAS: In our submission 35P(1) is not necessary for the reasons that have been discussed earlier today because the scope of the aggravated offence, in our view, there hasn't been any reason articulated for an offence that is broader than the aggravated offence. Secondly, I would agree – and in our written submission we take the same position, I think, Mr Fernandes was taking earlier, which is that 35P(2), there are two circumstances of aggravation.

The intent circumstance is not problematic, but the second one, which I think is that disclosure will impact on the – endanger the health and safety of a person or a security operation – is problematic in some way and should either be repealed or there should be a – I know that many of the submissions on behalf of journalists have advocated for some sort of public interest defence.

In our submission that's appropriate and there should probably be both some narrowing and some kind of defence, because there can be circumstances where a disclosure might mean that an operation is eventually brought to an end. But if there's very egregious conduct in that operation, then that would be appropriate. That's where a public interest test is necessary.

If you look internationally, there are plenty of examples of intelligence operations, including ones that had official sanction that just in the last

5 decade involved torture, extraordinary rendition and surveillance that was contrary to domestic law in the United States. So if you look to those examples, it's quite easy to see examples of where disclosures might mean that operations are brought to an end. But they would be justified and they – as a matter of free speech, they shouldn't be criminalised, effectively.

10 Just if I might comment very briefly on some of the specific issues that have been raised earlier today.

MR GYLES: Yes.

15 MS THOMAS: First of all, in relation to the IGIS, and again with greatest respect for the importance of that role, in our view, when the government points to the IGIS and says, “Well, the laws are not problematic and don't burden – or the burden on free speech is not problematic because journalists could just report the information to IGIS”, that really reflects an impoverished view of the role of the free press and the importance of freedom of communication and the right of the public to receive
20 information from the press.

MR GYLES: I think the point is more that the source could report to IGIS.

25 MS THOMAS: Yes, although - - -

MR GYLES: It's a bit unreal to suggest that a journalist going to - - -

30 MS THOMAS: Well, in the Commonwealth DPP's submission they say that they would take into account whether a journalist had reported to IGIS in the decision of whether to prosecute or not. Another theme of our submission and also in relation to ASIO's and the Attorney-General's Department's suggestion that journalists could consult with ASIO, call the ASIO hotline to decide – well, for guidance as to whether information was
35 related to an SIO.

40 In our submission some of those comments by government agencies are somewhat divorced from the reality of national security reporting and it's a theme that is in our report on this situation in the US. Reporting on national security issues inevitably involves having to develop sources. The way that journalists do that is to, over a period of time, build up trust with multiple sources, if they're good journalists. The way they build up trust is by demonstrating to the source that they will use the material responsibly.
45

5 It's very difficult to see that process how that is consistent with calling ASIO, perhaps repeatedly, for guidance about whether certain matters relate to an SIO, particularly where – I think it was emphasised this morning, the Australian press has a fairly productive relationship with government organisations currently and large media organisations have a routine practice of disclosing their important national security stories to government before they go to print to fact check and to get comment and also to allow the government to put a case that certain information shouldn't be – should be withheld. That happens from time to time.

10
15 When I spoke to journalists about 35P they emphasised that they do that routinely even though there is obviously a threat that the government will seek an injunction when they – they will use that little bit of time to seek a urgent injunction. So there is quite a lot of good faith from the Australian press in relation to these matters currently. As I think was emphasised this morning, the way the 35P provision works in order to get that information from ASIO you put yourself in a position as a journalist where ASIO or some other government officer can effectively shut down the investigation and the story with the threat of prosecution by suggesting that the information relates to an SIO in circumstances where the journalist probably doesn't have any way to test the veracity of that claim; the government is just asking the journalist to trust whoever it is that makes that claim.

20
25 Also, in circumstances where by making the inquiry they are effectively taking an action that could be used as evidence against them later that they did know or advert to the possibility that the issue that they were investigating or the information that they had related to an SIO. So in fact, the provision in that way probably undermines that healthy relationship between at least large media agencies and professional journalists and ASIO and the controlled operations, the police, in Australia.

30
35 Bizarrely enough, it probably puts professional journalists who are aware of the way that the law operates in a more difficult position than a blogger who may be unaware of the law, unaware of their ability to contact an ASIO hotline and the like because when the recklessness standard applies, ignorance is bliss, effectively. You've got some protection if you can legitimately claim to be ignorant of these matters.

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45 The final issue that was raised this morning that I wanted to comment on briefly was the comparison to controlled operations. Again, it's not really an issue of human rights, but just a practical issue. If you think about some of the press reporting on, for example, hundreds of police in Western Sydney last year, in retrospect, one might assume that there were

controlled operations involved in those matters and they reported on freely by the press.

5 I'm aware that the controlled operations legislation also uses that very broad "related to" standard. But it would appear that perhaps when the media are keeping good faith with the federal police they are not being held to that very strict standard of anything relating to a controlled operation you can't report. Whether that's problematic for their long-term legal interests is one thing. But because there are police – there are
10 general police, if I can describe them in that way, involved as well, there are general police matters that can be reported on in order to make the report, it's not so problematic.

15 With ASIO operations, it's difficult to reason about it because it's often difficult to think of a concrete example. But I think that one issue that arises is whether there would be a way to report about the issues of public interest without averting to the fact that it was an ASIO operation, for example, because that certainly might - - -

20 MR GYLES: As I've raised a couple of times, assume no 35P, what would be the position? Because that is your preferred position I think.

MS THOMAS: Yes.

25 MR GYLES: Certainly no 35P(1) anyway.

MS THOMAS: Yes.

30 MR GYLES: So what would be the inhibitions upon disclosure?

MS THOMAS: Obviously it's still illegal to disclose information that could lead to an officer being identified. There are provisions that protect Secret classified information and – so there would still be various provisions that would affect the reporting. I have to say I'm not a hundred
35 per cent across all of them. But if you look at the way national security stories are reported in the press, including internationally, they are often reported in a quite general kind of way, referring to the issues broadly and to broadly what has happened, no doubt partly for this very reason, because that type of reporting can avoid a lot of the laws that are engaged by much more specific reporting.
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That's exactly what 35P doesn't do. It doesn't focus specifically on what's problematic about information that might lead to someone's identity being disclosed or that would disclose methods and that type of
45 thing. Ultimately, from a human rights perspective, it's the government's

burden to justify the existence of a law that burdens free speech. In this case, the government has not, in our submission, advanced a justification for that very broad scope of the offence.

5 MR GYLES: Thank you very much for those introductory remarks. Dr Lynch, would you like to take up the cudgel?

DR LYNCH: Lesley Lynch, I'm secretary to the New South Wales Council for Civil Liberties, but today I'm speaking on behalf of the New
10 South Wales, Queensland, South Australia Councils of Civil Liberties and also for the Australian Council for Civil Liberties.

MR GYLES: Thank you.

15 DR LYNCH: They've come together, as you know, with a joint submission on this because it's recognised as a pretty important national issue.

MR GYLES: Where are the Victorians?

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DR LYNCH: And the Victorian, sorry. Did I leave them out? Please don't put that in the transcript. The Victorians.

MR GYLES: Maybe I misheard.

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DR LYNCH: I think I agreed with almost every word of Laura's as being consistent with our submission, almost every word in your general comments. I'll do a quick run-through of what I was going to say, only bits of what I was going to say as an opening speech. I'd like rather to
30 come back and pick up some of the issues and I know from this morning you were asking lots of questions. So we might - - -

MR GYLES: You've heard all that.

35 DR LYNCH: But before that, could I also offer apologies and regrets from my legal colleagues who had a very big hand in the writing of this submission, but particularly the playing around with, drafting alternatives - if you like, the ameliorating dimensions of this. They would have liked to have been here but the New South Wales and Victorian courts seem to
40 be very busy.

MR GYLES: I'm pleased to hear that.

DR LYNCH: So our apologies and regrets.
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MR GYLES: Thank you.

5 DR LYNCH: I do want to put on record that we do differ a little from the position of some of the submissions this morning, including the Law Council, in that we start from a deep objection to the special intelligence operation proposal as such. We do so not because of anything to do with secrecy or whatever; we do so because we think it's extremely dangerous to have such a broad-ranging immunity from such a wide range of criminal activity provided to our domestic intelligence agency.

10 In our earlier submission we had a lot to say about that and would happily do so again. But that's the starting point. Whatever happens in this context, we will, in the long term - as we imagine that provision will survive, this review iteration - the civil liberties councils will continue to campaign over the long term against that and four or five other provisions that have emerged in the 64, 65 pieces of counter-terrorism legislation which we think are beyond the pale, so to speak.

20 It follows, of course, that we are therefore advocating the repeal of both of the offences because both of those offences exist solely to protect the secrecy of the special intelligence operations - - -

MR GYLES: Which you don't like anyway.

25 DR LYNCH: I mean, that's our principal position. But, as you can see from our submission, having a touch of realism and long and bitter experience with not winning some of these arguments, we, of course, do not want to be totally removed from working with you around the maximum tightening and amelioration of these laws as is possible.

30 We have in our submission put forward a range of options and we've done, again, a quick run-through of the problems, both around the special intelligence operation regime itself. We have then run through numbers of the problems we had with the very loose, very expansive drafting around both of the offences. We've talked a lot about the circularity in terms of the authorisation process and the definition of - the criteria for that authorisation process. As I say, a long list - and you would have heard many of them.

40 We then look at some of the ways in the proposal could be tightened and we then offer one version, a bit of a catchall version, of both a journalist and a whistleblower's exception clause. Probably one other thing I want to note in this quick run-through is our objections to the two offences. One of the issues you were raising this morning was the difference between section 35P(1) and section 35P(2). As with all people, I think, who read

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it, what it actually says versus the rhetoric about these two offences, we are more greatly perturbed by the 35P(1), which we think is not just obnoxious but is entirely unnecessary and disproportionate.

5 In terms of section 35P(2): just one thing we would add to the comments that have been made about it by numbers of people today is that we think there is actually quite a big difference between the two bits in 35P(2). A big difference between conduct which endangers life or health, whatever the words are, and one which disrupts the activity. It seems to us that one
10 is a more serious – significantly more serious – kind of conduct.

That's one provision that we probably wouldn't argue against and didn't when we gave evidence in the last iteration before the PJCIS. We weren't opposed – we could see – we understood legislation which protected the
15 health, wellbeing, life, whatever. But we thought it was already pretty effectively covered in existing legislation.

When we look at amelioration or ways in which you could build in some protections or defences or exceptions around the two offences, like
20 Human Rights Watch, we are very uncomfortable with any pathway which would be focused just on journalists or even just on journalists and whistleblowers - though, of course, the issue of constraint on a robust free media is the very hot issue here.

25 But these offences will pick up a much wider range of people and, in fact, in the long run have an impact on the community. For that reason, we quoted the really obvious example, the interesting exchange of correspondence between the National Tertiary Education Union and the Attorney-General and his office. We've quoted that just as a very good
30 example that, as is the case with the special provisions for journalists around the mandatory data retention Act, you are going to have a host of other professions and groups of people surfacing and saying, "It affects us too."

35 So that creates a bit of a tension as in how you go about resolving this. If I can come back and add to your observation, Laura, as a researcher in an NGO, who is likely to be doing some work in this area. Many of the bodies - like the civil liberties bodies around Australia, for example -
40 could find themselves embroiled in this legislation because we do get lots of information from lots of sources and this is an obvious area in which information could quite possibly come our way.

MR GYLES: Do you have a newsletter and that sort of thing?

DR LYNCH: We do. Not frequently enough, unfortunately, but yes. But it would be what we do with that kind of information. I'm just saying broadly this issue creates a tension for us. There's been considerable debate within our civil liberties groups – should these provisions not be repealed – which is the cleanest and best way to solve this issue. The tension relates to any provision which is just for journalists – even if it includes journalists and their sources, the whistleblowers, we'd be very uncomfortable as it leaves out a large ambit of people.

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Now, the Attorney-General or his national security adviser has written back to the NTEU saying, “You really shouldn't be worried, there's no problem, but all right, we'll consider extending the extension to academics,” which I think concedes something. But, of course, the issue then is, how far – how many do you have this for? So we kind of think well, how far down that path do you go?

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You will see the exception that our lawyers have – and I have to say it was done very quickly – you can see that it incorporates both journalists and whistleblowers and has a go at defining them. But it has a very nice little catchall right at the end where it adds a general public interest defence. We put that forward as a bit of a stimulant and we would like to do some more work around this ourselves.

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One other thing just to put on the record before questions is that obviously we appreciate and we accept the need for any intelligence agency to work in secrecy; that is not the issue here. But not all-encompassing, permanent secrecy which overrides all aspects of public interest and not secrecy which should be protected in the face of serious misuse, abuse of power. This is not a debate about secrecy, it's about its limits and it's about that are appropriate in a democracy.

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We're very conscious of the real threat of terrorism and how it's changing. And our own thinking around what was likely in Australia – like I think that of many other players in this – has changed a lot in recent years. We accept the likelihood – not the likelihood, we presume it has been happening – that ASIO officers are in some contexts going to be forced into illegal activity.

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MR GYLES: Actually joining a terrorist group would be - - -

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DR LYNCH: Yes. And it's the only example that is given in the long debate, long discussions and in the evidence given by ASIO, by the AFP, by the Attorney-General's Department. They constantly come back to one situation. They come back to undercover work when they're embedded in organisations which have terrorist links.

5 While we're not supporting an SIO – but we keep saying, “If that’s what you’re trying to do, why doesn’t the legislation do that?”. It would be one obvious way you could limit this provision, not, as constantly happens, stuff being drafted in the most expansive and the loosest fashion as possible. I’ll stop there so we can have time for questions after my colleagues.

10 MR GYLES: Thank you very much. Pass on.

DR KLUGMAN: Dr Kristine Klugman, Civil Liberties Australia. What we’ll do is to have Bill Rowlings speak to our submission and then I will add an addendum at the end after he’s spoken.

15 MR GYLES: Thank you.

20 DR KLUGMAN: Correction. I’ll go first. Additional submission. Civil Liberties Australia asks you to recommend to the government and parliament that clauses relating to penalties for unauthorised disclosure of ASIO special operations be removed entirely for these reasons: it is not the duty of the media or the public to keep ASIO operations secret. That duty belongs to ASIO, it’s partner agencies and officials and MPs to whom they disclose operations. And it is the duty of the media to reveal any excesses or potential excesses by ASIO and its partners.

25 Point 2, recommend to the government and parliament a complete rewriting to be undertaken of all anti-terror and associated laws passed since 11 September 2001. As the Crimes Act was consolidated over a century ago because criminal acts have grown like topsy, so there’s now a clear need to rewrite a hundred or so pieces of legislation passed since
30 2001 into a Crimes (Terrorism) Act.

35 The extent to which the terror creep has spread into the laws of Australia is indicated by legislation such as 35P of the ASIO Act and the recent legislation concerning data retention. There has been no consolidated overview of the myriad of acts passed since 2001 other than the reports of INSLM and the INSLM reports have been ignored by the government, even to the extent it is the government’s express intention to abolish that office.

40 MR GYLES: It was. “Was” is the operative word.

DR KLUGMAN: I wouldn’t trust them as far as I could throw them.

45 MR ROWLINGS: It was abolished and it’s only acting, I notice.

MR GYLES: Yes, that's - - -

5 MR ROWLINGS: And it's only there because there was a trade-off done by the Labor Party to get legislation passed by parliament, this particular legislation.

10 MR GYLES: That may be, but my acting position is purely a result of the necessity to get a positive vetting, which takes – is a highly intrusive - - -

MR ROWLINGS: So are you cleared? Can we speak with you?

MR GYLES: You can, yes.

15 DR KLUGMAN: Since 2001, the legislative climate change has been that security and police agencies are given whatever powers are on their wish list and constraints on these behaviours of the agencies have been reduced significantly, for example, the need to obtain warrants before accessing the private data of Australians. We ask, therefore, for you to further
20 recommend that any further proposed change by security or police forces to their laws, regulations be first proposed through a fully publicly available blue paper which sets out the reasons for the security police request and lists the evidence proof of need on which the requests are made before any draft bill is submitted to parliament. If security police
25 aren't able to clearly demonstrate a need, no change should be contemplated to the rewritten Crimes (Terror) Act legislation.

30 Finally, Civil Liberties invites you to comment to the government and publicly that a merging of the Australian Institute of Criminology with the Australian Crime Commission will severely diminish the availability of independent crime statistics and the integrity of the crime-related commentary available to INSLM and the Australian people. Thank you.

35 MR GYLES: Yes.

MR ROWLINGS: I just wanted to quickly run through some points in our submission.

40 MR GYLES: Yes.

MR ROWLINGS: We open our submission by saying we need from a clean slate - - -

45 MR GYLES: Just give me a moment while I turn that up. I just want to remind myself about it.

MR ROWLINGS: While you're finding it, I can say that our submission has benefited from the advice of Jeffrey Miles who insisted we make a submission to you.

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MR GYLES: Yes, the former chief justice of this territory.

MR ROWLINGS: One of our members who I assume you know from the days of the Bar in Sydney.

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MR GYLES: I do know him quite well, yes.

MR ROWLINGS: Who sends his regards.

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MR GYLES: Good. Reciprocated.

MR ROWLINGS: From a clean slate, we need to - - -

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MR GYLES: Actually, interestingly, I appeared against Jeffrey Miles as a barrister. I appeared before him as a barrister in Papua New Guinea and in Sydney and in the ACT and I appeared as a judge of his court. So there you are.

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MR ROWLINGS: That's a fair history of involvement with him by the sound of it.

30

Our submission points out that the problem with the laws is that these are just the rump end of 12 or 13 years of bad laws. The laws have got bad because they started with the premise that there was emergency legislation. Emergency legislation was a natural response to what had happened in 2001. So we say that those laws that have been written higgledy-piggledy over that time need to be relooked at from a clean slate.

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We need to create reasonable laws around terrorism because we're all concerned about it, but they need to balance rights and freedoms with responsibilities and the legitimate, but not excessive, requirements of people responsible for crime and security.

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One of the main problems of this particular law is that it imposes mandatory self-censorship. You have to self-censor in this case and you don't know how far you have to self-censor because you just keep going until you make sure you don't say anything. Once we end up with a media and a public who are like that, we end up with societies that you wouldn't think represented the Australian society that we grew up in and that we want to see continue.

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5 In terms of this law, you asked about newsletters. As a commentator on civil liberties and human rights, we produce, Civil Liberties Australia, a monthly newsletter which is now in its 11th year. It comes out on the first of the month. It's done so more regularly than any daily newspaper in Australia. It has never missed a deadline and it always is on time as opposed to the newspapers.

10 During that time of 12 issues a year for 11 years, we've made many comments on things to do with ASIO and with operations of ASIO. There's no way in the world that we will stop doing that and there is no way in the world that we should be stopped from doing that because we are part of the watchdogs on civil society. It's our role is to do exactly that.

15 If you say it shouldn't apply to journalists, you've got a difficult position because I'm actually a journalist. I'm a retired journalist, fully-fledged, paid-up member of the MEAA. So there are people who are in my situation who are providing exactly the type of commentary that should be included in these laws who shouldn't be included in the laws because the laws are a nonsense. The laws go too far and they should be removed. It's not the duty of journalists to protect secrecy; it's a duty of ASIO to protect its secrecy.

25 I make the point that we've considerably asked parliamentary committees and INSLM and other inquiries for the past 14 years to look at these laws in an overall cumulative fashion. We're constantly told that, "No, I am only looking at this law." We've been told that by the social policy parliamentary committee in the House of Representatives. We've been told that by the Senate Legal and Constitutional Affairs Committee.

30 For that amount of time these committees have always looked only at one law. There has never been any body whatsoever look at the cumulative effect of these terror laws.

35 MR GYLES: I think the former monitor did his best, didn't he?

40 MR ROWLINGS: He looked at some of them but – well, he didn't go into the financial Acts and the other ones that spring out of these. I mean, it's an impossible job for one man to do as a part-time position, which is what is – that's no way – nobody could expect him to do that, to look at all of them. So there is a need, we believe, for that to be done.

45 Our major recommendation is that these "silence the media laws", which is what they are, be abolished, and that data retention laws, as they relate

to journalists and everyone else, be abolished. And that government starts from scratch to rewrite all the terrorism-related laws passed since 2001.

5 We make the point that Grete – Peter Grete is an Australian journalist known to us all for his imprisonment in Egypt.

MR GYLES: Yes.

10 MR ROWLINGS: At the National Press Club in Canberra last night he made this point, which is in our submission towards the back page. The public has a right to know; it's as simple as that. We hired the government, they work for us, not the other way around. And if we lose sight of that, if we lose sight of the public's need to know and to make decisions and to make democracy work, then again I think we run the risk
15 of losing control. That is a very savvy statement from somebody who's been in a position of a government that had written laws in such a way that it ended up putting journalists like him who are mere commentators on what was going on into jail. And two of them are still there. He's lucky to be out.

20 We make this final point, or two points. If Australians are free to criticise the judiciary and the executive and the parliament, which we are, why should one security agency, ASIO, be above critique when it is conducting the most intrusive and presumably dangerous special operations? Why
25 should it be above the parliament or the executive or the judiciary? And that seems to be where it's been placed.

If we make the point finally that in relation to the specific terms of reference of this inquiry, if ASIO is incapable of keeping its plans secret,
30 it should get out of the secret spy agency. There is no reason why the public should be responsible for – or that journalists should be responsible for keeping ASIO's business secret. That's ASIO's responsibility and if it fails to do so, it should answer to the parliament for its failure. You cannot write laws in our submission that take away what the responsibility
35 is on this particular agency. Thank you.

40 MR GYLES: What's – well, I think I know the answer, but what's your position about the IGIS, the Inspector-General, for example? The model at the moment essentially is, I think it was said previously, that – the theory is that there should be no publication about ASIO operations and that if there's a complaint about how they've been conducted, then it should go to the Inspector-General. That's putting it a bit too simply but that's really what it amounts to.

MR ROWLINGS: You asked a very important question before, I think, which Lesley half-answered. It was – well, maybe Laura did. What’s the situation now if we got rid of these laws? What would happen is what’s happened for decades, and that is, that the major media is responsible. If it knows there’s something afoot, if it finds out something, it inevitably goes to an authority of some sort, be it ASIO or a member of parliament or a police person, and says, “Look, we’ve got whiff of this. We want to report it.”

Quite often they are asked to and they do not report it. Quite often there’s a wait period. There’ll be, “Don’t go. We can’t go on that for another two weeks,” or a month. “Hold off, we’ll give you first release of it when it comes out.” That is effectively what’s always happened and there’s nothing wrong with that system and it’s always worked. That is why we say if ASIO could produce some evidence that they need this law, then perhaps there’d be some reason for it. But there is absolutely no evidence whatsoever that that system that operates now informally has ever broken down.

MR GYLES: You say there’s no evidence of abuse of the system.

MR ROWLINGS: Never, no. You can ask the journalists that Laura was talking about in Sydney and the major dailies who’ve operated that way for years.

DR LYNCH: If I could back Bill up on that. Obviously this is one of the questions that kept being pushed as we asked for some solid examples. I mean, obviously don’t tell us precise details, but give us some examples of what the problem is, what is different now. There’s intensity of activity probably. But you didn’t ever get any response other than from some members of committee and from Attorney-General, ASIO and the AFP saying it is a problem. Which is the same answer as to “why do we need the mandatory mass – rather than a targeted data retention scheme?” Because they say, “it is absolutely essential.”

Now, we need to go one step beyond that. We need some more substantive examples. They aren’t there. The queries have been numerous from numbers of sources. It’s one of the exasperations of this. Apart from anything else, apart from the fact that it doesn’t seem to be needed, apart from the fact that there’s quite strong legislation already in place, there is no tangible example of what is going wrong at the moment.

MR ROWLINGS: When I say I’ve worked in the media, I’ve worked on The Australian, The Daily Mirror, The Daily Telegraph and the Sun Herald in Sydney. So I have fair experience of how these things operate

in newspapers. What I am telling you is my experience of how they operate in newspapers. It's not made up. I don't have to go to journalists as I am a journalist, I know how it works. And that's precisely how it's worked.

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There has never been a case where the media has acted irresponsibly when they've gone with something like this and asked for it to be – and tried to find out about it. The idea of a media person going to a government authority to ask, "Can we publish?" is a nonsense. That just deflates – the media is no longer an independent media. If you have to go and ask somebody whether you can publish a piece of information you have, then you've destroyed the way the society operates. That just destroys - - -

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MR GYLES: Mind you, you are telling me that that's the way it operates now. You're contrasting that with a legal obligation.

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MR ROWLINGS: A legal obligation to do so. It works now because the media is more responsible than people think. The media is not anti the government, it's not anti-secret. It is anti-terrorist as much as anybody else is anti-terrorist. But to impose laws that will send journalists to jail for 10 years, or anyone else for that matter, on the basis of some government dictate is just not on. I mean, that's why these laws are awful law. There's no way in the world they should stay on the books.

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MR GYLES: What is the protection for – the example is given as the undercover operative. What is your answer to that problem? Disclosure of the circumstances of an operation which, although may be not obvious, will tell the people who are affected that they've got a traitor in their midst and who that traitor is.

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MR ROWLINGS: If it's an undercover operation by ASIO, it's up to ASIO to keep it undercover. It's not up to the media or the public to keep it undercover. Its very nature of it is it's undercover.

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MR GYLES: Okay, but let's just tease that out a bit, because ASIO can't shoot people when they disclose something. If they have a disaffected officer – and we all know that people become disaffected for good or bad reasons – if that disaffected officer then blows the cover, do you agree with any control over that at all?

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MR ROWLINGS: Absolutely, and it's already in the ASIO Act, as far as I know, as a disaffected officer.

DR LYNCH: It is, indeed, yes.

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MR GYLES: We're not dealing with a law-free zone then.

MR ROWLINGS: No, absolutely not. I mean, there's every precaution in the world to stop people doing that.

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MR GYLES: I just want to make sure I understand what you're saying, that's all. So you accept the what might be called secrecy provisions, as they now exist, with 35P out of the way.

10 MR ROWLINGS: Absolutely. I mean, the provisions are working – have worked, are working. There is absolutely no need to bring in this type of legislation, which is so broad brush that it's – I mean, if you imagine – I sometimes say to myself let's go back to the year 2000 before those planes crashed into there. If somebody put up this Act or half a dozen of the Acts
15 put up last year they wouldn't have got past first base.

The problem is the cumulative effect over 14 years of these laws. So we now accept, yes, okay, we just accept that. We've tried to modify it a little bit. There's no way in the world we should even contemplate
20 accepting this law. This law has no place in Australian legal jurisdiction.

DR KLUGMAN: The other problem I think is, as Bill has pointed out, that each of the committees that we go before looks at a particular section, a particular Act, and refuses to look at the whole scene. I've made the
25 analogy of the frog in boiling water. I don't know whether you know that analogy.

MR GYLES: I've forgotten it.

30 DR KLUGMAN: You can put a frog in hot water and very, very slowly increase the temperature.

MR ROWLINGS: Cold water.

35 DR KLUGMAN: Cold water and slowly increase the temperature. If you put a frog in boiling water it would leap out. If you slowly, slowly increase the temperature, so the myth goes, the frog gets boiled to death because it doesn't realise that it's in a dire situation. This is analogous
40 with these terror laws. People have become inured over the past 14 years to successive legislation which have, more and more, in extreme ways inhibited our rights and our freedoms.

MR GYLES: You might say since 1949, mightn't you, if you're really looking at it?

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DR KLUGMAN: Well, I think it's been more in this century.

5 MR ROWLINGS: I mean, the laws have changed dramatically as society has changed, but the party changed also because control has gone from states to federal. So there's been centrally written laws, which is another issue around this, I think. But there might have been changes since '49, but the changes are over the top since 2001.

10 If you remember that all the laws written in the year after 2001 were written in emergency, in a hurry.

MR GYLES: Yes.

15 MR ROWLINGS: And we've never recovered from that. They were all over the top. That's reasonable. I mean, it's not unreasonable that laws went too far because we were all worried about what was going to happen.

20 DR KLUGMAN: In fact, your predecessor, Bret Walker, in his report advocated the withdrawal of many of them. Of course, his advice was basically ignored, which is why I have some cynicism about the position that you're acting in the role of. I sincerely hope that the independent monitor role is made permanent and is given sufficient resources to really oversee the terror laws and to push for a review of the entire gambit of them.

25 MR ROWLINGS: In fact, if you want that as a recommendation, we'll make that a recommendation.

30 MR GYLES: That's all right. You don't need to because the statute says that now. Resourcing is another issue, of course, and capacity and so on. But the statutory remit is clear enough.

DR KLUGMAN: Rather tenuous, I think.

35 MR GYLES: The statute is not tenuous, but the - - -

40 MR ROWLINGS: The amount of resources allocated were very tenuous. \$300,000 a year salary for a man who's already fully occupied at the Bar with no time to do the job, and that's not exactly a big remuneration for a barrister who's one of the leading barristers in Australia.

MR GYLES: Have a look at the Remuneration Tribunal determination now and see what you think about that.

MS THOMAS: I don't think he minds too much about that. I don't think that's the fact that was impeding Mr Walker's work.

DR KLUGMAN: It's a reflection of how he was regarded.

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MR GYLES: He was regarded very well in that respect.

MR ROWLINGS: But certainly his reports weren't; they were ignored.

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MR GYLES: No, that's not my impression, having read them.

MR ROWLINGS: Nothing happened.

MR GYLES: Some of them were implemented.

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MR ROWLINGS: But nothing happened. He recommends that this – I tell you what did happen. He recommends that control or detention orders, one or the other, should be abolished because no one's used them. So what happens? We have a 200-person raid and they use the detention orders just so they can say, "We've used those."

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MR GYLES: That's a cynical view.

MR ROWLINGS: It's not cynical; it's what happened.

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MR GYLES: Well, it's historically correct, yes.

MR ROWLINGS: Exactly. So you could describe it as cynical, but it's historically accurate.

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MR GYLES: I shouldn't have said that. It is a bit - - -

MR ROWLINGS: Do you think that civil liberties bodies shouldn't be cynical?

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MR GYLES: No. It wasn't said critically. All right. I don't think there's any doubt where you stand.

MR ROWLINGS: Good. How far can these things go?

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MR GYLES: You mean the legislature?

MR ROWLINGS: No. What's changing is how the society controls the media. And this is clearly a control in the media, this and the data retention laws is clearly a control. Yesterday we had an example that

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shows you how far this can go without society worrying about it. There was an SBS soccer journalist who tweeted about - - -

5 MR GYLES: It was on the news this morning, yes.

MR ROWLINGS: About ANZAC, and he had a viewpoint which not many Australians would share, I suggest. He's been sacked on the basis of his views, which he's entitled to express, aren't in keeping with the mainstream. That's a very dangerous - - -

10 MR GYLES: Breach of the code of conduct, it was said.

MR ROWLINGS: Well, there's no code of conduct. What code of conduct?

15 MR GYLES: SBS.

DR LYNCH: Mind you, that is a growing issue which the New South Wales Council of Civil - - -

20 MR ROWLINGS: Why does a person expressing a personal view, which is clearly – he's a soccer reporter. He's not commenting on soccer.

DR KLUGMAN: Yes, we are a bit off.

25 MR GYLES: Now, look, if you're telling me I haven't got enough resources to deal with this legislation, I can't solve all those other problems. But I am anxious to make sure that – are there any detailed aspects that we haven't covered?

30 MS THOMAS: Could I just say a couple of things in relation to a few of the things that have been said? First of all, in relation to what you were just saying about information that might disclose the identity of an officer, I've only just appreciated this potential scenario where the – it might not be apparent on the face of the story to me but to somebody who could perhaps put the officer in danger, it might disclose to them.

MR GYLES: It joins the dots.

40 MS THOMAS: You can, if you think about it, there's obvious once that it's suggested to you. I think that one of the problems that arises in the dialogue, if I can describe it that way, between government agencies and NGOs and the media in this field is that those examples are not made explicit enough because there is an obvious interest, national security

interest, engaged there. So I would not necessarily see a law that was directly directed to preventing that from occurring as being problematic.

5 So perhaps that is one way in which it would be important to proceed in the future. What I would say about that is that it's very difficult to imagine a journalist making that report in circumstances where they had been told, "We appreciate that this is not obvious to you, but if you report these specific details, that will potentially endanger our operatives because they'll be meaningful to the people involved."

10 First of all, if the current provision that prevents the disclosure of the identity of an officer doesn't extend to that, then perhaps it should be modified to extend to that.

15 MR GYLES: It may or may not. I don't have a view about that.

MS THOMAS: I don't have it in front of me either and I appreciate the position that you're in. There's a lot of legislation in different places that interacts - - -

20 DR LYNCH: Could I - - -

MS THOMAS: Could I just finish first? But, secondly, it has been emphasised by journalists today that this law has the potential to break down or undermine that relationship of trust between the police and ASIO media liaison and journalists because journalists may be in a better position if they just don't ask the question.

30 So I think that's the kind of example where it may be in everybody's interest not to have a very broad offence, because if you maintain that relationship and if you don't give journalists a reason not to ask the question, then they are – the agency is more likely to be in a position where it can comment on the details that are included in the stories for the purpose of protecting its officers.

35 Then the only other thing that I wanted to say in relation to the IGIS is that I think that as part of that dialogue it would be unfortunate – the development of the legislation that created the IGIS position was a beneficial one. We've heard that the IGIS may also not have sufficient powers and resources to do its job as well as some people would like. That's often a feature of those types of position.

40 But it would be unfortunate if the government consistently pointed to positions like the IGIS as a justification for laws that burden free speech and the like or severe criminal penalties that might apply to journalists.

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Because if that happens consistently, it will change the view certainly of human rights and civil liberties' organisations about what those positions are really there for and I think promote cynicism about the existence of those positions and possibly even cooperation with those offices.

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That may not be the intention in this case, but I think the more detailed and specific the government's justifications are and the less they are very broad and just point to the existence of the IGIS or the existence of the public interest disclosure legislation, the more they are likely to get some cooperation and support from civil society more broadly and indeed from journalists probably.

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MR GYLES: Thank you. Yes, Dr Lynch.

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DR LYNCH: I just go back to the comment about protecting agents – I mean, yes, we all support protection of the identity of an agent and do not want to endanger them. But the illogicality or the confusion around this is, on the one hand, the external descriptions – and I think it's also in the explanatory memorandum – the rhetoric says these are really going to be very infrequent operations, presumably around particularly dangerous contexts, whatever. Yet, of course, the legislation and the authorisation process is really – we consider it - - -

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MR GYLES: Pretty wide.

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DR LYNCH: It gives the Attorney-General unfettered discretion as to when to authorise an SIO. Regarding the naming of, the exposing of an agent, ASIO agents are presumably regularly involved in covert undercover activities where the exposure of their identity would be dangerous for them. Well, it's managed now. This legislation only refers to very rare, infrequent SIOs. You're kind of puzzled about it.

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There is legislation now. It seems to work. What's - - -

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MR ROWLINGS: And I take you forward from there. Let's say that this legislation came in. How are they going to prosecute it? How are you going to take someone to court? What is ASIO going to say in court? Are they going to reveal the identity of the officer, reveal the secret operation?

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MR GYLES: I mean, I raised that this morning with some of the groups. The answer is – and it's substantially correct – that the power of a court to make non-disclosure orders covers a fair bit of that.

MR ROWLINGS: It certainly does. Therefore, we get a secret trial with no reporting on a secret mission that nobody's allowed to talk with and we say that we've got a democracy; they don't go together.

5 MR GYLES: Yes, all right. Anything else? Because that's all been very interesting and fruitful?

MR ROWLINGS: No, thank you. Thank you for your time.

10 DR KLUGMAN: Thank you for the opportunity.

DR LYNCH: Thank you, yes.

MR GYLES: Thank you for your cooperation.

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DR LYNCH: And good luck with your vetting. May it proceed rapidly.

MR GYLES: I'll just formally close the proceedings. I'll be resuming at 9.30 tomorrow for a second day of hearings. Thank you very much.

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**MATTER ADJOURNED AT 3.31 PM UNTIL
TUESDAY, 28 APRIL 2015 AT 9.30 AM**