

Question 1: investigations in relation to contraventions of section 35P of the ASIO Act

(1) Have any suspected or potential contraventions of section 35P been referred to the AFP for investigation since 30 October 2014? If yes, please provide details.

The AFP has not received any referrals in relation to section 35P of the ASIO Act.¹

Question 2: Experience in the investigation and enforcement of disclosure offences applying to Commonwealth 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 offences in sections 15HK and 15HL of the Crimes Act (disclosures of information relating to controlled operations) had, at that time, been investigated or referred for prosecution.

I would appreciate the AFP's advice, as at March 2015, as to whether any of the relevant disclosure offences in the Crimes Act, as identified in paragraphs (a)-(c) below, have been investigated or are being investigated, or 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 as to whether any persons under investigation are journalists reporting on operational matters.

Since 2007, the AFP has not investigated or referred for prosecution any matters related to sections 15HK, 15HL, 15LC and 15MS of the *Crimes Act* 1914.

¹ All answers are as at 9 April 2015.

Questions 3-4: experience in the conduct of controlled operations and the use of assumed identities by AFP officers – any conduct outside the limits of authority

(3) Has the AFP made any reports to the Attorney-General and the Commonwealth Ombudsman in relation to controlled operations it has undertaken, or the use of assumed identities by AFP officers, under the provisions of the Crimes Act noted below, which have identified instances of wrongdoing or conduct in excess of the relevant authority? If yes, please provide details.

A controlled operation authority is intended to address conduct that could constitute a criminal offence whilst undertaking the operation. No illicit conduct has occurred in excess of the relevant authority. Activities that are not specifically provided for within an authority may inadvertently occur as part of an investigation, but not involve wrongdoing. Such conduct could include:

- A participant is authorised to engage in conversations with suspect A but they also engage in discussions with suspect B.
- A civilian participant authorised to email C telephones C because emails have not received a response.

The conduct listed in these examples is technically in excess of the relevant authority, but does not constitute criminal conduct, nor does it cause significant harm or involve any impropriety. Nevertheless, in the interests of transparency the AFP records conduct engaged in outside an authority in accordance with 15HM(2)(p). The AFP also self-discloses conduct in excess of relevant authorities to the Ombudsman outside the controlled operations annual report process, during Ombudsman inspection periods. These reports are not detailed in the AFP's six monthly or Annual Reports to the Minister and Ombudsman.

Where these instances are identified and self-disclosed, the Ombudsman makes comment about these matters in its Inspection Reports to the AFP. The Ombudsman generally notes the conduct that was engaged in outside of the authority. The Ombudsman's Inspection reports usually have a Sensitive protective marking, although some of the reports have been marked Protected due to the nature of the information it contained.

No instances of misconduct under 15GI(2)(f) and 15GI(2)(g) have been identified.

Controlled operations – annual report

In addition, the AFP provides information to the Ombudsman for the controlled operations annual report. The annual report requirements are contained in Part 1AB, Section 15HN of the *Crimes Act 1914*. The report must contain all the details required by 15HM (2), (2A), (2B) and (2C) for controlled operations for which the AFP was the authorising agency in the previous 12 months and which were expired or revoked in the period – this relates specifically to the 'controlled operation' authorised even though the overarching investigation (for which a controlled operation authority was sought) may be ongoing. Only if the controlled operation authority had not expired or been revoked as at June 30 of

the reporting year can it be omitted from reporting (it will however need to be considered in the period when it is finalised.)

However, section 15HN(2) of the legislation allows a full or partial ministerial exemption from reporting to be sought if there is a risk of prejudice to such an overarching investigation. In light of this, when the sanitised reports are forwarded with release forms by the AFP Statutory Compliance Team to Case Officers and T/L's for publication clearance, they are informed that under 15HN(4) the names of targets and civilians have been removed. They are then asked to consider and advise if a full or partial exemption of information under 15HN (2) is appropriate. If the investigative team deem that all or any publication of the information will impact the investigation it *can* be excluded under 15 HN (2) in full and will form part of the Ministerial exemption brief. The Ministerial exemptions brief is classified as 'PROTECTED' and the information contained in that brief is not sanitised.

In the last financial year, 24 controlled operation records relating to the 2013-14 financial year were fully exempted from publication, a further five records relating to previous financial years were fully exempted from publication and one record related to the 2013-14 financial year was partially exempted with information redacted from the published report.

(a) Sections 15HM, 15HN and 15HO (reports on controlled operations), particularly with respect to the matters prescribed in paragraphs 15HM(2)(r) and (s), concerning loss of or serious property damage or personal injuries occurring in the course of or as a direct result of the operations in the reporting period.

No reports have been made to the Minister or Commonwealth Ombudsman concerning the loss of, or serious damage to property or personal injuries occurring in the course of, or as a direct result of controlled operations. There have been no losses, damage or injuries to report.

(b) Section 15LD (reports on the use of assumed identities), particularly with respect to the matters prescribed in paragraph 15LD(1)(f), concerning the identification of fraud or unlawful activity relating to the use of assumed identities in the course of mandatory audits completed under section 15LG.

There have been no allegations of, fraud or other unlawful activity raised.

(4) Has the AFP undertaken any controlled operations in which participants have, or are alleged to have, engaged in conduct of a kind specified in paragraphs 15GI(2)(f) and 15GI(2)(g) of the Crimes Act? If yes, please provide details.

The AFP has undertaken controlled operations in which it has been alleged that participants engaged in conduct of a kind specified in paragraphs 15GI(2)(f) and 15GI(2)(g) of the Crimes Act or similar conduct. AFP records (since 2007) do not record any instances where such allegations have been confirmed or substantiated.

An example of the conduct in question is the case of *Webster v The Queen* [2015] WASCA 20, the AFP was accused of entrapment for conduct engaged in during the course of a controlled operation. The conduct in question was that the AFP undercover officer told the appellant he could source large quantities of methylamphetamine from Indonesia, that he supplied the appellant with 2g of high-quality methylamphetamine, and that he offered to sell the appellant 2kg of methylamphetamine at what the appellant regarded as an irresistibly cheap price. The court held the undercover officer's behaviour did not breach section 15HA(2)(c) of the *Crimes Act 1914* and considered the behaviour to be legitimate and did not contravene minimum standards of acceptable police.

Additional cases may exist – however this information is not readily available and would be resource intensive to retrieve. It is not always apparent from a case record, without a manual search of all records, that such an allegation exists and even then, if not found substantiated, such a record of an unsubstantiated allegation is unlikely to have been retained. In addition, as Authorities are rarely produced in evidentiary packages or briefs of evidence, such records for matters brought before a court would not be available unless overtly addressed in that case.

Question 5-6: Experience in the investigation and enforcement of other Commonwealth disclosure offences applying to journalists

(5) Has the AFP investigated any matters involving alleged or suspected contraventions of 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).

(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).

(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.)

(d) The disclosure offences in respect of delayed notification search warrants in section 3ZZHA of the Crimes Act (in the event that any such warrants have been issued since the commencement of this scheme on 1 December 2014).

The AFP received a referral in 2013 of alleged breaches of section 39 of the *Intelligence Security Act 2001* by a former member of the AIC. This matter did not involve a disclosure by a journalist.

(6) Has the AFP investigated any alleged or suspected contraventions of the recruitment advertisement offences in subsections 119.7(2) and (3) of the *Criminal Code 1995* by journalists or media organisations? (Noting that these offences commenced on 1 December 2014, please also consider the predecessor to these offences in section 9 of the (now repealed) *Crimes (Foreign Incursions and Recruitment Act) 1978*. As section 9 was part of the original enactment of the 1978 Act, I would appreciate your suggestion as to a reasonable time period for present purposes. I may request further information if required.)

The AFP is unaware of any referrals in relation to these offences.

Question 7: AFP's media liaison arrangements with respect to national security operations

(7) Please describe the AFP's media liaison arrangements with respect to journalists or other media professionals who may contact the AFP in relation to matters that may relate to the AFP's national security operational activities. I am particularly interested in details of the following matters:

(a) The AFP's approach to the handling of inquiries from journalists who may contact its media liaison unit in relation to a potential news report or editorial piece because they are uncertain whether it may disclose operationally sensitive information (and may further be concerned about exposure to criminal liability if the relevant report was published and, in fact, disclosed such information);

All media enquiries are received by the AFP National media team (excluding ACT Police matters which are received by the ACT Police media team). The media team evaluates all enquiries against a range of criteria and all media responses are cleared to Commander level or above. The evaluation includes assessing any potential impact on partner agencies and whether the AFP's response needs to be provided for approval by that agency.

For any enquires relating to the AFP, the AFP will generally not comment on ongoing operational activity/investigations, national security issues, matters of

intelligence, matters before court, Interpol involvement in investigations, protection of High Office holders, extraditions Mutual Assistance Requests (MARs), speculation or hypothetical situations/scenarios. This policy means most controlled operations would be precluded from comment at the outset, thus AFP do not often need to specifically address a controlled operation should a journalist have information. In such a situation the AFP would not confirm or deny the information the journalist holds. However, the AFP Media Team will, if possible, ascertain the veracity of the information the journalist holds and inform them if their information is incorrect.

Controlled or otherwise sensitive operations are not routinely or widely known across the agency due to the significant sensitivity and risk involved with such operations. The operations are only known to those who have an operational requirement for such knowledge. This means the existence or details of controlled operations are not routinely known to AFP National Media team who are the primary point of contact for all enquiries from journalists.

If information known to a journalist/media organisation and subsequent media reporting is likely to jeopardise operational matters, the AFP National Media team will liaise with the journalist and/or their editor and negotiate a hold on any reporting. Further negotiation may be required to facilitate a mutually agreeable arrangement to publish at a later date, once operational matters are finalised.

Where there is a successful outcome resultant in part from activities under a controlled delivery or seizure, there will often be a subsequent media release which plays an important role in informing the public, accountability and deterrence. In such situations, a risk analysis will be undertaken to ensure no operational details that could result in harm to individuals or ongoing operations will be included in the media release.

If there are potential legal issues or impediments that AFP National Media becomes aware of from an operational area, and a journalist is uncertain as to whether reporting may expose them to criminal liability under the Crimes Act, an AFP National Media Team Leader will advise the media outlet and direct them to obtain independent legal advice prior to publishing/broadcasting. This is not a common occurrence.

The AFP National Media team may advise an operational area if concerned or suspicious a journalist may have information that could jeopardise ongoing police activity.

(b) any practices the AFP has implemented to manage the risk of confirming or denying the existence of a covert or otherwise sensitive operation, in the event a journalist contacted the AFP's media liaison unit in the circumstances described at (a) above;

As discussed above, the AFP does not provide confirmation of, or information about covert or otherwise ongoing operations. Common responses include:

- The AFP does not confirm or deny who it may, or may not, be investigating or discuss matters of intelligence.

It is not unusual for journalists to receive this response for a range of enquiries, particularly, because for operational reasons, it is not appropriate for the AFP to comment specifically on investigations, matters of intelligence, or operational methodology.

In some cases, a journalist may genuinely have information and seek clarification of the accuracy of the information by liaising with AFP National Media. In these instances, contact will be made by the AFP National Media team with the relevant operational area(s) within the AFP to clarify the accuracy of the statements and ascertain the level of sensitivity of a particular operation. This knowledge, if appropriate, will be relayed to the journalist, with an appropriate level of caution as to the sensitivity of a particular operation.

If the journalist's publishing of material appears to involve the risk of criminal liability, the journalist is advised to seek legal advice.

(c) whether there are any specific arrangements in place, or under consideration, with respect to liaison with journalists who may contact the AFP in relation to prospective news or editorial reports, out of concern that they may disclose information relating to a controlled operation, potentially in contravention of section 15HK of the Crimes Act (the basic offence for the intentional disclosure of information that relates to a controlled operation, where the person is reckless as to the circumstance of that relationship); and

As discussed above, the AFP does not provide confirmation of, or information about covert or otherwise ongoing operations.

(d) how, if at all, 'journalists' and 'media organisations' (or similar descriptors) are defined or otherwise interpreted by the AFP for the purpose of its media liaison activities. (For example, are there circumstances in which the AFP 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 AFP's interpretation?)

Where 'journalist' is defined by legislation, the AFP relies on that definition and acts accordingly to ensure compliance with legislative obligations. Otherwise, the AFP generally considers 'journalists' and 'media organisations' as individuals or entities that must be part of, or be a recognised and accredited news organisation. Due to the variety, rapid development and constantly evolving media field, any journalists/organisations making an enquiry to the AFP are assessed on a case-by-case basis.

Journalists are required to verify their status as an employee, or freelancer, of an accredited and/or recognised mainstream media organisation via a company email address or provide the contact details of their editor.

The AFP exercises caution in dealing with freelance journalists: establishing their identity and credibility are important processes. An assessment is made, even where freelance journalists may have had their articles published by reputable

media organisations. To facilitate an exchange of information, the freelance journalist would need to provide contact details of an editor who can verify a relevant relationship with the freelance journalist.

The AFP also recognises mainstream blogs, such as New Matilda, Mumbrella and Crikey. For bloggers, their reputation as established opinion shapers and ability to exert influence within the mainstream media is an important consideration in the AFP's decision to engage and exchange operational information with a blogger/journalist.

Questions 8-9: legal policy issues – elements and offence-specific defences⁶

(8) The 'basic offence' in subsection 35P(1) of the ASIO Act (applying to persons who intentionally disclose information, reckless as to the circumstance it related to a special intelligence operation) is modelled on the basic disclosure offences in sections 15HK, 15LC and 15MS of the Crimes Act (with respect to controlled operations, the identification of persons using assumed identities and the identification of operatives who are witnesses in proceedings or their place of residence).

A number of commentators have suggested that the 'basic offence' in subsection 35P(1) (and by extension, the 'basic offences' in the Crimes Act in relation to controlled operations, assumed identities and law enforcement operatives who are protected witnesses) are an undue limitation on the media reporting of suspected wrongdoing by ASIO or security agencies in the course of relevant operations or activities.

A number of amendments have been suggested by various stakeholders and commentators, primarily in the course of Parliamentary scrutiny and public debate of the (then) Bill inserting section 35P in the ASIO Act. I would welcome any comments the AFP may wish to provide on the following suggested amendments, to the extent that they may equally apply to controlled operations under the Crimes Act:

The special intelligence operations (SIO) regime is modelled on the provisions of Part IAB of the Crimes Act, which authorise and govern the conduct of controlled operations for law enforcement purposes. All instances of departure are directed to accommodating the different purposes to which special intelligence operations and controlled operations are directed, and ensuring that the requirements applied to each regime are adapted to achieving its particular purpose. The AFP considers it appropriate to include similar disclosure offences in 35P due to the potential harm which may result from disclosure of details of an SIO.

The 'basic' and 'aggravated' offences in sections 15HK, 15HL, 15LC and 15MS of the *Crimes Act* recognise the serious risks to personal safety and security and to the integrity of an operation that an unauthorised disclosure may have. The offences relating to SIO disclosure recognise the potential endangerment to Australia's national security and lives that a disclosure may have.

(a) repeal specific disclosure offences applying to these operations and rely on secrecy offences of general application (such as those in section 79 of the Crimes Act);

The offences at section 79 of the *Crimes Act 1914* apply to different conduct. The offences require a nexus to a duty to treat prescribed information as secret (or because it relates to a prohibited place) and as such, do not have broad application.

These offences have a very complicated structure and despite having been in place since the original version of the *Crimes Act 1914*, there have been few prosecutions. In the case of *R v Lappas* [2003] ACTCA 21, the charge under section 79 was only laid as an alternative to the primary charge of espionage.

The offence at section 79(2) requires the intention of prejudicing the security or defence of the Commonwealth (or a part of the Queen's dominions). This threshold is irrelevant to police operations.

More general disclosure offences at section 70 of the *Crimes Act 1914* and section 18 of the *ASIO Act 1979* only apply to Commonwealth officers and ASIO employees, affiliates and contractors respectively.

(b) repeal the 'basic offence' in section 15HK and retain only the 'aggravated offence' in section 15HL, which requires proof of intention to endanger a person's safety or to prejudice the effective conduct of an operation (or that the disclosure will have that effect);

As highlighted above, the disclosure of information or reporting on an operation may have the effect of endangering a person's safety or prejudice the effective conduct of a controlled operation regardless of the intention of the person who makes the disclosure. In other words, whether the person making the disclosure intends to endanger a person or prejudice an operation is unlikely to change the actual effect of the disclosure.

The purpose of the offences at sections 15HK and 15HL is to reduce or eliminate the threat or risk of harm to the safety of participants (and others) and to ensure the integrity of controlled operations. The aggravated offence reflects the increased criminality in the actions of a person disclosing information and holding the malicious intention or where the disclosure will certainly endanger health and safety or prejudice a controlled operation.

The effect of repealing the 'basic offence' would be allowing things to be reported without requiring an intention to endanger or prejudice an operation, or certain foreseeable harm. It cannot be said that journalists have the requisite expertise or would be in a position to make an informed assessment regarding the risk of endangerment to a person(s) or the impact on a police operation. It is highly improbable a journalist would have knowledge of the full extent of the

operation, the level of involvement of undercover and overt police and civilian participants (including informants), and have an appreciation of associated risks and dangers. For example, when a controlled operation involves a dangerous criminal syndicate and puts undercover police and informants at risk of exposure.

(c) replace the fault element of recklessness (in either or both the basic and aggravated offences) with that of knowledge that the information subject to the disclosure related to a controlled operation;

Recklessness is the default fault element for the physical elements of circumstance and result for all Commonwealth offences. Recklessness is not considered a low threshold. It requires foresight of a substantial risk that a circumstance exists (here, that the information relates to controlled operations) and then with regard to the circumstances known, it is unjustifiable to take the risk. In the controlled operations context this threshold operates appropriately, reflecting the grave risks and potential danger to the health and safety of persons associated with controlled operations. The AFP considers recklessness is the appropriate fault element for this element of these offences.

(d) include an offence-specific defence for disclosures made in good faith and in the public interest (including the reporting of suspected corruption or wrongdoing), or a specific exemption for journalists reporting on national security matters in the public interest, with the potential to limit these exceptions by framing them “in a manner which provides sufficient clarity” to persons making disclosures in the public interest “while still ensuring that information which is genuinely likely to result in serious harm to individuals is not publicly disclosed”;

Such a defence may lead to disclosures which unwittingly or accidentally cause harm, and would go against the purpose of the offences. The identity of an individual making the disclosure does not change the harm caused by disclosure, which the offence is seeking to prevent and reduce. Open reporting is the type of disclosure that is most likely to cause the most harm to ongoing operations and the safety of individuals due to the widespread dissemination. As noted above at the response to question (8)(b), journalists are not equipped to determine risks of harm to persons and operations that may result from the disclosure of information relating to operations, such as controlled operations. An assessment of harm would require specific and detailed knowledge of all aspects of the operation – information which is beyond the reach of the public, including journalists, due to the high risk involved in these operations.

There are competing public interests in ensuring intelligence and policing operations can be conducted with sufficient protections, particularly as these types of operations typically involve informants. The continuation of the trusted relationship between police and informants is critical to law enforcement’s ability to fight crime and maintain safety and security. The value of informants to police and policing operations has been recognised by the Parliament on various occasions, including at the 2010 amendments to Part IAB of the *Crimes Act 1914*

where informants as participants were provided with specific civil indemnity and criminal immunity for conduct undertaken in accordance with a controlled operations authority. Further, the integrity of such operations is paramount as they often lead to the prevention of crime, the disruption and dismantling of criminal schemes and syndicates and the prosecution of criminals, the benefit to society is significant.

Most police operations resulting in a prosecution are scrutinised closely at trial, the details of which are revealed in open court and judgments. For example, in *Webster v The Queen* [2015] WASCA 20 (involving an AFP controlled operation and alleged wrongdoing) and *R v Cowan* [2013] QSC 337 (involving an undercover Queensland police operation and a murder confession) where many details of the operations were exposed at court and on the public record.

(e) include an offence-specific defence for the disclosure of information already in the public domain;

The AFP considers that this is a complex issue. The AFP would need to further consider the risks and consequences of such a defence before making detailed comments on this proposal.

(f) include specific statutory sentencing criteria, including requirements that courts must specifically consider the public interest, if any, in the disclosure of the information constituting the offence, in determining sentences;

The AFP does not think it would be necessary or appropriate to have such statutory sentencing criteria. Defence would be able to make sentencing submissions regarding any public interest served for the court to consider against the facts of the specific case. Further, the courts generally maintain their own sentencing guidelines.

(g) make the offences (or the schemes as a whole) subject to sunset clauses;

Part IAB of the *Crimes Act 1914* was enacted following the High Court decision of *Ridgeway v R* (1995) 184 CLR 19. In *Ridgeway*, the High Court recommended the enactment of a statutory scheme to regulate police covert operations. The Commonwealth and most other Australian jurisdictions responded by enacting controlled operations legislation. The legislature and courts have long recognised the important role played by police covert operations. The AFP would firmly oppose any move to make the controlled operations regime in the *Crimes Act 1914* subject to a sunset clause.

The offences relating to controlled operations disclosure were inserted in 2010. Noting the significant potential impact of the release of information relating to controlled operations, the AFP is of the opinion the offences are of critical

importance and must remain in place on an ongoing basis. The risks may remain to participants many years after the conclusion of an operation.

(h) limit the offences to the disclosure of certain types of information relating to an operation. (For instance, limiting the offences to the disclosure of information that identifies a participant in an operation, or a method or technique utilised in the operation; or adopting a definition of 'operational information' along the lines of that in 34ZS(5) of the ASIO Act, which applies to the disclosure offences in section 34ZS in relation to ASIO's questioning warrants and questioning and detention warrants); and

The AFP is of the view the current drafting of offences in Part IAB of the *Crimes Act 1914* is appropriate. Reporting the existence of an operation and surrounding circumstances could create risks irrespective of whether a participant is identified. Harm could materialise in ways difficult to contemplate or foresee when drafting such limitations. It is imperative the legislation be drafted in a way that avoids any 'gaps' which could be exploited which would undermine the policy intent of the offences; to protect the operational integrity of highly sensitive investigations and protect participants.

(i) amend the phrase 'relates to' in paragraphs 15HK(1)(b) and 15HL(1)(b) to particularise the nature or degree of relationship between the information disclosed and a controlled operation. (For example, would it be feasible, in the AFP's view, to exclude information that relates to a controlled operation by way of identifying actions taken outside the authorised scope of an operation?)

Given the aim of the offences and the risk environment, a wide operation of the offences is appropriate. Any disclosure could jeopardise lives and operations.

There are a number of adequate safeguards built into the controlled operations scheme to encourage participants to act in accordance with the scope of the authority; in particular, the loss of civil indemnity and criminal immunity if a participant acts outside the scope of the authority (see sections 15HA and 15HB) and Ombudsman oversight (Division 4 of Part IAB).

It is imperative the legislative drafting avoids any 'gaps', including for persons who are not acting with a public interest intention when disclosing information relating to a controlled operation.

Excluding information that identifies actions taken outside the authorised scope of an operation would create a number of significant risks to operational security and integrity, and would require an assessment of the extent to which a disclosure relates to a controlled operation. As discussed under the response to question 3, such actions may not involve any wrongdoing but are technically in excess of the authority. Further, it could generally not be expected that a person who intends to disclose information about a controlled operation would in fact be able to identify the scope of the operation and make an assessment about a particular action.

(9) It has been suggested that, notwithstanding the technical application of the elements of the 'basic offence' in subsection 35P(1), the absence of an explicit public interest or journalistic exemption may produce a 'chilling effect' on reporting of suspected wrongdoing by ASIO (and by, extension, the offences in sections 15HK and 15HL of the Crimes Act).

Specifically, there is suggestion that the offences are likely to create an incentive for journalists to take a conservative approach in the reporting of operational matters, rather than rely on prosecutorial or investigative discretion not to enforce an offence. (For example, by electing not to report on matters, or reporting very limited information.)

It has also been suggested that section 35P may operate in combination with other disclosure offences in national security legislation, including sections 15HK and 15HL of the Crimes Act, to produce, in aggregate, a 'chilling effect' on journalists seeking to report on security matters.

Can the AFP provide any comments to address these concerns, or alternatively to explain why it is appropriate that matters of security take priority in this way?

The disclosure of information relating to police operations can inhibit the functions of law enforcement in protecting the community from criminal activity, enhance the ability of criminals to avoid law enforcement detection, and limit the trust placed in law enforcement by informants, harming the ability of police to obtain cooperation within the criminal milieu.

The AFP strongly maintains the view that there is a competing public interest that police and law enforcement continue to be able to work to deter, prevent and disrupt criminal conduct – in particular the thwarting of terrorists, in ways which cannot be disclosed by the media contemporaneously. While in some instances reporting is appropriate and welcomed after the conclusion of operations, in some cases risks may remain even after the conclusion of the operation, particularly where human sources are involved, in which case reporting could cause significant harm.

Journalists would generally not be privy to the entire context surrounding particular operations and the involvement of and risks to individuals (for example informants and undercover police officers the full implications of the release of the information (whether about wrongdoing or otherwise) on operational risks may not be apparent and may have serious operational consequences. For example, in Operation Neath details of the operation were published and available before finalisation of the Operation had commenced, leading to early resolution of the operation which may have affected the safety of officers involved and the completeness/sufficiency of evidence obtained during that operation.

Information may also be viewed out of context and, if released into the public domain, could be highly problematic: for example, if it is believed a police officer is involved in corrupt conduct when in fact the officer is authorised to act in such way under a controlled operation.

The AFP notes the existence of other oversight mechanisms including the Ombudsman, PJCIS and the IGIS which exist to ensure the transparency and accountability of sensitive operational activities.

Question 10: proof of fault elements – recklessness as to the circumstance a person was aware of a substantial risk the information related to the relevant kind of operation

(10) 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 person was aware of a substantial risk that the information disclosed related to a special intelligence operation or a controlled operation. I am aware of some stakeholder commentary that the fault element of recklessness represents a ‘very low’ threshold that could be satisfied relatively easily.

Does the AFP have any views about on such commentary, particularly by reference to its experience in conducting investigations and referring matters for prosecution in relation to offences applying the fault element of recklessness as to a circumstance in which conduct occurs?

Recklessness is not considered a low threshold at all. A person must be aware of substantial risk based on the facts/information known to them, and it must be unjustifiable to take that risk. Evidence is required to prove to the high criminal standard beyond reasonable doubt that the person was reckless.

Question 11: potential application of section 35P to ASIO’s media liaison activities

(11) 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 AFP 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 AFP provide any general comment on the matters it may take into consideration in considering the potential availability of paragraphs 35P(3)(a) or (d) in any investigations it may conduct in relation to the scenario described about? (Paragraph (a) relates to disclosures in connection with the administration or execution of Division 4 of Part III. Paragraph (d) relates to disclosures in connection with the performance of functions or duties, or the exercise of the powers, of the Organisation.)

The offence at section 35P(1) could apply, however it would depend on a number of factors including what was disclosed. Existing offences under section 70 of *Crimes Act 1914* and section 18 of the *ASIO Act* might just as easily have applied in the absence of section 35P.

Section 35P(3)(d) in particular may form the basis of a defence. It would be necessary to consider what was disclosed, to whom and for what purpose. The context of each matter would be assessed on a case by case basis. It would also be necessary to consider how the disclosure relates to ASIO functions and duties under section 17 of the *ASIO Act*.

Question 12: statutory interpretation issue – paragraph 35P(2)(c)12

(12) Does the AFP 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?

In the AFP's view, the absence of a note does not give rise to such an argument. Both notes do nothing more than contain the effect of section 5.6 of the Criminal Code and do not modify the default fault element.

The AFP is unsure how section 35P(2)(c) could be read differently due to the absence of a note.

Section 35P(2)(c)(i) provides a fault element of intention. Section 35P(2)(c)(ii) is silent so accordingly the default fault element applies, namely recklessness.

For section 35P(2)(c)(ii) to have intention as a fault element would in effect be the same as section 35P(2)(c)(i) thus making it redundant. This cannot have been the intention of the legislature.