

Independent National Security Legislation Monitor Inquiry in to section 35P

Response to Question Thirteen: compatibility of section 35P with the right to freedom of expression

Overview of Offences

The *National Security Legislation Amendment (No. 1) Act 2014* (Cth) (the Act) introduces two new offences in relation to the unauthorised disclosure of information relating to an SIO – a basic offence in subsection 35P(1), and an aggravated offence in subsection 35P(2). These offences are based on corresponding disclosure offences in sections 15HK and 15HL of the *Crimes Act 1914* (Cth) (Crimes Act) in relation to controlled operations. Nearly all States and Territories have enacted identical offences in their controlled operations legislation, reflecting a model national controlled operations law that was developed and endorsed by all jurisdictions in 2003.

In broad terms, the basic offence in subsection 35P(1) applies to a person who has intentionally disclosed information, and is reckless, at the time of making the disclosure, to the circumstance that the information related to a special intelligence operation.

The aggravated offence in subsection 35P(2) requires further proof that the person made the disclosure intending to cause a specified form of harm, or that the person was reckless as to the circumstance that the disclosure will cause such harm. (The specified forms of harm in subsection 35P(2) are prejudicing the conduct of an operation, or endangering the health or safety of any person.)

Both offences are subject to all of the general defences and excuses in Chapter 2 of the *Criminal Code Act 1995* (Cth) (Criminal Code). In addition, they are subject to administrative safeguards¹ and specific exceptions (which operate as offence-specific defences) contained in subsection 35P(3). These exceptions substantially replicate the exceptions to the offences in sections 15HK and 15HL of the Crimes Act, and comprise of disclosures made:

- in connection with the administration or execution of the SIO scheme in Division 4;
- for the purpose of any legal proceedings arising out of, or otherwise related to Division 4 (or any report of such proceedings);
- in accordance with any requirement imposed by law;
- in connection with the performance of the functions or duties, or the exercise of powers, of ASIO;
- for the purpose of obtaining legal advice in relation to an SIO;
- to an Inspector-General of Intelligence and Security (IGIS) official for the purpose of the IGIS exercising powers or performing functions or duties under the IGIS Act; or
- by an IGIS official in connection with the IGIS exercising powers or performing functions or duties under the IGIS Act.

¹ The administrative safeguards are thoroughly analysed at p. 7. The safeguards include (a) the Prosecution Policy of the Commonwealth public interest test, (b) the Commonwealth Director of Public Prosecutions (CDPP) National Legal Direction on the application of the public interest test to section 35P and (c) the Attorney-General's direction to the CDPP which requires consent to prosecute a journalist under section 35P.

Committee conclusion

The Committee made the following concluding remarks on section 35P, suggesting that it is incompatible with the right to freedom of expression under the ICCPR:

On the information provided, the committee considers that the new offence provisions for disclosing information regarding SIOs are incompatible with the right to freedom of expression because the provisions appear to impose disproportionate limits on that right.²

The Committee expressed a view that the information provided in the Statement of Compatibility did not demonstrate that the offence provisions in section 35P of the ASIO Act for the disclosure of information relating to an SIO are reasonable, necessary or proportionate limitations on the right to freedom of expression. On that basis, the Committee concluded that the offence provisions are incompatible with the right to freedom of expression. The Committee noted the Statement of Compatibility relies on “defences and safeguards as facilitating the operation of oversight and accountability bodies in respect of the measure”.³ The Committee advanced two specific reasons for its position.

(1) Application of the fault element of recklessness to the basic offence in subsection 35P(1)

Firstly, the Committee suggested that as the basic offence in subsection 35P(1) applies to conduct which is done recklessly rather than intentionally, a journalist could be prosecuted for and convicted of an offence even though he or she did not intentionally disclose information about an SIO and did not know that the information was so related.

The Committee expressed concern that the offences could therefore operate to discourage journalists from the legitimate reporting of ASIO’s activities, for fear of falling foul of this offence provision. The Committee suggested (at pp. 56-57 of its report) that the offences could potentially have a ‘chilling effect’ on journalism and could undermine public reporting on and scrutiny of ASIO’s activities. The Committee’s concern appears to be that the Statement of Compatibility, in its view, did not explain why the fault element of recklessness rather than intention was included in the offence.

(2) Perceived restrictions on ‘public interest whistleblowing’

Secondly, the Committee expressed a view that the available defences in subsection 35P(3) do not provide adequate protection for so-called ‘public interest whistleblowers’ – being persons who publicly disclose information relating to an SIO because it pertains to actual or suspected wrongdoing by ASIO, and the disclosure of such information is in the public interest to ensure the propriety and accountability of ASIO’s activities. The Committee described the relevant exceptions as ‘very narrow’, noting that they generally cover internal disclosures such as those made to the IGIS.⁴

Attorney-General’s Department (AGD) view

AGD does not agree with the Committee’s conclusion that these new offence provisions are incompatible with the right to freedom of expression. As acknowledged in the Statement, the offences engage (by limiting) the right to freedom of expression in Article 19(2) of the ICCPR, in that

² Sixteenth Report of the 44th Parliament, p. 57.

³ Sixteenth Report of the 44th Parliament, p. 56.

⁴ Sixteenth Report of the 44th Parliament, p. 57.

they prohibit the disclosure of information relating to an SIO, including the publication or other communication of such information unless caught by one of the exceptions in subsection 35P(3). However, as also noted in the Statement, Article 19(3) of the ICCPR provides that the right to freedom of expression is not absolute and may be permissibly limited where necessary to achieve a legitimate purpose, including the protection or maintenance of national security. The Committee acknowledged, in the context of consideration of the right to privacy, that maintenance of national security and protection of the Australian community may be regarded as a legitimate objective.⁵

As noted by the Committee, for a limitation to be permissible, it must be reasonable, necessary and proportionate to the achievement of a legitimate objective. Measures such as safeguards, defences, and exceptions may contribute to a limitation being compatible, and may in particular contribute to its reasonableness and proportionality.

Necessary to achieve a legitimate objective

As explained in the Statement (at p. 22), the offence provisions in section 35P are necessary to achieve the legitimate objective to protect persons participating in an SIO and to ensure the integrity of such operations, by creating a deterrent to unauthorised disclosures of information about their existence or methodology, which may place at risk the safety of participants or the effective conduct of the operation.

SIOs are necessarily conducted on a covert basis and are intended to remain covert in perpetuity absent any disclosure required by law. In particular, the disclosure of the existence and conduct of an SIO creates an unacceptable risk that the operation may be compromised, and that the safety of the participants (and potentially their family or associates) may be jeopardised. For example, such disclosures may cause participants in an SIO or their families or associates to be targeted by persons of security concern in retaliation for this participation, or to be targeted by those who are hostile to Australia's interests in order to obtain information about the operation or intelligence capabilities deployed in that operation.

The disclosure of information relating to an SIO may also frustrate the conduct of an operation by causing the targets of such an operation to alter their behaviour or to engage counter-intelligence matters. The disclosure of information relating to an SIO may also jeopardise other investigations where there is some connection between the two – for example, if there is some relationship between the persons being investigated or an authorised participant, whose identity is disclosed, is known to associate with other persons who are also performing investigative roles.

Once such information is disclosed, there is very limited (and potentially no) recourse available to address these significant risks. This harm is not contingent on a person's malicious intention in making a disclosure, other than the risk that it may be aggravated by persons who act with a malicious intention, since this may further increase the prospects that these adverse consequences will eventuate or their magnitude. As such, the limitation these offences place on the right to freedom of expression is necessary for the protection of national security and the health and safety of participants in SIOs.

The PJCIS, in its 2014 advisory report on the (then) Bill, gave extensive consideration to the offences in section 35P (including the same matters later raised by the PJCHR in its 16th Report) and accepted that the offences are necessary and appropriate in their current form, subject to some further amendments to extend the exceptions to disclosures made for the purpose of obtaining legal advice

⁵ Thirteenth Report of the 44th Parliament, p. 10.

and to the IGIS (and internal disclosures within the Office of the IGIS). The Government accepted these recommendations and moved Parliamentary amendments in the Senate, which are now part of the Act.

Rational connection and proportionality to legitimate objective

The offence provisions are rationally connected and proportionate to the legitimate objective they pursue. The offences will help to ensure the integrity of SIOs and protect persons participating in them by creating a deterrent, in the form of a criminal sanction, to disclosing information that may place these operations or their participants (or family members or associates) at risk. A criminal sanction is appropriate, having regard to the gravity of the risks presented by the disclosure of the existence of an SIO – noting that such risks do not in any way depend on the motives of the discloser, nor diminish with the passage of time, and that such risks are not capable of being averted or adequately managed once a disclosure is made. It is therefore appropriate that all members of the community are subject to a non-disclosure duty in relation to such operations, other than for the exceptions in subsection 35P(3), or the making of an internal disclosure of suspected wrongdoing to appropriate authorities – including the IGIS.

The provisions are also proportionate to this legitimate objective. The offences are subject to a number of exceptions⁶ as well as a number of operational and administrative safeguards – in addition to the significant safeguards provided by the elements of the offences themselves.

Exceptions and defences

In particular, and as stated above (p.1) the offences are subject to all of the general defences and excuses in Chapter 2 of the Criminal Code. In addition, they are subject to specific exceptions (which operate as offence-specific defences) contained in subsection 35P(3). These exceptions substantially replicate the exceptions to the offences in sections 15HK and 15HL of the Crimes Act.

The Committee specifically commented on protections for so-called ‘public interest whistleblowers’, suggesting that they are “very narrow” and their focus on internal disclosures meant that “they do not offer adequate protection of the public interest in respect of public reporting” including in instances “where it is alleged that mistakes were made by ASIO” (at p. 57).

The issue of so-called ‘whistleblower’ protections were considered comprehensively by the PJCIS in its 2014 inquiry into the (then) Bill. AGD and ASIO gave extensive evidence to the PJCIS in response to stakeholder suggestions that subsection 35P(3) should include a designated public interest defence, for persons who make disclosures that are assessed by the trier of fact to have been in the public interest (or such that the public interest in publication outweighed the detriment to security sustained by the disclosure of such information). The PJCIS accepted the evidence of AGD and ASIO that such a defence was not appropriate, and did not make any such recommendation on this basis. In particular, AGD and ASIO noted that:

A public interest defence would inappropriately make a jury or a trial judge the final arbiter of whether or not a disclosure caused harm to the public interest. There is a risk that such individuals may not have an appropriate understanding or appreciation of the possible impact of releasing that information or placing it at risk, and may not have an opportunity to adequately assess how the disclosure of a particular piece of information may, when taken

⁶ The exceptions to the offence are outlined above, p.1.

*together with other information, cause prejudice to national security or other important national interests.*⁷

Rather, section 35P makes appropriate provision for internal disclosures of perceived wrongdoing in the course of, and as part of, an SIO to the IGIS. As further explained below, the elements of the offences in section 35P themselves provide very significant safeguards to journalists seeking to report on ASIO's activities.

Elements of the offences

The Committee considered that the elements of the offences in section 35P meant that they may "have a potential chilling effect" on journalists "reporting on ASIO activities" (at p. 56). It was critical of the fault element of recklessness, applying to the circumstance that the person making the disclosure must have been reckless as to its relationship with an SIO. The Committee asserted (at pp. 56-57) that this was not a reasonable or proportionate limitation on the right to freedom of expression because:

- "SIOs can cover virtually all of ASIO's activities" and, as such the offences could "discourage journalists from legitimate reporting of ASIO's activities";
- "without direct confirmation from ASIO, it would be difficult for a journalist to accurately determine whether conduct by ASIO is pursuant to a SIO or other intelligence gathering power"; and;
- "a journalist could be found guilty of an offence even though they did not intentionally disclose information relating to an SIO".

The Committee's remarks reveal a misunderstanding of the component elements and requirements of proof in relation to the fault element of recklessness under Commonwealth criminal law and on the activities that may be encompassed by an SIO.

The offences deliberately do not require the prosecution to prove, to the criminal standard, that a person conclusively knew that the information related to an SIO.⁸ This reflects that the damage sustained to national security as a result of a disclosure is identical whether the person knew, or was reckless as to the circumstance that the information related to an SIO (other than the fact that a fault element of knowledge may result in that harm being aggravated). However, it would be very difficult, if not impossible, for the prosecution to conclusively prove the discloser's state of mind in relation to the degree of specific knowledge required. (That is, proof beyond reasonable doubt of the person's actual advertence to the fact that the information related specifically to an SIO – being an internally authorised, covert operation under Division 4 of Part III – and not some other activity being undertaken by ASIO.) This is so because the primary evidence of a person's knowledge is the person's own evidence of his or her state of mind.

Accordingly, limiting the applicable fault element to knowledge would mean that a significant category of conduct that is properly regarded as culpable would go unpunished. (That is, persons who make disclosures with reckless disregard as to whether the information related to an SIO – in that

⁷ Attorney-General's Department, Supplementary Submission 1.3 to the PJCIS inquiry into the NSLA (No 1) Bill at pp. 13-14.

⁸ The fault elements of knowledge or recklessness apply to a physical element of an offence that is constituted by a circumstance in which conduct occurs or a result of conduct. The fault element of intention applies only to conduct. See Criminal Code section 5.6.

those persons were aware of a substantial risk of that relationship, but nonetheless, and unjustifiably in the circumstances known to him or her at the time, made the disclosure.) Given the very significant harm that can eventuate from the disclosure of the existence of a covert operation of the most sensitive kind, it is appropriate that reckless disclosures are subject to criminal penalty. This clearly communicates an expectation that persons who seek to report on ASIO's activities turn their minds to whether the disclosure of information is justified in all of the circumstances known to them at the time, and specifically conduct an assessment of risk.

The fault element of recklessness imposes a very high threshold. It requires the prosecution to prove that the person was aware of a substantial risk the relevant information related to an SIO (in the sense of being aware of a real and not remote likelihood that the information related specifically to an SIO) and nonetheless, and unjustifiably in the circumstances known to him or her at the time, took the risk of making the disclosure. In the event there is reasonable doubt as to the person's awareness of risk, or the unjustifiable nature of their actions (as determined by a jury) the person must be acquitted. In addition, an assessment of the availability and sufficiency of evidence – including the potential application of defences – must be undertaken in order for a prosecution to be commenced or continue. The requirement that the person must have acted 'unjustifiably' means that an assessment of a person's actions to manage risk are directly relevant to the establishment (or negation) of this element. In particular, evidence that a person adhered to the ordinary practices of responsible journalism – including consulting ASIO on possible or suspected sensitivities via its dedicated media inquiries line which is open 24/7, obtaining and considering legal advice on a proposed publication, and seeking to independently verify information provided to him or her – tends strongly against a finding that the person acted unjustifiably.

Importantly, the offences in section 35P only apply to persons who disclose information reckless as to the circumstance of its relationship to an SIO – that is, awareness of a substantial risk that the information related not merely to any type of intelligence collection operation, but specifically one that is authorised and conducted under the provisions of Division 4 of Part III. The prosecution must prove, beyond reasonable doubt, that the person was aware of a real and not remote possibility of this very specific connection, and nonetheless and unjustifiably, in the circumstances known to him or her at the time, disclosed the information. The level of specificity required, together with the high standard of proof, and the fact that SIOs are authorised and conducted on a solely internal basis, makes this a very difficult requirement to satisfy, such that prosecutions are anticipated to be very rare.

Since 2010, offences with identical elements have existed in the controlled operations scheme in Part IAB of the Crimes Act (sections 15HK and 15HL). There have been no investigations or referrals for prosecution in relation to these offences. This strongly suggests that concerns about limitations on freedom of expression have not been substantiated in practice. In addition, corresponding disclosure offences (with identical elements) exist in the controlled operations legislation of nearly all jurisdictions (being all States and Territories other than South Australia and the Northern Territory. However, the latter jurisdiction introduced a Bill to its Parliament in 2014 to establish a controlled operations scheme and apply the disclosure offence.) The disclosure offence was developed and agreed to by all Governments as part of a model national law on controlled operations in 2003.

Administrative safeguards

In addition to the considerable safeguards in the elements and defences applying to section 35P, proposed prosecutions under 35P are also subject to three administrative safeguards, detailed below.⁹

1) Prosecution Policy of the Commonwealth – public interest test

First, the Prosecution Policy of the Commonwealth requires the Commonwealth Director of Public Prosecutions (CDPP) to take into consideration the public interest in commencing or continuing a prosecution.¹⁰ As noted in the Explanatory Memorandum to the Bill, it is open to the CDPP to take into account any public interest in a disclosure as part of applying the public interest test.

Under the Prosecution Policy of the Commonwealth, the prosecution must also consider the availability of admissible evidence in relation to each element of the offence charged, and must be satisfied of its sufficiency to support a conviction.¹¹ This requires the prosecution to consider the prospects of a jury being satisfied, beyond reasonable doubt, that the person was reckless as to the relationship of the information disclosed to an SIO at the time of making the disclosure. The prosecution is also required to consider the availability and strength of any defences as part of its decision-making in relation to the commencement or continuation of a prosecution.

2) (b) CDPP National Legal Direction – application of the public interest test to section 35P

Secondly, on 29 October 2014, the Commonwealth Director of Public Prosecutions (CDPP) issued a National Legal Direction, *prosecuting offences for unauthorised disclosure of information relating to controlled operations, special intelligence operations or delayed notification search warrants*. That Direction relevantly requires prosecutors to seek the personal approval of the Director to any proposed prosecutions of offences against section 35P. It also requires prosecutors to consider inviting a prospective defendant to make submission on the public interest, if any, in a disclosure where the prosecutor considers the competing arguments are finely balanced.

3) Attorney-General's direction to the CDPP – consent to prosecutions

In addition, on 30 October 2014, the Attorney-General issued a direction to the CDPP under section 8 of the *Director of Public Prosecutions Act 1983*. This direction requires the CDPP to obtain the consent of the Attorney-General to the prosecution of a journalist for certain disclosure offences in intelligence and security legislation, where the facts constituting the alleged offence relate to the work of the person in a professional capacity as a journalist.¹² The CDPP issued an update to its National Legal Direction on 1 December to make reference to the Attorney-General's section 8 direction, and to include in the National Legal Direction the other disclosure offences identified in the Attorney-General's section 8 direction.

⁹ AGD considers that a fourth administrative safeguard exists in the form of this inquiry. AGD provided an unclassified background briefing paper to the INSLM in December 2014, setting out the policy rationale for, and key provisions of, the SIO scheme, focusing on the disclosure offences in section 35P. The briefing also addressed a number of stakeholder suggestions for the repeal of, or amendments to, section 35P. The matters noted above are addressed in more detail in the unclassified background briefing paper (as well as in AGD's extensive submissions to the PJCIS inquiry into the (then) Bill).

¹⁰ *Prosecution Policy of the Commonwealth*, updated 9 September 2014 at pp. 5-6, paragraphs [2.8]-[2.10].

¹¹ *Prosecution Policy of the Commonwealth*, updated 9 September 2014 at pp. 4-5, paragraphs [2.4]-[2.7].

¹² The offences covered by the direction are section 35P, the controlled operations disclosure offences in sections 15HK and 15HL of the Crimes Act, and a disclosure offence applying to delayed notification search warrants in section 3ZZHA of the Crimes Act.