

5 May 2015



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

By email: INSLMsubmissions@pmc.gov.au

Dear Mr Gyles

INQUIRY INTO SECTION 35P OF THE ASIO ACT

I write further to the Law Council of Australia submission dated 20 April 2015 to the Acting Independent National Security Legislation Monitor's (INSLM) Inquiry into section 35P of the *Australian Security Intelligence and Organisation Act 1979* (Cth) (the ASIO Act).

During the Law Council's appearance before you on Monday 27 April 2015, you raised the question of whether current secrecy provisions (such as sections 18, 18A and 18B of the ASIO Act) in conjunction with the complicity provisions under the *Criminal Code Act 1995* (Cth) (the Criminal Code) would be adequate to capture unauthorised disclosures of information relating to a special intelligence operation (SIO).

Sections 18, 18A and 18B of the ASIO Act apply only to unauthorised disclosures by persons who have accessed information while acting in a specified official capacity (for example, as an ASIO employee, an ASIO affiliate or a person having entered into a contract, agreement or arrangement with ASIO) (the official).

Under those secrecy provisions any third party, such as a journalist, would only be guilty of an offence themselves if they were involved before or during the commission of the offence by the official. This could be in a joint criminal enterprise (section 11.2A of the Criminal Code), as an aider/abettor/counsellor/procurer (section 11.2 of the Criminal Code), a conspirator (section 11.5 of the Criminal Code) or as an inciter (section 11.4 of the Criminal Code).

If the official disclosed the information to the third party, without any encouragement or assistance from the third party, the third party may *not* be guilty in any of these ways. The third party could be guilty of being an accessory after the fact (section 6 of the *Crimes Act 1914* (Cth)) if they assisted the disclosing person to avoid detection or prosecution in some way.

However, merely receiving information unsolicited from an official would likely not be an offence, nor would further disclosing that information to other parties.

Section 35P relates to more specific information – relating to a SIO – but may be committed by *anyone* disclosing such information: no matter who they are or how they received the information.

Therefore, the existing secrecy provisions in the ASIO Act do not appear to cover the field covered by section 35P if a third party receives *unsolicited* information from an individual such as an ASIO employee. Nor do they cover the field if someone receives information from someone not covered by the secrecy provisions.

If for example an official discloses information about a SIO to her/his husband/wife who tells a journalist, under sections 18, 18A and 18B of the ASIO Act, the husband/wife will likely not be liable for the actions of their spouse, if the information was volunteered to them. The husband/wife will not be liable for their own disclosure to the journalist since they are not covered by the secrecy provisions. The journalist in turn will not be liable for publishing it.

On the other hand, the existing secrecy provisions would clearly cover situations where a journalist encouraged incited or conspired with, an official to disclose information in breach of sections 18, 18A and 18B of the ASIO Act. Proving the encouragement or agreement would be a matter for evidence as in any criminal trial.

The Law Council hopes that the above comments will be of assistance to the INSLM.

Please contact Dr Natasha Molt, Senior Policy Lawyer (on
should you require further information.

Yours faithfully,

SECRETARY GENERAL