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The Hon Roger Gyles AO QC  
Acting Independent National Security Legislation Monitor  
One National Circuit  
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Dear Mr Gyles

### **Inquiry into section 35P of the ASIO Act**

I refer to your letter of invitation of 30 March 2015. I am grateful for the opportunity to make a submission to your inquiry, as below.

#### **1. Summary of submission**

1.1 Section 35P has a direct negative impact on journalists, in two ways:

- (a) they can be prosecuted for acts done by them in pursuit of their profession, and none of the arguments which have been asserted to the contrary have any basis; and
- (b) it will inevitably cause them to be much less likely to report on intelligence-related matters generally for fear of unwittingly committing an offence – the so-called "chilling effect" on press freedom.

1.2 No case has been made out to justify the enactment of s35P(1) or its negative impact on journalists. In terms of the arguments raised to so justify it, those arguments are more than adequately satisfied by the enactment of s35P(2) (the aggravated offence provision).

1.3 While a case could most likely be made out to justify s35P(2) if properly argued, this has not successfully been done and there are structural drafting problems with s35P(2) as presently enacted.

1.4 Section 35P(1) ought to be repealed, and Parliament should revisit s35P(2) with a view to properly understanding what kinds of acts it considers should be outlawed in this context and amending s35P(2) to more appropriately address that purpose.

2. **Does section 35P have any impact on journalists?**

- 2.1 Presumably this question has only arisen at all because the Attorney General and his Department have repeatedly insisted that it does not. The Attorney General himself has said that it is "almost inconceivable" that a journalist could be prosecuted under s35P.
- 2.2 The answer to the question is, however, obviously yes. It is not possible to construe the provision any other way. The offence under s35P(1) has two elements:
- (a) that the person intentionally disclosed information relating to a special intelligence operation (**SIO**); and
  - (b) that they knew or were reckless as to whether the information related to an SIO.
- 2.3 Of the defences in s35P(3), only s35P(3)(c) could ever have application in a case of a journalist disclosing information relating to an SIO; that is, if they were required by law to do so. Otherwise, there are no available defences upon which a journalist could call.
- 2.4 The offence covers all disclosures of information relating to an SIO, no matter how many times the information has already been disclosed or by what means. Even if it had been widely reported, any further disclosure would still be illegal. The offence comfortably covers the ordinary situation which would confront a journalist: where they have come into possession of information from a whistleblower or other internal government source. If they publish or refer to the information in circumstances where they satisfy the element of recklessness, they commit the offence.
- 2.5 In submissions to the Parliamentary Joint Committee on Intelligence and Security which considered this legislation, the Attorney General's Department argued that a journalist could not offend s35P unless they had some actual knowledge that it might relate to an SIO. The Department submitted that it would be impossible for a journalist to accidentally offend s35P, because if they had no awareness that the information related to an SIO, they could not meet the requisite standard of recklessness to that fact. The Department's submission included the following statement:
- "The Department does not accept suggestions that a mere awareness that ASIO is, or may be, involved in any activity of any kind must necessarily give rise to awareness of a substantial risk that there was an SIO or not."
- 2.6 While this statement is literally true, it does not answer the concern. First, obviously not every ASIO operation will be an SIO. However, the problem for journalists is how they are to assess the risk that an SIO exists when they come into possession of information which might relate to an SIO (they of course can never know whether it actually does, by the nature of SIOs). Secondly, the risk needn't "necessarily" arise for s35P to be triggered. In order to be reckless, a person has only to be aware of circumstances which create the risk that the information relates to an SIO, and take that risk anyway.

- 2.7 In practice, what this means is that, any time a journalist becomes possessed of information relating to an intelligence operation, it follows that the journalist will almost inevitably be aware of the risk that that operation has been declared an SIO. There is no way of discovering whether it is an SIO or any information which might help them to work out how high the risk is. Therefore, the risk being unmeasurable but obviously in existence, the journalist is faced with the choice of disclosing the information or not disclosing it, knowing that if they are wrong about it not relating to an SIO they could be prosecuted under s35P.
- 2.8 A simple illustrative example is the revelation that Australia's security agencies had been bugging the personal phones of the Indonesian President and his wife. If that information was leaked to a journalist today, the journalist would surely have to think that there was a substantial risk that the bugging operation was part of an SIO. Therefore, they would be very brave to publish that news or anything relating to it.
- 2.9 Compounding the problem for journalists is the overarching concern that they could be prosecuted and found guilty even in circumstances where they have not considered the SIO risk at all. Take the hypothetical example of a journalist who comes into possession of leaked intelligence information which he or she considers to be relatively low level; consequently, the journalist does not seriously contemplate that the information might relate to an SIO. If they turn out to be wrong about that, and a prosecution is launched against them, they will plead not guilty on the basis that they were not reckless as to the fault element. It is certainly possible in such a case that the tribunal of fact might disbelieve the journalist's protestations and conclude instead that they were reckless. That may be a fair result in the particular case, but the possibility alone will add substantially to the dilemma with which all journalists now have to contend when deciding what to do with potentially sensitive information. Nobody wants to go to prison just for doing their job.
- 2.10 For these reasons, it must be beyond doubt that s35P directly impacts journalists in two ways: they can be prosecuted under it for acts done in pursuit of their profession, and there is no basis for asserting that this is unlikely let alone inconceivable; and the existence of the offence provision will inevitably cause journalists to be much less likely to disclose information about any intelligence operations because of the risk of committing a crime, given that the standard of recklessness can be satisfied without any proof of actual knowledge or intent.

### 3. **Impact on journalists – "chilling effect" on freedom of the press**

- 3.1 As noted above, there is an unavoidable real world consequence of s35P which exists regardless of the debate over whether the provision is targeted at journalists or whether the authorities will seek to use it against journalists in practice. This is the "chilling effect" which it will have on the media.
- 3.2 Not much more needs to be said about this. It is just an obvious fact that journalists and their employers will now bring a different lens to the handling of information that may potentially relate to matters of intelligence or national security. Whereas previously they could publish, for example, material obtained from whistleblowers within the Government, without being concerned about being prosecuted, with s35P in place that is no longer the case. They must

and no doubt will be considering the likelihood that any particular piece of information relates to an SIO, and making publication decisions accordingly. Necessarily, stories which would previously have been published or broadcast will now not be.

3.3 It cannot seriously be argued that this will not happen (and is probably happening already). The chilling effect that this will have on the ability and willingness of the media to do its job, of reporting on and exposing governmental actions, is crystal clear. Given the absolutely critical importance of a free press to our democratic institutions and society, this should worry everyone.

#### 4. **Additional arguments relating to the impact on journalists**

4.1 In addition to the unfounded general assertion that journalists won't be targeted and the misleading suggestion that they won't meet the standard of recklessness in the absence of actual knowledge (dealt with in 2.6 above), some additional arguments have been made by the Attorney General and his Department in relation to the exposure of journalists to s35P.

4.2 First, there is the suggestion that whistleblower protections have some relevance to s35P. Simply, they don't. The whistleblower protections in other legislation have no application to s35P and provide no assistance to anyone being prosecuted under it.

4.3 Secondly, Attorney Brandis made this statement in response to a question as to whether s35P would catch a journalist reporting on something disclosed by a whistleblower like Edward Snowden:

"If it's a journalist covering what a whistleblower has disclosed, then the journalist wouldn't fall with the reach of the section, because the relevant conduct is the conduct constituting the disclosure. So if the event is already disclosed by someone else and a journalist merely reports that which has already been disclosed, as it was by Snowden, then the provision would not be attracted."<sup>1</sup>

4.4 That statement is absolutely wrong. The section makes every disclosure an offence, regardless of any prior disclosures. It does not define "disclosure", which thus carries its ordinary meaning of any kind of communication of the information, public or private. And SIOs have no sunset date; once an SIO has been declared, s35P will apply to any disclosure of information relating to it at any time in the future.

4.5 Thirdly, much emphasis has been placed on the obligation which the Commonwealth Director of Public Prosecutions has, under the Prosecution Policy of the Commonwealth, to consider the public interest in the commencement or continuation of any prosecution. The Explanatory Memorandum to the legislation puts it this way (paragraph 582):

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<sup>1</sup> Q&A, ABC Television, 3 November 2014

"It would be open to the CDDP, in making independent decisions on this matter, to have regard to any public interest in the communication of information in particular instances as the CDDP considers appropriate."

4.6 The above statement is a trite statement of the law, and should provide no comfort. Indeed, the CDDP could decide to not prosecute some or even any journalists under s35P because he or she determines that it is not in the public interest to do so, but why should this choice be placed in the hands of the executive? We cannot know what attitude the current or any future CDDP will have to this issue. Bearing in mind that SIOs themselves are not subject to judicial oversight and are entirely creations of the executive, the public interest is entirely unprotected through the entire chain from the declaration of an SIO to the decision to prosecute a journalist for reporting on it. At that point the judiciary can only enforce the law, and there is no public interest defence.

5. **Is the impact on journalists justified?**

5.1 Accepting both that s35P will have a substantial negative impact on journalists, and that it is sometimes appropriate for the law to infringe on our traditional freedoms in pursuit of another, higher, legitimate purpose, the question then is whether this particular infringement is justified.

5.2 While Australians enjoy no "natural" human rights protected by law, it is accepted that we have certain inherent freedoms to which we are entitled except to the extent to which the law impinges upon them. Even the only recognised constitutionally protected freedom which we enjoy, to communicate on government and political matters, is itself a creation of the law (the Constitution itself).

5.3 The so-called freedom of the press, therefore, is open to being impinged upon by the legislature as it sees fit. If any such restriction or burden on press freedom offends the constitutionally implied freedom as per the *Lange* test, then it is invalid. It has not been suggested anywhere that s35P is invalid on this basis, and that seems almost certainly correct. While s35P satisfies the first limb of the *Lange* test in that it does burden the implied freedom, it is unlikely that the High Court would not find that it is appropriate and adapted to the purposes of the *ASIO Act*, that is the protection of intelligence operations and operatives and the broader national interest. We could, of course, all be wrong about that, but that is not a matter for this inquiry.

5.4 The constitutional validity or otherwise of s35P does not fully answer the question of whether it is a justifiable law, however. Many laws relating to national security have been made since September 2001, and the asserted justification for each one has been the protection of our society from those who wish to do us harm. The governmental rhetoric consistently talks of the occasional need to sacrifice some degree of our freedoms in order to preserve our way of life as a whole. Summarising the attitude of both sides of politics to this entire debate, Prime Minister Abbott told Parliament in September 2014 that "the delicate balance between freedom and security may have to shift. There may be more restrictions on some, so that there can be more protection for others."

- 5.5 Holding the legislature to its own standard, it is only reasonable that each new national security law which takes away some part of our freedoms is subjected to the test of proportionality. That is: is this law necessary or sufficiently desirable, in that the balance between the reduction in our freedoms which it imposes and the threat to which it responds falls clearly on the side of protecting us from that threat?
- 5.6 This test has several parts. The negative impact on freedoms has to be defined, as does the threat it is designed to address. Critically, the likelihood that the provision will effectively address that threat must be assessed. It is insufficient for the authorities to say of a new law that it might help; they must make out a clear case that it will at least materially reduce the threat. Otherwise, pretty much any draconian law could be justified.
- 5.7 The impact of s35P has been explained, specifically its negative impact on journalists and the freedom of the press. The positive legislative purpose of s35P - what it is designed to do and why we need it - has to be drawn from the legislative materials accompanying it.
- 5.8 The Attorney General's Second Reading Speech makes this statement:
- "In addition, the Bill introduces new maximum penalties of 10 years' imprisonment for existing offences involving unauthorised communication of intelligence-related information, which at two years' imprisonment are disproportionately low. The higher maximum penalties better reflect the gravity of such wrongdoing by persons to whom this information is entrusted."
- 5.9 The Second Reading Speech must, regrettably, be disregarded. It contains two serious misstatements regarding s35P – the offence is entirely new, not existing, and it applies not just to persons "entrusted" with intelligence-related information but anyone who comes into possession of it by any means.
- 5.10 The Explanatory Memorandum, paragraph 569, says this:
- "These offences are necessary to protect persons participating in an SIO and to ensure the integrity of operations, by creating a deterrent to unauthorised disclosures, which may place at risk the safety of participants or the effective conduct of the operation."
- 5.11 The thrust of the argument in the Explanatory Memorandum is the protection of intelligence operatives and the integrity of operations. This draws attention to the two-tiered structure of s35P, which of course creates two separate offences – the general offence in s35P(1) which has a maximum penalty of 5 years' imprisonment, and the aggravated offence in s35P(2) with a maximum penalty of 10 years' imprisonment. The aggravating elements in s35P(2)(c) are either that the person making the disclosure intends to endanger the health or safety of any person or prejudice the effective conduct of the SIO, or that the disclosure of the information will have one of those effects.
- 5.12 The aggravating factors in s35P(2)(c) are exactly what are identified in the Explanatory Memorandum as the justification for the enactment of s35P as a whole. It should be borne in mind that, while s35P(2)(c)(i) requires actual intent, s35P(2)(c)(ii) does not. It requires proof

that the disclosure will in fact have the requisite effect on people's safety or of prejudicing the SIO, but the mental element of the offence in that case is still only recklessness. This means that, if a person holds information relating to an SIO, and is reckless as to whether it does relate to an SIO, and one of the aggravating factors is present (either they intend harm or it will do harm as defined), then they will commit an offence under s35P(2).

- 5.13 It can readily be seen therefore that s35P(2) has a significantly wide reach. It will adequately capture any circumstance where a recipient of information is seeking to damage legitimate national security interests by making a disclosure, as well as a circumstance where no such intention exists but the disclosure will actually do that damage and the recipient is reckless as to the risk. In terms of the case for s35P which is asserted in the Explanatory Memorandum and has been argued by the Government, that case is actually more than satisfied by the enactment of s35P(2).
- 5.14 This leaves s35P(1) out on a limb. It is not needed for the purposes argued as justifying it, which as shown above are adequately satisfied by s35P(2). To put the issue in rhetorical terms, why should a journalist face a 5 year prison term for performing their job in circumstances where they had no intention of causing harm and were not even reckless as to the risk of causing harm?
- 5.15 The end result is that no case has been made out in support of the necessity of s35P(1), and consequently, the balance of benefit and detriment falls squarely on the side of the argument that its enactment was not justified, and therefore neither is the negative impact which it will have on press freedom and journalists.

## 6. **Is s35P(2) justified?**

- 6.1 Whether s35P(2) is justified is a more difficult question. The first category of aggravating factor in s35P(2)(c)(i) appears to be reasonably justifiable, given that it is only triggered when the person making a disclosure intends serious harm to people or to the SIO itself. It seems reasonable to legislate to deter anyone, including a journalist, from disclosing sensitive intelligence information with that intent.
- 6.2 This does raise a structural problem with s35P(2), however, because the recklessness element still applies to the question of the person's knowledge that the information relates to an SIO. It is difficult to see why there should be a distinction drawn, when a person intends the kind of harm identified in s35P(2)(c)(i), between the case where they either know or are reckless as to whether the information they are disclosing relates to an SIO, and the case where they do not know and are found not to have been so reckless. Why should the former case be a crime carrying a 10 year penalty, and the latter case not a crime at all? Given that the offence can only occur where the information does in fact relate to an SIO, it is hard to see why this distinction was thought appropriate.
- 6.3 As to s35P(2)(c)(ii), as noted above this requires that actual harm will result from the disclosure. The recklessness element still applies to the s35P(2)(b) element, and presumably it will also on the same basis apply as the fault element for the circumstance in s35P(2)(c)(ii). That is, the

person will have to be reckless as to both the fact that the information relates to an SIO and the fact that it will endanger health or safety or prejudice the SIO.

6.4 This still opens up the possibility of a journalist being found guilty of an offence under 35P(2) in circumstances where they had no actual knowledge of the relevant facts. It is admittedly a much lower likelihood than under s35P(1), because of the aggravating factor, and it may be that an adequate case exists for the offence to be structured in this way. Unfortunately, that case has never been clearly argued or made out.

6.5 In summary, while in general terms s35P(2) may well be justified as a reasonable imposition upon press freedom, its drafting is inapt for the purpose and insufficient focus appears to have been brought to it in the legislative process. It ought to be revisited and revised in accordance with a closer consideration of exactly what conduct should be proscribed. If s35P(1) was repealed, I suspect that this task could be approached in a much more coherent manner.

## 7. **Conclusion**

7.1 My submissions following upon the above are that:

- (a) it is obvious that it s35P will have a substantial negative impact on journalists and press freedom;
- (b) no case having been made out in justification of its enactment, section 35P(1) ought to be repealed; and
- (c) Parliament should revisit s35P(2) with a view to properly understanding what kinds of acts it considers should be outlawed in this context and amending s35P(2) to more appropriately address that purpose.

Yours sincerely

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