

The Hon Roger Gyles AO QC
Independent National Security Legislation Monitor (INSLM)
PO Box 6500 CANBERRA ACT 2600
Email: INSLMsubmissions@pmc.gov.au

1 April 2015

Dear My Gyles,

RE: Inquiry into the operation of section 35P *Australian Security Intelligence Organisation Act 1979* concerning offences for the disclosure of information relating to a 'special intelligence operation'

The National Tertiary Education Union (NTEU) represents the professional and industrial interests of 28,000 staff working in higher education, including staff in Australia's universities and research institutes. We note the Prime Minister announced on 7 December 2014 that the Independent National Security Legislation Monitor (INSLM) is reviewing the impact of section 35P of the *Australian Security Intelligence Organisation Act 1979* on journalists. We are providing a submission as a refinement of our prior statement to the Attorney-General George Brandis on this matter.

We note that the Attorney-General George Brandis wrote to the Commonwealth Director of Public Prosecutions (DPP) on 30 October 2014 to ensure that under Section 8 of the Commonwealth Director of *Public Prosecutions Act 1994* where a matter involves a journalist, no prosecution should occur without the consent of the Attorney-General of the day.

We also acknowledge recommendations made by the Parliamentary Joint Committee on Intelligence and Security to ensure public interest considerations were introduced into the legislation, and the subsequent alteration of the Explanatory Memorandum to require the Commonwealth Director of Public Prosecutions (CDPP) to consider the public interest before initiating a prosecution.

For the purposes of the section 35P review, the NTEU would encourage your further consideration and recommendations in relation to:

- The confirmation that academic writing and research satisfies the conditions of what is 'justifiable' under s35P of the ASIO Act and that this is credible evidence against prosecution;
- All protections afforded to journalists being extended to the academic profession. This would include a recommendation to extend the direction made by the Attorney-General under section 8 of the *Public Prosecutions Act* to the Australian academic

profession where their practices and activities are made in the exercise of their professional duties and responsibilities;

- Extension of the National Legal Direction made by the CDPP on 1 December 2014 to include practices and activity consistent with the exercise of academic freedom;
- Modification of the Prosecution Policy of the Commonwealth to include public interest considerations that exclude individuals acting in a manner consistent with their professional duties and responsibilities;
- Insertion of a public interest defence for journalists and academics against unauthorised disclosures under section 35P.

Confirmation that 'academic writing and research' is credible evidence against prosecution

We previously wrote to the Attorney-General on 14 January 2015 about the operation of the *National Security Legislation Amendment Act (No. 1) 2014*, and expressed concerns about the extent to which university staff were protected from the operation of section 35P.

According to the advice provided by the Attorney-General, "the Government is satisfied that a person who engages in the usual practices of... academic writing and research is highly unlikely to be exposed to prosecution because such actions would be credible evidence supporting a conclusion that a person did not act unjustifiably in making a disclosure". We believe that this advice should be endorsed by INSLM and that such a statement would be credibly framed if introduced into the legislation.

Protections afforded to journalists should be extended to the academic profession

The NTEU has a keen interest in academic freedom, or intellectual freedom of expression, which is critical to the mission of Australian universities as recognised in the objects of the *Higher Education Support Act 2003* and section 19-115. Academics and researchers in the exercise of their academic freedom are expected:

- To publish freely and speak without fear of retribution, and
- To teach without interference, and be guided in their pedagogy by intellectual rigour, to their best knowledge and free conscience.

This professional duties and obligations are discrete from the kinds of public interest considerations that impact journalists, because they relate to the quality of a given academic's professional ability and performance.

This has specific relevance to academics researching or teaching in the fields of law, security studies, diplomacy, border protection or counter-terrorism. For instance, it would be impossible to credibly instruct students about the counter-terrorism legislative framework without reference to case studies that might include an inadvertent disclosure about the existence of a special intelligence operation. On this basis, we believe that all protections afforded to journalists should be extended to academics.

Extension of the National Legal Direction made by the CDPP on 1 December 2014

We believe there should be a modification to the National Legal Directions made by the CDPP on the unauthorised disclosure of special intelligence operations to include academic freedom as a factor discrete from any public interest requirements. We believe such an approach is fundamental not only to the public interest, but to the exercise of academic freedom, which is a discrete obligation necessary for proper and professional conduct of academics employed within the university sector. We note that the protection of academic freedom does not directly overlap with determinations for public prosecution made by the CDPP.

Modification of the 2012 Prosecution Policy of the Commonwealth

We believe that the *Prosecution Policy of the Commonwealth* which explains that the CDPP should pursue a prosecution if it is in the public interest, should also consider statements to protect individuals who are acting in a manner consistent with their professional duties and responsibilities.

Insertion of a defence for journalists and academics against unauthorised disclosures under section 35P

In making these recommendations, it is necessary to restate that the NTEU has broad-ranging concerns with the character of the new counter-terrorism regime imposed by the Commonwealth Government. While the directions made by the Attorney-General under section 8 are welcome, they do not provide any greater public transparency or accountability against major indiscretions performed by government. Section 35P is in effect a backdoor attack on free speech framed in the language of national security. The most important measure to protect free speech would be to insert a defence for journalists and academics against prosecutions undertaken according to section 35P.

I look forward to your response and if you have any further queries please do not hesitate to contact me (jrea@nteu.org.au) or Paul Kniest (pkniest@nteu.org.au).

Yours sincerely,



JEANNIE REA
National President

cc: Attorney-General George Brandis