CDPP
Australia's Federal Prosecution Service

Acting Independent National Security Legislation Monitor
Inquiry into section 35P of the ASIO Act

Request for information from the Commonwealth Director of Public Prosecutions

20 April 2015

QUESTION 1: ENFORCEMENT OF SECTION 35P OF THE ASIO ACT

(1) Have any matters been referred to the CDPP for prosecution of offences against section 35P of the ASIO Act since 30 October 2014? If yes, please provide details.

The Commonwealth Director of Public Prosecutions' file management database

The Commonwealth Director of Public Prosecutions (**CDPP**) operates a file management database known as the Case Recording Information Management System (**CRIMS**). CRIMS commenced operation in June 1994. CRIMS is the core legal information system for the CDPP. It records file activity in relation to all matters referred to the CDPP for prosecution. CRIMS records case details at various phases of the prosecution process and can be interrogated to provide information on the outcome of all matters referred to the CDPP for prosecution. CRIMS retains historical records of completed matters dating back to June 1994.

Number of prosecutions for offences against s35P

A search of the CDPP CRIMS database reveals no record of matters prosecuted or referred for consideration of prosecution for offence/s against section 35P of the *ASIO Act*.

QUESTION 2: ENFORCEMENT OF DISCLOSURE OFFENCES APPLYING TO CONTROLLED OPERATIONS, ASSUMED IDENTITIES AND WITNESS PROTECTION SCHEMES UNDER THE CRIMES ACT 1914

(2) The Attorney-General's Department (AGD) gave evidence to the Parliamentary Joint Committee on Intelligence and Security inquiry into the (then) National Security Legislation Amendment Bill (No 1) 2014 that no matters in relation to the analogous offences in sections 15HK and 15HL of the *Crimes Act 1914* (disclosures of information relating to controlled operations) had, at that time, been investigated or referred for prosecution.
I would appreciate the CDPP's advice, as at March 2015, as to whether any of the relevant disclosure offences in the Crimes Act identified in paragraphs (a)-(c) below have been referred for prosecution.

(a) Sections 15HK and 15HL (controlled operations).

(b) Section 15LC (assumed identities).

(c) Section 15MS (witness protection for law enforcement operatives).

If yes, please provide details, particularly whether any prospective defendants are or have claimed to be journalists, and the conduct alleged to have constituted the offence is that person's disclosure of information in their capacity a journalist.

A search of the CDPP CRIMS database reveals no record of matters prosecuted or referred for consideration of prosecution for offence/s against sections 15HK, 15HL, 15LC or 15MS of the *Crimes Act 1914*.

QUESTION 3-4: PROSECUTIONS OF PARTICIPANTS IN A SPECIAL INTELLIGENCE OPERATION OR CONTROLLED OPERATION, WITH RESPECT TO CONDUCT OUTSIDE THE LIMITS OF THEIR AUTHORITY; AND PROSECUTIONS FOR THE MISUSE OF ASSUMED IDENTITIES[1]

(3) Has the CDPP received any referrals for prosecution in relation to persons who are authorised participants in a special intelligence operation (under Division 4 of Part III of the ASIO Act) or a controlled operation (under Part IAB of the Crimes Act), in respect of conduct that is alleged to have exceeded the person's authority in relation to that operation? If yes, please provide details. (Please consider the time period from the commencement of Part 1AB in its current form in 2010, and from the commencement of Division 3 of Part III of the ASIO Act from 30 October 2014.)

The CDPP CRIMS database does not generally record information pertaining to the occupation of a defendant or potential defendant. In many cases, the occupation of a defendant is not known if they do not choose to reveal it or it is not otherwise relevant to the matter. With that limitation in mind, we have attempted to identify any matters that may fall within the parameters of this request by searching the "comments" and "text" fields of the CRIMS database for matters which may have involved an ASIO officer or a law enforcement officer (based on the definition of law enforcement agency in Part 1AB of the *Crimes Act 1914*). These searches have not identified any matters prosecuted or referred for consideration of prosecution in the above circumstances where the accused was either an ASIO officer or a law enforcement officer for the period post the commencement of Part 1AB of the *Crimes Act 1914* in its current form i.e. since 19 February 2010.

(4) Has the CDPP received any referrals for prosecution for offences against section 15LB of the Crimes Act, in relation to persons who are authorised to use an assumed identity under Part IAC of the Crimes Act, in respect of conduct that is alleged to constitute a misuse of that assumed identity? If yes, please provide details. (Please consider the time period from the commencement of Part 1AC in its current form in 2010.)

1 I have sought this information with a view to informing my consideration of concerns raised by some stakeholders and commentators that section 35P of the ASIO Act may operate to preclude the reporting of special intelligence operations notwithstanding that there may be a strong public interest in such reporting – particularly the reporting of operations in which participants have, or are alleged to have, engaged in unauthorised conduct, especially that which constitutes a serious offence. I have also asked similar questions of the AFP and AGD with respect to their awareness of enforcement action (and of ASIO with respect to enforcement action concerning the misuse by ASIO officers of assumed identities).

A search of the CDPP CRIMS database reveals no record of matters prosecuted or referred for consideration of prosecution for offence/s against section 15LB of the *Crimes Act 1914*.

QUESTIONS 5-6: EXPERIENCE IN THE ENFORCEMENT OF OTHER COMMONWEALTH DISCLOSURE OFFENCES APPLYING TO JOURNALISTS[2]

(5) Has the CDPP received any referrals for prosecution in relation to disclosure offences other than section 35P of the ASIO Act and those in Parts 1AB, 1AC and 1ACA of the Crimes Act by journalists, in connection with reporting on national security operations by ASIO or any other Australian security agency? Please consider the following provisions and specified time periods in particular:

(a) Section 34ZS of the ASIO Act in relation to questioning warrants and questioning and detention warrants (since the enactment of its predecessor, former s 34VAA, in 2003).

A search of the CDPP CRIMS database reveals no record of matters prosecuted or referred for consideration of prosecution for offences against section 34ZS of the *ASIO Act* or its predecessor section 34VAA.

(b) Section 92 of the ASIO Act, concerning publication of the identity of ASIO officers. (Given the inclusion of this offence in the 1979 enactment of the ASIO Act, I would appreciate your suggestion as to a reasonable time period of consideration for present purposes. I may request further information if required).

A search of the CDPP CRIMS database reveals no record of matters prosecuted or referred for consideration of prosecution for offences against section 92 of the *ASIO Act*.

(c) The official secrets offences in Part VII of the Crimes Act. (As with (b), I would appreciate your suggestion as to a reasonable time period of consideration for present purposes. I may request further information if required.)

Part VII of the *Crimes Act 1914* includes the official secrets offences in sections 79 and 83. A search of the CDPP CRIMS database reveals records of 3 matters prosecuted which include at least one offence against section 79 of the *Crimes Act 1914* and 25 matters prosecuted that include at least one offence against section 83 of the *Crimes Act 1914*. As noted above, the CDPP CRIMS database does not generally record information pertaining to the occupation of a defendant or potential defendant. Having said that, there is nothing in the CRIMS database records pertaining to these matters which would suggest that any of the defendants prosecuted were 'journalists'.

(d) The disclosure offences with respect to delayed notification search warrants in section 3ZZHA of the Crimes Act (since the commencement of this provision 1 December 2014).

A search of the CDPP CRIMS database reveals no record of matters prosecuted or referred for consideration of prosecution for offences against section 3ZZHA of the *Crimes Act 1914.*

2 Please note that similar questions have been asked of AGD, the AFP and ASIO. You may wish to liaise with these agencies to identify suggested time periods for paragraphs (b)-(d).

(6) Has the CDPP received any referrals for prosecution in relation to the recruitment advertisement offences in subsections 119.7(2) and (3) of the Criminal Code, in which the prospective defendant is a journalist or a media organisation? (Noting that these provisions commenced on 1 December 2014, please also consider the predecessor to these provisions in section 9 of the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*. Given the inclusion of section 9 in the original enactment of the 1978 Act, I would appreciate your suggestion of a reasonable time period of consideration for present purposes. I may request further information if required.)

A search of the CDPP CRIMS database reveals no record of matters prosecuted or referred for consideration of prosecution for offences against sections 119.7(2) or (3) of the *Criminal Code* or section 9 of the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* in which the defendant was a journalist or a media organisation.

QUESTIONS 7-10: REASONABLE PROSPECTS OF CONVICTION – PROOF OF ELEMENTS OF SECTION 35P OFFENCES – RECKLESSNESS AS TO THE CIRCUMSTANCE A PERSON WAS AWARE OF A SUBSTANTIAL RISK THAT THE INFORMATION RELATED TO A SPECIAL INTELLIGENCE OPERATION

Question 7: Standard of Proof

(7) The offences in section 35P of the ASIO Act (and in sections 15HK, 15HL, 15LC and 15MS of the Crimes Act) apply the fault element of recklessness to the physical element of a circumstance that the information disclosed related to a special intelligence operation or a controlled operation. I am aware of some stakeholder commentary suggesting that the fault element of recklessness in respect of section 35P represents a 'very low' threshold that could be satisfied relatively easily, and that such commentary was opposed by AGD and ASIO in the course of the Parliamentary Joint Committee on Intelligence and Security inquiry into the National Security Legislation Amendment Bill (No 1) 2014.

Can the CDPP provide any comments on suggestions that the fault element of recklessness is a 'low' bar, particularly by reference to its experience in the prosecution of offences (or making decisions about the commencement or continuation of prosecutions of offences) which apply the fault element of recklessness to a physical element of a circumstance in which conduct occurs?

The offences in s35P of the *ASIO Act* are contained in sections 35P(1) and 35P(2). The elements of these offences are as follows:

Section 35P(1)

(a) the person discloses information (*Conduct - Fault Element Intention*);

(b) the information relates to a special intelligence operation (*Circumstance – Fault Element Recklessness*).

This offence is punishable by a maximum penalty of 5 years' imprisonment.

Section 35P(2)

(a) the person discloses information (*Conduct – Fault Element Intention*);

(b) the information relates to a special intelligence operation (*Circumstance – Fault Element Recklessness*); **and**

(c) *either:*

(i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation (*Ulterior Intent*); *or*

(ii) the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation (*Circumstance – Recklessness*).

This offence is punishable by a maximum penalty of 10 years' imprisonment.

Section 4 of the *ASIO Act*, *inter alia*, defines a "special intelligence operation" as

> "*an operation:*
> *(a) in relation to which a special intelligence operation authority has been granted; and*
> *(b) that is carried out for a purpose relevant to the performance of one or more special intelligence functions; and*
> *(c) that may involve an ASIO employee or an ASIO affiliate in special intelligence conduct.*"

The prosecution must prove each element of each offence to the criminal standard of beyond a reasonable doubt.

Section 5.4(1) of the *Criminal Code* provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the known circumstances, it is unjustifiable to take the risk.

The *Model Criminal Code Officers Committee Report on the Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility* (December 1992), stated (at p27) that

> *This definition [of recklessness] substantially follows the US Model Penal Code in using "*substantial*" and "*unjustifiable*" as the two key words. The Committee has defined recklessness in terms of a "substantial" risk rather than in terms of probability or possibility because they invite speculation about mathematical chances and ignore the link between the degree of risk and the unjustifiability of running that risk in any given situation.*

With respect to the offences contained in sections 35P(1) and 35P(2), the prosecution must establish that, at the time of disclosure, a person was aware of a substantial risk that the information disclosed related to a special intelligence operation, and having regard to the circumstances known to him or her at that time, it was unjustifiable to take the risk. The prosecution does not need to prove that a person had *knowledge* that the information disclosed related to a special intelligence operation (although proof of knowledge will satisfy the fault element of recklessness pursuant to s5.4(4) of the *Criminal Code*).

If a person discloses information unaware of a substantial risk that it relates to a special intelligence operation, that person will not have committed an offence against either section 35P(1) or 35P(2). The question of whether the taking of the risk is unjustifiable in the circumstances known to the

person at the time must be assessed in light of all of the evidence. This will ultimately be a question of fact for a jury to consider in any given case.

The CDPP disagrees with the suggestion that the fault element of recklessness in respect of section 35P is a "*low bar*" for the prosecution to establish. Although it is undoubtedly lower than knowledge, recklessness is a more onerous test than it first perhaps appears, and is substantially greater than negligence or strict or absolute liability. If it were knowledge, the offence would most likely, in many if not most conceivable circumstances, be very difficult, if not impossible to prosecute. Accordingly, and in keeping with the scheme of the *Criminal Code*, the legislature has chosen, appropriately in our view, to use a fault element of recklessness as to the nature of material alleged to have been disclosed.

The stance of the CDPP on this issue accords with authority. In *Hann v Commonwealth DPP* [2004] SASC 86, Gray J observed (at [24]) that "*(t)he term* "*substantial risk*" does not appear to be defined in Australian legal dictionaries. However Carswell's Words and Phrases, an American legal dictionary, described the phrase as meaning "*real and apparent on the evidence presented … not a risk that is without substance or which is fanciful or speculative*". The word "*substantial*" has been described in Australian legal dictionaries as "*real or of substance as distinct from ephemeral or nominal*". "*Risk*" has been described as "*a possibility, chance or likelihood*". Gray J held (at [26]) that "*(i)n order to establish recklessness under the Criminal Code it must be shown that the defendant was aware of the substantial risk. Conscious awareness of risk is required, it is not enough to show that the risk was obvious or well known.*"

Further, following a decision of a 5-member bench of the New South Wales Court of Criminal Appeal in *R v JS* [2007] NSWCCA 272; (2007) 230 FLR 276, at 300 [120] to 305 [159], especially at 301 [127]-[129] and 304 [152], in a prosecution under section 35P, the CDPP would have to establish that a defendant/accused was aware of a substantial risk that the information disclosed related to an operation that was a "special intelligence operation" as defined.

It follows that the prosecution will face a considerable burden in establishing beyond reasonable doubt that a person was aware of a substantial risk that the information disclosed related to a special intelligence operation. The prosecution would also have to establish that, having regard to the circumstances known to the person at the time of the disclosure, it was unjustifiable to take the risk (see question 9 below).

QUESTIONS 8-10: PROOF OF THE TWO LIMBS OF RECKLESSNESS AS TO A CIRCUMSTANCE

Background to questions 8-10

Questions 8-10 (below) relate to the scenario that a prospective defendant in the prosecution of an offence against section 35P of the ASIO Act was a journalist who disclosed information relating to a special intelligence operation as part of a news or media report. (Identical questions could arise with respect to prospective prosecutions under 15HK, 15HL, 15LC and 15MS of the Crimes Act.)

I am seeking information about the general approach the CDPP would take in determining whether to commence a prosecution. I am particularly interested in the general approach that would or might be taken to assessing the availability and sufficiency of evidence establishing that the prospective defendant was reckless as to the circumstance that the information related to the relevant operation, pursuant to subsection 5.4(1) of the *Criminal Code 1995*, as it applies to paragraphs 35P(1)(b) and (2)(b) of the ASIO Act. I have divided my questions into each limb of the recklessness test in paragraphs 5.4(1)(a) and (b) of the Criminal Code.

Question on limb 1: awareness of substantial risk – paragraph 5.4(1)(a) of the Criminal Code

Background

Question 8 is directed to prosecutorial decision making with respect to the first limb of the fault element of recklessness in paragraph 5.4(1)(a) of the Criminal Code, as it applies to paragraphs 35P(1)(b) and (2)(b) of the ASIO Act.

I am interested to understand the general approach the CDPP might take in assessing whether there are reasonable prospects of conviction, with respect to proof of a person's awareness of a risk, and proof of the requisite magnitude of that risk (being a 'substantial' risk).

Question

(8) How does, or how might, the CDPP go about considering the availability and sufficiency of evidence with respect to the person's awareness of a substantial risk that the information disclosed related to an operation of a particular kind (being a special intelligence operation)?

The CDPP is not an investigative agency and has no investigative function. The CDPP can only prosecute where there has been an investigation and referral made by the Australian Federal Police or other investigative agency. In considering the sufficiency of evidence in any given matter, the CDPP is able to rely only on the evidence collected by the referring agency, although requisitions for further evidence are common.

Typically an investigative agency will refer a brief of evidence to the CDPP for assessment in accordance to the *Prosecution Policy of the Commonwealth*. When evaluating any brief referred for consideration of prosecution, the CDPP will assess the evidence available against each element of the relevant offence.

In a matter referred for prosecution under section 35P, the CDPP could expect the brief of evidence to include such evidence as:

- a record of interview with the potential defendant which may provide evidence of the person's awareness of a substantial risk that the information disclosed relates to a special intelligence operation;
- third party witness statements;
- evidence obtained via the execution of a search warrant such as email correspondence and other computer content;
- text messages found on the relevant mobile phones;
- the published article that is said to contain the information related to a special intelligence operation; and

- relevant surveillance product.

The CDPP regularly receives briefs of evidence containing such material where the offence involves a consideration of whether "*recklessness*" can be established. In a proposed prosecution brought under section 35P, the evidence would be assessed as a whole to determine whether there is sufficient evidence to establish that the accused was aware of a substantial risk that the information disclosed relates to a special intelligence operation. It will be a question of fact in each case to determine whether sufficient evidence exists to demonstrate that a person was aware that the information disclosed relates to a special intelligence operation or was aware of a substantial risk that this circumstance existed. In the absence of direct evidence, one might expect that in many cases it will be very difficult to establish that a person was aware of a substantial risk that the information disclosed related to a special intelligence operation, as defined.

Questions on limb 2: unjustifiable taking of risk – paragraph 5.4(1)(b) of the Criminal Code

Background

Questions 9 and 10 seek to understand the general approach taken by the CDPP in assessing whether there are reasonable prospects of conviction, with respect to the availability and sufficiency of evidence of the matters required by the second limb of the fault element of recklessness, set out in paragraph 5.4(1)(b) of the Criminal Code (for the purpose of paragraphs 35P(1)(b) and (2)(b) of the ASIO Act).

Questions

(9) How, if at all, would or might the CDPP take into consideration evidence of any steps that a journalist took to verify facts or otherwise manage risk in relation to the disclosure, for the purpose of making an assessment of the availability and sufficiency of evidence with respect to the requirements of paragraph 5.4(1)(b) of the Criminal Code? (For example, how, if at all, might consideration be given to evidence suggesting that the journalist had consulted with the ASIO's media liaison unit in relation to the story, or obtained legal advice in relation to a possible publication before making the disclosure?)

As noted above in the answer to question 7, in addition to proving beyond reasonable doubt that a person was aware of a substantial risk that the information disclosed relates to a special intelligence operation, the prosecution must also prove that, having regard to the circumstances known to the person at the time that the information was disclosed, it was unjustifiable to have taken the risk. It is not necessary for the person to have believed that it was unjustifiable to take the risk. Whether it is unjustifiable is a question of fact in each case. In *R v Saengsai-Or* (2004) 61 NSWLR 135, Bell J (with whom Wood CJ and Simpson J agreed) stated that whether it is unjustifiable to take the risk "requires that the jury make a moral or value judgment concerning the accused's advertent disregard to the risk." This was cited with approval in *Lustig v The Queen* [2009] NSWCCA 143.

The Explanatory Memorandum to the *Criminal Code Bill 1994* gives some further guidance as to the meaning of unjustifiable (at p17):

> *Proposed section 5.4(2) makes it clear that the unjustifiability of the risk is to be assessed on the facts as the accused believes them to be. It was decided that the modification of the existing recklessness tests by substituting "substantial" for "probability" or "possibility" and adding the concept of unjustifiability set the proper level for recklessness. Distinguishing*

recklessness and negligence only on the basis of the subjective/objective test would have been too great a departure from the established concepts. The tests in proposed section 5.4 adequately distinguishes between the culpability of those who knowingly take substantial and unjustifiable risks and those who do not see risks but are criminally negligent.

In making any assessment of the sufficiency of evidence available to establish that a person was reckless, within the meaning of section 5.4(1)(b) of the *Criminal Code*, the CDPP would take into account all of the available evidence. Any action that a person may have taken in an effort to address or mitigate that risk will also be relevant. In the example raised in question 9, this assessment will involve consideration of the precise nature of any practical steps taken by a journalist to eliminate or mitigate the risk prior to the disclosure. For example, if the journalist consulted with ASIO's media liaison unit in relation to an article that was to be published and was told that the information did not relate to a special intelligence operation, then the disclosure would, without more, appear to be justifiable in the circumstances known to the journalist. This would be the case notwithstanding that the media liaison unit had made a mistake in relation to their advice and the information did in fact relate to a special intelligence operation. This is because section 5.4(1)(b) of the *Criminal Code* makes it clear that the unjustifiability of the risk is to be assessed on the facts as the defendant perceived them to be. Conversely if the journalist consulted with ASIO's media liaison unit in relation to an article that was to be published and was told that the information did relate to a special intelligence operation, this would appear to provide direct evidence that the journalist was aware that the information related to an operation that had the character of a special intelligence operation.

If the journalist made attempts to consult with ASIO's media liaison unit and the media liaison unit was unresponsive, then whether it was unjustifiable to take the risk in the circumstances known to the journalist would turn on the precise facts of the case. For instance, had the journalist imposed an unreasonable timeframe on ASIO to provide a response and then proceeded to publish its story regardless of whether s/he had received a response within that time; what other steps had the journalist taken to assure themselves that the information did not pertain to a special intelligence operation. Evidence of any steps that a journalist took to verify whether the information was related to a special intelligence operation, would be in and of itself, evidence that the journalist was at the very least aware that the information may relate to a special intelligence operation.

(10) Further, would or might evidence of any 'public interest value' in a journalist's publication (such as the exposure of allegations of serious wrongdoing by ASIO in the course of an operation) be relevant to an assessment of the availability and sufficiency of evidence with respect to paragraph 5.4(1)(b) of the Criminal Code as it applies to paragraphs 35P(1)(b) and (2)(b) of the ASIO Act?[3]

3 In this regard, I am interested to understand the general approach the CDPP might take in considering whether a journalist's motivations for publishing information are relevant to an assessment of whether there are reasonable prospects of conviction, with respect to the requirement in subsection 5.4(1)(b) of the Criminal Code that the taking of the risk in making the disclosure was 'unjustifiable'. The CDPP's National Legal Direction provides guidance about the consideration of public interest value in a publication for the purpose of applying the 'public interest test' component of the *Prosecution Policy of the Commonwealth*. In addition to this, I am interested in understanding how, if at all, this factor could or may be taken into account in the application of the 'reasonable prospects of conviction' component of the Prosecution Policy.

The offence in section 35P(1) reflects Government policy that the disclosure of information related to a special intelligence operation may create a significant risk that the operation may be compromised and that the safety of participants and their families may be threatened. The resultant harm is not dependant on a person's motivations or intentions in making the disclosure (except in so far as the harm may be aggravated by a person who acts with malicious intent). A journalist's motivation for publishing such information is not relevant to any assessment of whether there are reasonable prospects of conviction, but may be highly relevant to the public interest test. Section 5.4(1)(b) of the *Criminal Code* is only relevant to the assessment of whether it was unjustifiable to take the risk that the information related to a special intelligence operation having regard to the circumstances known to him or her at the time.

The CDPP would only take a journalist's motivation for publication into account when considering whether the public interest required a prosecution to be pursued. This is in accordance with the *Prosecution Policy of the Commonwealth* and the *National Legal Direction for Prosecuting Offences for the Unauthorised Disclosure of Information relating to Controlled Operations, Special Intelligence Operations or Delayed Notification Search Warrants.* Exposure of serious wrongdoing by an ASIO officer would, if demonstrated, necessarily be an important consideration in the application of the public interest test, depending on all the circumstances.

QUESTIONS 12-14: APPLICATION OF THE PUBLIC INTEREST TEST IN PROSECUTORIAL DECISION-MAKING

Background to questions

Questions 12-14 arise from the public interest test in the *Prosecution Policy of the Commonwealth*, and the guidance for its application to disclosure offences including section 35P of the ASIO Act and sections 15HK and 15HL of the Crimes Act in the CDPP's National Legal Direction updated on 1 December 2014.

I am aware of the general, illustrative list of public interest factors in the *Prosecution Policy of the Commonwealth* at [2.10]. I am further aware of the statement in the National Legal Direction that the prosecutor must, in making decisions about the commencement or continuation of a prosecution in relation to disclosure offences including section 35P of the ASIO Act and sections 15HK and 15HL of the Crimes Act, consider "*whether the disclosure of the relevant information, including the manner, form and timing of such disclosure was in the public interest (as opposed to being merely of public interest*" (at p. 4).

I note that the National Legal Direction further provides that, "*if the question is finely balanced, the CDPP may provide a prospective defendant an opportunity to make submissions as to why a particular disclosure was in the public interest, such that a prosecution should not take place*" (at p. 4).

I am interested in understanding how these general requirements are to be, or may be, applied in practice. The questions below are directed to this line of inquiry.

Questions

(11) I am interested to understand the types of public interest considerations to which a prosecutor might have regard in assessing whether a disclosure (by way of a journalist's publication) was in the public interest, as distinct to being merely a matter that may be of interest to some members of the public. Does the CDPP have any further information or views on this matter?

Prosecution Policy of the Commonwealth and the National Legal Direction for Prosecuting Offences for the Unauthorised Disclosure of Information relating to Controlled Operations, Special Intelligence Operations or Delayed Notification Search Warrants

Paragraphs 2.8 – 2.10 of the *Prosecution Policy of the Commonwealth* requires the CDPP to take into consideration the public interest in commencing or continuing a prosecution. Paragraph 582 of the Revised Explanatory Memorandum to the *National Security Legislation Amendment Bill (No.1) 2014* states as follows:

> *'Subsection 35P(3) does not include an express defence for the communication of information relating to a special intelligence operation, where such communication is found to be in the public interest. The Commonwealth Director of Public Prosecutions (CDPP) is required, under the Prosecution Policy of the Commonwealth, to consider the public interest in the commencement or continuation of a prosecution. It would be open to the CDPP, in making independent decisions on this matter, to have regard to any public interest in the communication of information in particular instances as the CDPP considers appropriate.'*

The *Prosecution Policy of the Commonwealth* recognises that the prosecutor must consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted. The Policy provides a non-exhaustive list of factors which may arise for consideration. The Policy notes that, generally speaking, the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.

The considerations that may be taken into account in assessing whether or not the public interest requires a prosecution to be pursued will be different in every matter. It is for this reason that the *Prosecution Policy of the Commonwealth* is drafted in a way which is flexible enough to take account of such matters. Equally the *National Legal Direction for Prosecuting Offences for the Unauthorised Disclosure of Information relating to Controlled Operations, Special Intelligence Operations or Delayed Notification Search Warrants* (NLD) issued on 1 December 2014 is drafted in a way which will ensure that it is flexible enough to take into account the multitude of scenarios that may arise for consideration by the CDPP. The NLD articulates the process the CDPP will adopt in considering whether to commence or continue a prosecution of a person charged with an unauthorised disclosure offence under section 35P(1) and 35P(2) of the ASIO Act and other relevant disclosure offences. The NLD specifically requires prosecutors to seek the approval of the Director for any proposed prosecution for an offence against section 35P. This will ensure that the Director will personally be involved in any decision to prosecute. The NLD also provides that the CDPP may invite a prospective defendant to make a submission as to why a particular disclosure was in the public interest where the prosecutor considers that the question is finely balanced. Under the NLD the prosecution must consider whether the disclosure of the relevant information, including the

manner, form and timing of such disclosure was in the public interest. This is distinct from merely being a matter that may be of interest to some members of the public. The disclosure of information related to a special intelligence operation may, by its very nature, be of interest to some members of the public. One would expect that exposure of wrongdoing by an ASIO official would be much more likely to be in the public interest, than merely of public interest.

Possible scenarios

In the absence of real evidence it is very difficult to speculate as to how the *Prosecution Policy of the Commonwealth* may be applied in a given case. Experience tells us that each case will be different and will need to be considered on its own merits in all the circumstances, often with competing considerations. However, in order to assist the Acting INSLM better understand how the *Prosecution Policy of the Commonwealth* may be applied in respect to a matter involving an alleged breach of s35P of the *ASIO Act*, it may be instructive to consider two very different hypothetical scenarios which give rise to very different public interest considerations.

Scenario One

In the first scenario, a journalist receives information that s/he believes may be related to a special intelligence organisation and would like to publish this information. The information received by the journalist is that ASIO is using an undercover intelligence operative to infiltrate a domestic terrorist cell. There is nothing in the information received by the journalist which would suggest that there has been any impropriety by the intelligence officers involved in the operation. The journalist is aware that the terrorist cell is said to be planning an act of terrorism in Australia. The journalist contacts ASIO to ascertain whether that information pertains to a special intelligence operation. The ASIO officer contacted, in connection with the performance of their functions, confirms that the information is related to a special intelligence operation that is presently in progress and requests that the journalist refrains from doing anything to publish details of the operation until the operational consequences of the security breach can be properly evaluated. Despite this request, the journalist nevertheless publishes the information. As a result of the publication ASIO is forced to abort an important counter-terrorism intelligence operation. There is nothing in the published story which raises a matter that is in the public interest.

In this scenario there would appear to be little or no evidence available to suggest that the publication of this information was in the public interest. The journalist had knowledge that the information related to a special intelligence operation and published this information regardless of the fact that s/he knew that such publication could have an adverse impact on an important ASIO intelligence operation. Whilst the story published by the journalist was of interest to the public in so far as it detailed the activities of an ASIO intelligence operation to combat a domestic terrorist plot, no public interest in publishing the story was apparent on the face of the story. The contravention was deliberate. An application of the Prosecution Policy of the Commonwealth in the circumstances of this case would suggest that a prima face case is made out and that a prosecution of the journalist would appear to be in the public interest. There is no apparent reason why a journalist should be immune from the rule of law in these circumstances.

Scenario Two

In the second scenario a journalist receives information about serious wrongdoing by a Commonwealth officer in the course of a special intelligence operation. The information suggests that the Commonwealth officer has used his position as an undercover officer to engage in inappropriate and unlawful conduct. The journalist has gathered evidence from the victim of the Commonwealth officer's inappropriate and unlawful conduct. The journalist contacts ASIO on several occasions to ascertain whether the information does in fact relate to a special intelligence operation. On each occasion contact is made, the journalist advises ASIO that s/he is considering publishing an article about the matter. ASIO will not confirm (or deny) that the information relates to a special intelligence operation. ASIO does not provide the journalist with a viable or otherwise appropriate avenue to report the alleged serious wrongdoing by the Commonwealth officer. The journalist decides to publish the article revealing the extent of the wrongdoing by the Commonwealth officer.

In this scenario there would appear to be significant public interest considerations exposing serious wrong doing by the Commonwealth officer, even if there is sufficient evidence to prosecute. The journalist has made attempts with ASIO to confirm that the information related to a special intelligence operation to no avail. Whether the prosecution of the journalist would be in the public interest will depend on the full circumstances of the case. However the disclosure of wrongdoing by a Commonwealth officer will be one of several factors that will be taken into account in assessing whether or not the public interest requires a prosecution. Other relevant factors might include: any measures the journalist took to report the alleged criminal misconduct via appropriate avenues; the manner in which the journalist has made reference to the special intelligence operation in the publication; whether the journalist has revealed names, dates, locations and other specifics that would increase the likelihood of jeopardising the operation or endangering the safety of participants. Relevantly, Para 2.10 of the *Prosecution Policy of the Commonwealth* provides that the actual or potential harm occasioned to an individual is a factor that may arise for consideration in determining whether the public interest requires a prosecution. This is particularly relevant in the context for potential for harm from the unauthorised disclosure of a special intelligence operation.

This scenario may well be one in which the public interest considerations either favour no prosecution taking place, or are 'finely balanced'. As stated above the matters that will be taken into account in assessing whether or not a prosecution is in the public interest will be different in every matter.

(12) How will the CDPP assess whether or not the question of any public interest value in the publication is 'finely balanced' and therefore whether it may be appropriate to offer a prospective defendant an opportunity to make submissions in accordance with the National Legal Direction? In particular, what sorts of factors might be taken into account? Will the individual prosecutor or the Director be the arbiter of this question? If a prospective defendant specifically sought an opportunity to make submissions, is such an opportunity likely to be afforded?

A prosecutor assesses a brief of evidence received from an investigative agency in accordance with the *Prosecution Policy of the Commonwealth*. This requires the prosecutor to consider the sufficiency of the evidence available for each element of the offence. If a prosecutor is satisfied that sufficient evidence exists and that there are reasonable prospects of conviction, the prosecutor will then turn their mind to whether it is in the public interest to commence or continue the prosecution.

Sometimes the public interest issue will be so clearly against prosecution that a final assessment of prospects is not necessary. As the relevant NLD requires the consent of the Director for a prosecution of a relevant offence (as described in the NLD), the Director will ultimately need to make a decision in relation to whether to prosecute in accordance with the *Prosecution Policy of the Commonwealth*. Whilst each case will need to be considered on its merits, where the Director concludes that the disclosure of the relevant information was in the public interest, it will be difficult to conclude that a prosecution is justified.

The scenarios set out above in our response to question 11 fall towards the two opposite ends of the spectrum of possible matters that may be referred to the CDPP for prosecution. There will be a myriad of other possible factual scenarios that fall in between. The CDPP regularly deals with referrals where the question of whether a prosecution is in the public interest is more "*finely balanced*". In such cases there are likely to be some factors which militate in favour of a prosecution and other factors which militate against. For example, whilst there may be some public interest to the story that was published by the journalist, the publication of the story may have had very serious consequences for the health and safety of a Commonwealth officer or a civilian participant. Some weighing up of competing considerations may be required. The NLD requires that for these matters the CDPP may provide a prospective defendant an opportunity to make submissions as to why a particular disclosure was in the public interest, such that a prosecution should not take place. In the usual course, this invitation would be made by a senior prosecutor.

The CDPP will always carefully consider any submission received from a defendant or potential defendant. It is common for such submissions to be received in matters in which there are compelling circumstances of the alleged offence and/or of the alleged offender. Whilst there is no need for an invitation to be extended in order for a submission to be made to the CDPP, the NLD will require a prosecutor to proactively seek such a submission where the question of public interest is finally balanced.

(13) In the CDPP's view, is there a risk that a prospective defendant who makes submissions about the public interest value in a publication may technically contravene the 'basic offences' in subsection 35P(1) and 15HK(1)? If such a risk arises, could this be managed adequately as a matter of practice?

In circumstances where the CDPP is actively considering a brief of evidence that has been referred recommending a prosecution under section 35P of the *ASIO Act* or section 15HK of the *Crimes Act 1914*, the CDPP will already be in possession of the information which is said to relate to the special intelligence operation or controlled operation. A prospective defendant who makes a submission to the CDPP regarding the public interest value in a publication would not, in these circumstances, be disclosing information to the CDPP in the sense that the CDPP is already in possession of such information. Any disclosure made to the CDPP would also be a disclosure made to a person in the Commonwealth who was already in possession of the relevant information. Given the nature of these charges, it is likely that the information would also have already been more broadly published by the relevant journalist.

The *Criminal Code* contains a general defence of lawful authority in section 10.5. Section 10.5 provides that a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law. In addition the CDPP would maintain its prosecutorial discretion to not prosecute a person based on their submission to the CDPP. In circumstances where the CDPP has invited a submission from a potential defendant or his or her legal representative regarding matters of public interest, it would not be appropriate or in the public

interest for the CDPP to seek to prosecute a person based on the information supplied in response. It is not uncommon for such submissions to be made on a "without prejudice" basis for more abundant caution.

QUESTION 14: INTERPRETATION OF PARAGRAPH 35P(2)(C)

(14) Does the CDPP have any views on whether the inclusion of the notes to subsections 35P(1) and (2), with respect to the fault element applying to each of paragraphs 35P(1)(b) and 35P(2)(c), may have any implications for the interpretation of the fault element applying to paragraph 35P(2)(c)? That is, could the absence of a corresponding note to paragraph 35P(2)(c) give rise to a credible argument that there is a necessary intendment to displace the default fault element of recklessness under section 5.6(2) of the Criminal Code?

There are a number of examples of interpretative notes used in offence provisions in Commonwealth statues. The use of notes in this way is not consistent across Commonwealth legislation. Notes are provided as a guide to the interpretation of an offence. Such notes do not form part of the offence provision but are merely an aid to assist in the interpretation of the legislation.

The notes included in section 35P arose from a recommendation made by the Parliamentary Joint Committee on Intelligence and Security in its 2014 Advisory Report. At recommendation 13 the Committee recommended that "*to make clear the limits on potential prosecutions for disclosing information about special intelligence operations, Section 35P of the National Security Legislation Amendment Bill (No.1) 2014 be amended to confirm that the mental element (or intent) of the offence is 'recklessness', as defined in the Criminal Code, by describing the application of that mental element to the specific offence created by section 35P."* The Government adopted and implemented all of the Committee's recommendations for the Bill.

The physical element in section 35P(1)(b) and 35P(2)(b) is a circumstance in which conduct occurs, within the meaning of section 4.1(1)(c) of the *Criminal Code*. If a provision does not specify a fault element for a physical element that consists of a circumstance, section 5.6(2) of the *Criminal Code* operates to provide that the fault element of recklessness applies. Accordingly, without the inclusion of the notes in sections 35P(1) and 35P(2), recklessness would nevertheless be the fault element that would apply to the physical element that consists of a circumstance in section 35P(1)(b) and 35P(2)(b). In this circumstance the notes merely confirm the fault element that applies as a result of section 5.6(2) of the *Criminal Code*.

In any event, the capacity of extrinsic material to substantially affect the meaning of legislation is extremely limited: See *R v JS* [2007] NSWCCA 272; (2007) 230 FLR 276 per Spigelman CJ at 300 [129], 303 [142]-[144].

In our view the inclusion of the notes to sections 35P(1) and 35P(2), with respect to the fault element applying to each of paragraphs 35P(1)(b) and 35P(2)(b), does not have any implications for the interpretation of the fault element applying to paragraph 35P(2)(c). As such the usual fault elements would apply. That is, in the case of the aggravated offence in section 35P(2), the person intended to disclose the information (section 35P(2)(a)); the person was reckless as to the circumstance that the information related to a special intelligence operation (section 35P(2)(b)); and the person either intended to endanger the health or safety of any person or prejudice the effective

conduct of the special intelligence operation; or the person was reckless that the disclosure of the information will do so (section 35P(2)(c)).

QUESTIONS 15-18: ATTORNEY-GENERAL'S SECTION 8 DIRECTION – CONSENT TO PROSECUTION

Terms and application of the Attorney-General's direction

(15) The Attorney-General's direction under section 8 of the *Director of Public Prosecutions Act 1983* of 30 October 2014 applies to the prosecution of relevant offences where the prospective defendant is a journalist and the facts alleged to constitute the offence relate to the work of the person in a professional capacity as a journalist.

How will the CDPP interpret the terms 'journalist' and the 'professional capacity' of such persons for the purpose of determining when the Attorney-General's direction is applicable to particular prosecutions? For example, what approach will or may be taken in relation to prospective prosecutions of persons such as 'bloggers', or persons from 'non-mainstream' media organisations, or persons who are employed as journalists but also operate their own media platforms – such as columnists who also maintain a blog?

Via the Direction issued to the CDPP on 30 October 2014 under section 8 of the *Director of Public Prosecutions Act 1983* (the DPP Act), the Attorney-General has expressed his desire to consent to any prosecution of a "journalist" under the relevant offence provisions. Given the clear intent of this Direction and the very few cases that are likely to arise for consideration under these provisions, the CDPP will take a very broad view of the terms "journalist" and "*professional capacity*" and will refer to the Attorney-General for consent any matter which could arguably come within the scope of these words. The CDPP intends to amend the terms of the NLD to confirm the same should those words not otherwise be further defined.

General practice in making directions with respect to prosecutorial consent

(16) I understand that, in general terms, directions under section 8 of the *Director of Public Prosecutions Act 1983* have been made sparingly. Can the CDPP provide the number of directions (or an approximation) of such directions that have been issued, and an indication of the types of matters to which they relate?

The power of the Attorney-General to issue directions to the CDPP pursuant to section 8 of the DPP Act has been exercised very infrequently. There have been seven section 8 Directions issued since the inception of the CDPP over 30 years ago. Details of each of these Directions are set out below:

Parliamentary Commission of Inquiry:
General Gazette No 26, 1 July 1986, p 2682: Direction to produce materials relating to the committal proceedings and the trial and re-trial of the Honourable Mr Justice Murphy to the Parliamentary Commission of Inquiry. Dated 13 June 1986.

In 1986, a direction was issued requiring the DPP to make available to a Parliamentary Commission of Inquiry all material in the possession of the Office relating to the prosecution of Mr Justice Murphy.

Serious Corporate Wrongdoing: Direction relating to investigation and enforcement:
General Notice Gazette No 40, 7 October 1992, p 2720: Serious Corporate Wrongdoing: Direction relating to Investigation and Enforcement. Dated 30 September 1992.

On 30 September 1992 the Attorney-General issued a section 8 direction to the Director and a direction under s12 of ASC Law to the Australian Securities and Investment Commission. The direction required the ASIC and the DPP to develop and implement policies for the exercise and discharge of their respective powers and functions to comply with guidelines set out in the direction.

Part IIIA of the Crimes Act 1914: Child Sex Tourism:
General Notice Gazette No 45, 16 November 1994, p 2919: Directions relating to the circumstances in which the DPP should institute or carry on prosecutions for offences under Part IIIA of the *Crimes Act 1914*. Dated 3 October 1994.

On 3 October 1994 the Minister for Justice issued a direction to the Director relating to the circumstances in which the DPP should institute or carry on prosecutions for child sex tourism offences under Part IIIA of the *Crimes Act 1914*.

Appearances before a Parliamentary Committee:
General Notice Gazette No 44, 6 November 1996, p 3297: Direction to the Director with respect to the general policy to be pursued in relation to the performance of the functions and the exercise of the powers of the Director. Dated 20 October 1996.

On 20 October 1996 the Attorney-General issued a direction setting out the procedures to be followed by the DPP in cases where Parliament or a Parliamentary Committee seeks access to information held by the DPP.

Section 233C Migration Act 1958: People Smuggling:
General Gazette No 35, 5 September 2012, p 2318: Directions relating to the circumstances in which the DPP should institute or carry on prosecutions for offences under 233C of the *Migration Act 1958* (Cth) ("*Migration Act*"). Dated 27 August 2012.

On 27 August 2012 the Attorney-General issued a section 8 direction to the Director relating to the circumstances in which the DPP should institute, carry on or continue to carry on a prosecution for people smuggling offences under section 233C of the *Migration Act*.

People Smuggling Direction: Revoked:
Government Notices Gazette C2014G00412, 7 March 2014: Directions regarding the revocation of section 8 Direction relating to people smuggling prosecutions. Dated 4 March 2014.

On 4 March 2014 the Attorney-General issued a section 8 direction to the Director revoking the direction issued to the Director on 27 August 2012 under section 8 of the Act (see above) regarding prosecution for people smuggling offences under section 233C of the *Migration Act*.

Note: The revocation does not apply to any proceedings, including appeals, which commenced prior to 4 March 2014.

Prosecution of Journalists for Disclosure offences:
Government Notices Gazette C2014G02068, 15 December 2014: Directions regarding the Prosecution of Disclosure Offences in National Security Legislation. Dated 30 October 2014.

On 30 October 2014 the Attorney-General issued a section 8 direction to the Director requiring the Director not to proceed with a prosecution of a person for alleged contravention of section 35P of the *ASIO Act 1979* and sections 15HK, 15HL and 3ZZHA of the *Crimes Act 1914* without the written consent of the Attorney General where the person is a journalist and the facts constituting the alleged offence relate to the work of the person in a professional capacity as a journalist.

(17) Does the CDPP have a view on what it may consider to be the preferable vehicle for giving effect to Ministerial prosecutorial consent requirements? (For example, is there a preference for the inclusion of such requirements in primary legislation; or by way of Ministerial direction?)

There are a number of examples of prosecutorial consent requirements being included in offence provisions. Whether the relevant consent under consideration should be included in the legislation or by way of Ministerial direction is a policy question and a matter for Government. It will not make any material difference to the CDPP either way. We note that the relevant section 8 Direction requiring the consent of the Attorney-General is unique.

(18) Does the CDPP have a view on whether there may be benefit in streamlining the Ministerial consent requirement, by applying a consent requirement (whether legislative or by way of Ministerial direction) to all proposed prosecutions of the relevant offences, not merely those with respect to 'journalists' who made the relevant disclosure in a 'professional capacity'?

This is a matter of policy and therefore a matter for Government. In particular it is for the Attorney-General to consider the terms of any Ministerial direction given to the CDPP. The CDPP would not however have any objection to Government applying the consent requirement (in whichever form) to all proposed prosecutions of relevant offences.

QUESTIONS 19-20: OFFENCE-SPECIFIC DEFENCES IN SUBSECTION 35P(3)

An offence-specific defence to section 35P for public interest disclosures

(19) I am aware that a number of stakeholders and commentators have supported the inclusion in subsection 35P(3) of a 'public interest defence' applying to persons who disclose information in good faith, where such a disclosure in in the public interest. Can the CDPP provide any comment on how such a defence might operate in practice?

Whether a public interest defence should be included in section 35P(3) is a policy question and as such a matter for Government. However, the CDPP would not support the inclusion of a public interest defence, essentially because it is likely to be unworkable, even in the case of a very clear and unmeritorious breach in the first scenario above.

The CDPP submits that, as is the case for all other criminal offences, the appropriate point at which to consider public interest is at the point that a prosecutor is invited to consider a matter in

accordance with the *Prosecution Policy of the Commonwealth*, being after a matter has been investigated and the agency concerned is of the view that there is or may be sufficient evidence to prosecute.

The exceptions in section 35P(3) substantially replicate those available to the offences in sections 15HK and 15HL of the *Crimes Act 1914*. The inclusion of a public interest defence would be a most unusual treatment. General defences are available in Chapter 2 of the *Criminal Code*. The defences in Chapter 2 do not contain a defence of public interest. A person is not criminally liable if any of the defences in Chapter 2 exist.

A public interest defence would require a jury to ultimately decide whether the disclosure that was made was in the public interest. The jury is unlikely to have available to them all of the information to assess the impact of the disclosure and hence the public interest in making the disclosure. In the absence of a clear definition of what amounted to "*the public interest*", the trial judge would be left with the very difficult task of constructing a direction to the jury as to how a defence of public interest is to be considered and applied. In our view any such defence would be unique, problematic and unworkable.

The risk or damage caused by disclosure of information related to a special intelligence operation is not dependant on the "*motive*" for the disclosure and we understand that the policy rational behind the offence is directed to the damage or potential for damage caused by any disclosure. We also note that section 35P(3) contains an exception for disclosures of suspected wrongdoing in relation to a special intelligence operation to the IGIS. Furthermore, paragraphs 2.8 to 2.10 of the *Prosecution Policy of the Commonwealth* require the CDPP to take into consideration the public interest in commencing or continuing a prosecution in all cases.

Application of paragraphs 35P(3)(a) and (d) to ASIO's media liaison activities

(20) This question relates to the scenario in which a journalist who is concerned that a potential report on an operational matter may contravene subsection 35P(1) because it may contain information that relates to a special intelligence operation, and seeks information from ASIO's media liaison unit about this matter. Does the CDPP consider that the offence in subsection 35P(1) could potentially apply to an ASIO officer who provides information to a journalist in these circumstances? Can the CDPP provide any general comment on the matters it may take into consideration in assessing the availability or strength of a possible defence under paragraphs 35P(3)(a) or (d)? (Being disclosures in connection with the administration or execution of Division 4 of Part III; or disclosures in connection with the performance of functions or duties, or the exercise of the powers, of the Organisation).

Whether an offence against section 35P(1) has been committed must be evaluated on the evidence present in each case. However, without something further, the scenario described above would not constitute an offence against section 35P(1). Section 35P(3)(d) provides an exception that subsection (1) and (2) do not apply if the disclosure was in connection with the performance of functions or duties, or the exercise of powers, of the Organisation. If a journalist, concerned that information relates to a special intelligence operation, contacts an ASIO media officer to discuss this matter, the ASIO media officer would be discussing the information *in connection with the performance of functions or duties*. Section 13.3(3) of the *Criminal Code* provides that a defendant bears an evidential burden in relation to this exception. However, in making a decision under the

Prosecution Policy of the Commonwealth, the CDPP is required to take into account the availability and strength of any available exception.

QUESTION 21: CDPP'S MEDIA LIAISON ARRANGEMENTS

(21) I would appreciate a general outline of the CDPP's media liaison arrangements, particularly with respect to the prosecution of security offences, and disclosure offences with respect to security information. I would be grateful if this response could address how, if at all, 'journalists' and 'media organisations' (or similar descriptors) are defined or otherwise interpreted by the CDPP for the purpose of its media liaison activities. (For example, are there circumstances in which the CDPP might decline to liaise with a person who self-identified as a journalist, or an entity that described itself as a media organisation, but did not satisfy the CDPP's interpretation?)

CDPPs Media Liaison Arrangements

The CDPP has a very small communications team lead by a Senior Communications Manager. Media liaison is part of the work undertaken by the team—responding to media inquiries, writing media releases and general monitoring of media activities and comment through our contracted service provider.

Our process for managing media inquiries is done through two key channels—main media phone number of 02 6206 5708 and central email, communications@cdpp.gov.au. All media inquiries, regardless of the media outlet, are directed to these channels. We then seek all questions in writing to our central email account—both to confirm the questions or comments the journalist is seeking, as well as verify the journalist/person is from the organisation they say they are from.

Questions are reviewed and appropriate answers drafted in consultation with the relevant lawyer or senior manager. Final responses are then cleared by the relevant Deputy Director and, in some cases, the Director. We aim to respond to all inquiries within a 24 hour period, often within the same working day. Responses are usually limited to relevant factual information. As a general rule, the CDPP does not comment on cases which are currently before the court. In providing responses to media inquiries, the CDPP abides by any suppression or other non-disclosure order.

All prosecutors and CDPP staff know (or should know) to direct any media inquiries to the communications team. We do not make official media statements in Court, though it is common for journalists in public Court hearings to quote comments made by our prosecutors in court.

Media releases

Our process for issuing media releases is again managed by the communications team. We generally only issue media releases at the completion of a prosecution. This is managed on a case-by-case basis, as we do not issue a media release on **all** legal matters completed by the CDPP. Prosecutors work with our Senior Communications Manager to determine what and which cases should be publicised by our Office. Our aim of publicising legal matters is to:

- Increase awareness of criminal law and consequences of illegal activity
- Increase awareness and understanding of the work of the CDPP
- Support the work of the justice system in deterring potential offenders.

Once it is agreed that a media release is appropriate, the communications team prepare the material in consultation with the lawyer managing the matter. It is then cleared by the relevant Deputy Director or Director of the CDPP. Final release in then published on our public facing website – cdpp.gov.au.

Journalists and Media Organisations

With advances in technology and digital methods of communication, media has expanded beyond traditional print and television. For example we do receive inquiries from online magazines. Again, the same process outline above is followed, and we look at the platform/messages/channel in determining what response (if any) can be given.

It is important to note that while every effort is made to respond to media inquiries, we do decline to comment where appropriate. This is assessed on receipt of the inquiry in writing.