

Supplementary submission:  
Certain Questioning and  
Detention Powers in relation  
to Terrorism

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**Independent National Security Legislation  
Monitor**

**5 September 2016**

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## Table of Contents

<b>Acknowledgment</b> .....	<b>2</b>
<b>Question on Notice</b> .....	<b>3</b>
<b>Law Council answer</b> .....	<b>3</b>
Review of section 34ZS welcomed .....	4
Constitutional validity .....	5
International law obligations .....	5
Secrecy offence relating to warrants and questioning .....	6
Persons who might be captured by the offence .....	7
Permitted disclosures .....	8
‘Indirect result’ .....	9
Express harm requirement .....	10
Strict liability .....	11
Defence of prior publication .....	13
Penalty .....	13
<b>Attachment A: Profile of the Law Council of Australia</b> .....	<b>14</b>

## Acknowledgment

The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission.

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## Question on Notice

1. The Law Council of Australia attended a hearing of the Independent National Security Legislation Monitor's (**INSLM**) inquiry into *Certain Questioning and Detention Powers in relation to Terrorism* on 19 August 2016.
2. In response to a question from the INSLM at the hearing, the Law Council has prepared this supplementary submission to further inform the INSLM's consideration of the Australian Security Intelligence Organisation's (**ASIO**) questioning and detention powers in relation to terrorism.
3. The Law Council understands that the INSLM asked questions along the following lines at the hearing:

*What implications does the Law Council of Australia believe section 34ZS of the ASIO Act raises for public discourse? In particular, what is meant by having information as an 'indirect result' of a warrant in subsection (1)(d) (e.g., would it prevent the press from publishing news and information), and do the strict liability provisions in subsection (3) effectively only apply to the subject and lawyer, or do they have broader implications?*

*How far the restrictions in section 34ZS go, and what types of criticisms there are, if any can be made of it?*

## Law Council answer

4. As per the Law Council's initial submission to the INSLM's current inquiry, the Law Council does not believe that the questioning and detention warrant scheme is a necessary and proportionate response to present threats to security. In this context, a secrecy provision relating to the scheme may not be appropriate.
5. However, the secrecy provision also relates to ASIO's questioning warrants. The Law Council acknowledges that the aim of section 34ZS is to protect information which, if disclosed without authority, could prejudice an intelligence investigation or result in harm to ASIO 'insiders'.<sup>1</sup> A tightly confined secrecy provision relating to the questioning warrant scheme may therefore be appropriate, provided that there are adequate safeguards for protecting the rights of outsiders and that it is a proportionate response. It is also critical to ensuring adequate accountability.
6. Section 34ZS may have the following impact on public discourse:
  - It creates uncertainty as to what may be disclosed about the activities of ASIO without fear of prosecution. This uncertainty may arise for the subject of the warrant, his/her legal representative or other third parties such as journalists, parents and guardians.
  - Subjects of a questioning warrant, their legal representative, journalists, parents, guardian or others (other than the subject of the warrant and his/her lawyer) are prohibited from disclosing or publishing while the warrant is in

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<sup>1</sup> 'Insiders' include ASIO employees, affiliates or associates, including contractors who have entered into an agreement or arrangement with ASIO. 'Outsiders' are third parties such as subjects of a warrant and journalists.

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effect or two years after the expiry of the warrant any operational information, broadly defined, regardless of whether it has any continuing operational significance and even if it discloses reprehensible conduct by ASIO insiders.

7. The breadth of section 34ZS may arguably be invalid to the extent that it infringes the constitutional protection of freedom of political communication. Criticisms of section 34ZS, reflected in this submission, include: the uncertainty of the information caught; the application to information which may have no continuing operational significance; the absence of an express harm requirement; and the application of the offences to previously disclosed information which might already be in the public domain. These criticisms may combine to suggest that section 34ZS may not be reasonably appropriate and adapted to serve a legitimate end – that is, that the offence is disproportionate.
8. For similar reasons, section 34ZS may also arguably be inconsistent with Australia's international obligations under Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*.
9. Constitutional validity and consistency with the ICCPR may be more assured if five issues are addressed:
  - Section 34ZS should be redrafted to clearly only apply to outsiders;
  - There should be an express harm requirement for a breach by an outsider;
  - If the term 'indirect result' is to be retained, it should be defined in the Explanatory Memorandum or the legislation;
  - The strict liability provisions should be removed from the offence; and
  - There should be a defence of prior publication for outsiders.

## **Review of section 34ZS welcomed**

10. The Law Council welcomes the INSLM's queries in relation to section 34ZS of the *Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act)*, particularly in light of the Australian Law Reform Commission's (**ALRC**) recommendation in its *Traditional Rights and Freedoms Report (2015)* that section 34ZS warranted further review by the INSLM or Parliamentary Joint Committee on Intelligence and Security as part of their ongoing role.<sup>2</sup> If the INSLM's current inquiry does not allow for a comprehensive assessment of section 34ZS, the Law Council recommends the provision be subject to further INSLM review.

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<sup>2</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 24.

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## Constitutional validity

11. Section 34ZS would likely be supported by the defence power in section 51(vi) of the Constitution.
12. Relevant factors in determining validity may include:<sup>3</sup>
  - whether the law effectively burdens freedom of communication about government or political matters in its terms, operation or effect – it is likely that the answer would be ‘yes’ as the purpose is to prevent disclosures about the operations of ASIO;
  - whether the purpose of section 34ZS and the means adopted to achieve that purpose are compatible with maintaining the constitutionally prescribed system of representative and responsible government – arguably the answer would be ‘yes’ given the purpose of section 34ZS is to protect national security and individual lives; and
  - whether section 34ZS is reasonably appropriate and adapted to serve that legitimate end (the proportionality test) – given the combination of the criticisms of the provision, it may be arguable that it is not proportionate.
13. Subsection 34ZS(13) seeks to uphold the implied freedom of political communication implied by the Australian Constitution.
14. However, the High Court is yet to determine the scope of section 34ZS and it is uncertain as to how the section may be read down.<sup>4</sup>
15. The Law Council is also not aware of any cases where a prosecution has been brought under section 34ZS. This means that in practice the precise scope of the provision is uncertain.
16. It is therefore critical that section 34ZS be improved to the extent possible to better ensure Constitutional validity.

## International law obligations

17. Article 19 of the ICCPR<sup>5</sup> provides for the right to freedom of opinion and expression.<sup>6</sup> It requires that section 34ZS is necessary to achieve a legitimate objective and

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<sup>3</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; and *McCloy v State of New South Wales* [2015] HCA 34.

<sup>4</sup> In *Monis v The Queen* (2013) 249 CLR 92 members of the High Court expressed different views as to the extent to which it is permissible to read down a provision to identify the purpose of the provision. This assessment underpins a determination of whether the provision may infringe the implied freedom of political communication.

<sup>5</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

<sup>6</sup> The article states: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals. Australia signed the ICCPR in 1972 and ratified in 1980.

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proportionate – that is, that it is appropriate and involves the least restrictive means needed to achieve its protective function.<sup>7</sup>

18. The assessment of whether section 34ZS is inconsistent with Article 19 is similar to that required for Constitutional validity. However, a conclusion that section 34ZS is inconsistent with article 19 of the ICCPR may be more likely than a conclusion that it infringes the implied freedom of political communication.<sup>8</sup> This may be because ‘necessity (and proportionality) is directly in issue, rather than being seen through the prism of the implied freedom of political communication’.<sup>9</sup> The criticisms of the provision when combined may suggest that section 34ZS is inconsistent with Article 19.

## Secrecy offence relating to warrants and questioning

19. Section 34ZS was initially introduced into the ASIO Act as section 34VAA by the *ASIO Legislation Amendment Act 2003* (Cth).
20. The then Attorney-General stated that the purpose of the provisions was to ‘protect the effectiveness of intelligence gathering operations in relation to terrorist offences’.<sup>10</sup> While the then Attorney-General acknowledged that the offences were demanding, he also noted that this is because the information ‘could result in the loss of life’.<sup>11</sup>
21. The Explanatory Memorandum to the ASIO Legislation Amendment Bill 2003 also noted that the offence was intended to:

*... deter the subject of a warrant from notifying persons who have terrorist links that they are being questioned. The disclosure of such information could result in a terrorist investigation being compromised. The clause also protects sensitive information, such as information relating to ASIO’s methods of operations, its sources, and intelligence holdings.*<sup>12</sup>

22. The *ASIO Legislation Amendment Act 2006* (Cth) repealed section 34VAA of the ASIO Act and replaced it with section 34ZS.
23. Section 34ZS prohibits disclosure of information:
- which indicates a fact relating to content of the relevant warrant or relating to the issuance of the warrant or the questioning or detention of a person in connection with the warrant; and/or
  - which is ‘operational information’ and which if the above first limb is inapplicable, the discloser must have as a direct or *indirect* result of the warrant.

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<sup>7</sup> Human Rights Committee, General Comment No 34, 102 sess, UN Doc CCPR/C/GC/34 (12 September 2011) para 34.

<sup>8</sup> Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015) 115.

<sup>9</sup> *Ibid.*

<sup>10</sup> Former Attorney-General, Hon Philip Ruddock MP, House of Representatives Hansard, 2 December 2003, 23483.

<sup>11</sup> *Ibid.*

<sup>12</sup> Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment Bill 2003, [22].

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24. 'Operational information' is defined broadly to mean:
- information that ASIO has or had;
  - a source of information (other than the person specified in the warrant) that ASIO has or had;
  - an operational capability, method or plan of ASIO.<sup>13</sup>
25. The disclosure offence applies where the disclosure is made while the warrant is in effect, and in the two years after the expiry of the warrant.<sup>14</sup>
26. The maximum penalty for the offence is 5 years imprisonment.<sup>15</sup>
27. Strict liability applies to disclosure of operational information by lawyers and the subject of the warrant.<sup>16</sup>
28. The breadth of the definition of 'operational information' and possible uncertainty about an 'operational capability, method or plan' could well have a chilling effect on the disclosure of permissible information. The provision in practice may prevent a subject and/or his/her lawyer from speaking to others such as the media even where a disclosure may be permitted.
29. This uncertainty may be ameliorated by the inclusion of an express harm requirement as a physical element of the offence (discussed below).

## Persons who might be captured by the offence

30. The difficulty with section 34ZS is that it does not distinguish between insiders and outsiders.<sup>17</sup>
31. In Report No 112, *Secrecy Laws and Open Government in Australia*, the ALRC recognised a distinction between secrecy offences directed specifically at insiders (who have special duties to maintain secrecy) and those capable of applying to all persons.<sup>18</sup> The importance of this distinction was highlighted in the INSLM's *Report on the impact on journalists of section 35P of the ASIO Act (INSLM's section 35P Report)*.<sup>19</sup>
32. While section 34ZS is principally intended to apply to the subject of a warrant or his/her legal representative, it potentially applies to any person who discloses information relating to questioning and questioning and detention warrants associated with countering terrorism.

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<sup>13</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s34ZS(5).

<sup>14</sup> *Ibid*, s34ZS(1) and s34ZS(2).

<sup>15</sup> *Ibid*, s34ZS(1).

<sup>16</sup> *Ibid*, s34ZS(3).

<sup>17</sup> 'Insiders' include ASIO employees, affiliates or associates, including contractors who have entered into an agreement or arrangement with ASIO. 'Outsiders' are third parties such as subjects of a warrant and journalists.

<sup>18</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2010).

<sup>19</sup> Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015) 18.

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33. That is, the offences may apply to ASIO outsiders: third parties such as the subject of the warrant, his/her legal representative and others such as journalists who make a subsequent disclosure.
34. The INSLM's section 35P Report includes a useful discussion of the meaning of 'disclose'. It notes that the proper construction of the word 'disclose' must await judicial determination as it is not clear whether it would be interpreted broadly to include wider dissemination such as 'communicate' or 'publish'.<sup>20</sup> The INSLM also noted that the narrower and ordinary meaning of 'disclose' is to reveal something that is known by the discloser and not previously known to the person to whom the disclosure is made.<sup>21</sup> However, to avoid prosecution, journalists and other third parties would be likely to assume that the wide official interpretation may be accepted. This is particularly so in the case of section 34ZS which includes a reference to a person obtaining operational information as an 'indirect result' of for example the warrant and the express prohibition in subsection 34ZS(11) as to disclosure of previously disclosed information.
35. On the face of the legislation section 34ZS can also apply to disclosures by ASIO insiders (ASIO employees, affiliates or associates – contractors who have entered into an agreement or arrangement with ASIO). In practice, however, prosecution of insiders may be more likely to occur under sections 18 or 92 of the ASIO Act which carry a more severe penalty of 10 years' imprisonment.
36. Nonetheless, the intended purpose of the legislation (as described above) was to effectively capture outsiders, such as the subject of the warrant. Section 34ZS should therefore be redrafted to clearly only apply to outsiders.

**Recommendation:**

- **Section 34ZS should be redrafted to clearly only apply to outsiders.**

## Permitted disclosures

37. A 'permitted disclosure' is an exception to the secrecy obligations and is defined in subsection 34ZS(5) and broadly includes disclosures:
- to a parent, guardian or sibling;
  - with the consent of the prescribed authority, the Director-General of Security, or the Attorney-General;
  - made to a relevant complaints agency such as the Inspector-General of Intelligence and Security or the Ombudsman; and
  - a disclosure to a lawyer for the purposes of obtaining legal advice in connection with a warrant or to seek a remedy in legal proceedings in relation to the warrant or treatment of a person in connection with the warrant.

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<sup>20</sup> Ibid, 11.

<sup>21</sup> Ibid, 10-11, citing *Nasr v New South Wales* (2007) 70 A Crim R 78 at 106 and the various other cases cited there; see further *Ashby v Commonwealth* (2012) 203 FCR 440 at [30] and 31.

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38. In permitting certain disclosures, the prescribed authority, the Director-General of Security, or the Attorney-General are required to take the following factors into account:
- the subject's family and employment interests to the extent that the decision-makers are aware of these interests;
  - the public interest; and
  - the risk to security if the permission were given.<sup>22</sup>
39. Other factors may also be taken into account in deciding whether to permit a particular disclosure of information.<sup>23</sup>
40. Section 34ZS does not appear to require 'the risk to security if the permission were given to be the paramount consideration.'<sup>24</sup>
41. However, the ability of a prescribed authority to take into account the public interest in authorising a disclosure may in practice be limited. A prescribed authority may be reluctant for example to call into question ASIO's assessment of what constitutes a risk to security. For example, in *Church of Scientology v Woodward*<sup>25</sup> the High Court did not accept an attempt by the Church of Scientology to challenge ASIO's assessment that the Church presented a possible threat to security.

### **'Indirect result'**

42. Operational information may not be disclosed if a person has that information as a direct or 'indirect result' of the issue of the warrant, or the doing of anything authorised by the warrant or other provisions under Division 3 of Part III of the Act.
43. The rule of law requires that the law be both readily known and available, and certain and clear.<sup>26</sup> The scope of the term 'indirect result', however, is not defined in the legislation or Explanatory Memorandum. It does not appear to have been judicially considered.
44. The Explanatory Memorandum to the ASIO Legislation Amendment Bill 2003 noted that:
- Operational information may not be disclosed if a person has that information as a direct or indirect result of the issue of the warrant, or the doing of anything authorised by the warrant or other provisions under Division 3 of Part III of the Act.*<sup>27</sup>
45. However, the Explanatory Memorandum also includes a confusing reference to an 'indirect disclosure' as well as an 'indirect result' despite the legislation referring only to the latter.<sup>28</sup>

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<sup>22</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s34ZS(9).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Church of Scientology v Woodward* [1982] 154 CLR 25.

<sup>26</sup> Law Council of Australia, *Policy Statement – Rule of Law Principles* (2011).

<sup>27</sup> Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment Bill 2003, 21, 24.

<sup>28</sup> *Ibid.*, 19-21.

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46. The Explanatory Memorandum to the ASIO Legislation Amendment Bill 2006 did not elaborate further on what is meant by 'indirect result'.
47. The term would therefore be interpreted according to its ordinary meaning.<sup>29</sup> The *Macquarie Dictionary* defines 'indirect' as 'coming or resulting otherwise than directly or immediately, as effects, consequences'.<sup>30</sup> The ordinary meaning of 'result' is 'the outcome, consequence, or effect'.<sup>31</sup>
48. The effect of the term 'indirect result' would appear to have the following impact. Journalists, parents, guardian or others (other than the subject of the warrant and his/her lawyer) are prohibited from disclosing or publishing while the warrant is in effect or two years after the expiry of the warrant any operational information, broadly defined, regardless of whether it has any continuing operational significance and even if it discloses reprehensible conduct by ASIO insiders.
49. As noted above, there is the ability for the prescribed authority, Director-General of Security or the Attorney-General to authorise disclosure prior to the expiry of this period. In the case of journalists, however, this would be unlikely unless prior permission was granted to the subject or his/her lawyer to make a disclosure to a journalist.
50. The Law Council therefore recommends that the term 'indirect result' be defined in the legislation or Explanatory Memorandum.

**Recommendation:**

- **The term 'indirect result' be defined in the legislation or Explanatory Memorandum.**

## **Express harm requirement**

51. The Law Council considers that a number of the INSLM's recommendations relating to section 35P of the ASIO Act are equally pertinent to a consideration of section 34ZS.
52. In Report No 112, *Secrecy Laws and Open Government in Australia*, the ALRC accepted that 'specific secrecy offences prohibiting the disclosure of information obtained or generated by intelligence agencies – without the need to prove harm in every case – are justified by the sensitive nature of the information and the special duties and responsibilities of officers and others who work in and with such agencies'.<sup>32</sup> Generally, the ALRC recommended that secrecy offences capable of applying to persons other than insiders have an express harm requirement.
53. Consistent with the position taken by the ALRC and the INSLM's section 35P Report,<sup>33</sup> section 34ZS should include an additional physical element that the disclosure of information will endanger the health or safety of any person or prejudice

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<sup>29</sup> *Acts Interpretation Act 1901* (Cth), s15AB(1).

<sup>30</sup> Macquarie Dictionary, (2015) <<https://www.macquariedictionary.com.au/>>

<sup>31</sup> Ibid.

<sup>32</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2010) 140.

<sup>33</sup> Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015) 24.

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the effective conduct of an ASIO operation. Recklessness would be the default fault element in relation to this physical element.

**Recommendation:**

- **There should be an express harm requirement for a breach by an outsider.**

## Strict liability

54. Subsection 34ZS(3) applies strict liability to the physical elements of subparagraphs 34ZS(1)(c) and (2)(c) so that there is no need to prove fault in relation to those circumstances for disclosures made by:

- the subject of a warrant; or
- a lawyer who has at any time been:
  - present, as the subject's legal adviser, at the questioning of the subject under the warrant; or
  - contacted for the purpose of the subject obtaining legal advice in connection with the warrant; or
  - contacted for the purpose of the subject obtaining legal representation in legal proceedings seeking a remedy relating to the warrant or the treatment of the subject in connection with the warrant.

55. This means that as long as the subject or lawyer intends to disclose information<sup>34</sup> it does not matter if they knew or were reckless as to the fact that the information was operational information. For the other physical elements of the offence which are a circumstance the fault element of recklessness applies.<sup>35</sup>

56. The defence of honest and reasonable mistake is available for strict liability offences.<sup>36</sup> This defence is available where a person who considers whether or not certain facts existed at or before the time of the disclosure, and was under a mistaken but reasonable belief about those facts, and had those facts existed, the conduct would not have constituted an offence.

57. The Explanatory Memorandum to the ASIO Legislation Amendment Bill 2003 notes that section 34ZS (then 34VAA) applies strict liability so that there is no need to prove fault in relation to those circumstances for disclosures made by:

- (a) the subject of a warrant; or
- (b) a lawyer who is contacted by the subject for the purposes of questioning or other proceedings in connection with a warrant.<sup>37</sup>

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<sup>34</sup> Paragraphs 34ZS(1)(b) and (2)(b) relate to conduct and hence the fault element of intention applies. See section 5.2 of the *Criminal Code Act 1995* (Cth).

<sup>35</sup> *Criminal Code Act 1995* (Cth), s5.4.

<sup>36</sup> *Criminal Code Act 1995* (Cth) ss 6.1, 6.2. See also *Proudman v Dayman* (1941) 67 CLR 536.

<sup>37</sup> Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment Bill 2003, 26.

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58. Generally, strict liability may be imposed where a person is placed on notice to guard against the possibility of inadvertent contravention.<sup>38</sup>
59. However, the application of strict liability in the case of section 34ZS does not appear justified for several reasons. These reasons are based on principles developed by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) (2002)<sup>39</sup> and include:
- There is no evidence that it would be difficult to prosecute fault provisions – as is evidenced by the fact that recklessness applies as the fault element for persons who are not the subject of the warrant or their legal representative;
  - Strict liability should not be imposed where schemes are so complex and detailed that breaches are virtually guaranteed, or where parties must, by necessity, rely on information from third parties. In the case of the exercise of questioning and questioning and detention warrants, a subject and his/her legal representative are largely in practice bound to rely on information and the views of ASIO in determining what may amount to operational information. This has the potential to create a ‘chilling effect’ whereby such individuals fear an inadvertent breach even where a disclosure may be permitted.
  - Strict liability should not be imposed where it is accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning. When the strict liability offences in section 34ZS were first introduced, many organisations, including the Law Council, noted that the ASIO questioning and detention warrant powers were an unjustified response to countering terrorism. The former INSLM and the Law Council have consistently called for repeal of the regime. In this context, strict liability provisions are not appropriate.
  - Strict liability should only apply for offences where the penalty does not include imprisonment, and where there is a cap of 60 penalty units for monetary penalties. The penalty for a contravention of section 34ZS substantially exceeds this principle by the imposition of a 5 year term of imprisonment.
  - Strict liability should be accompanied by program-specific defences which account for reasonable contraventions. These should be in addition to the defences in the Criminal Code.<sup>40</sup> Specific defences do not apply to section 34ZS.
60. For these reasons, the Law Council recommends the removal of the strict liability provisions in section 34ZS.

**Recommendation:**

- **The strict liability provisions should be removed from section 34ZS of the ASIO Act.**

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<sup>38</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 291.

<sup>39</sup> Senate Standing Committee for the Scrutiny Of Bills, Parliament of Australia, *Alert Digest*, No 6 of 2002, 26 June 2002.

<sup>40</sup> *Criminal Code Act 1995* (Cth), pt 2.3.

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## Defence of prior publication

61. Consistent with the INSLM's reasoning and recommendation regarding section 35P of the ASIO Act.<sup>41</sup>

- There should be a defence of prior publication (not available to a member or ex-member of the intelligence and security services in respect of information available to him or her in that capacity), which would require the defendant to satisfy the court:
  - that the information in question had previously been published;
  - that, having regard to the nature and extent of that prior publication and the place where it occurred, the defendant had reasonable grounds to believe that the second publication was not damaging; and
  - the defendant was not in any way directly or indirectly involved in the prior publication.

**Recommendation:**

- **There should be a defence of prior publication for outsiders in section 34ZS of the ASIO Act.**

## Penalty

62. The former INSLM recommended that the length of imprisonment for offences against secrecy obligations in relation to questioning warrants should be reduced to 2 years.<sup>42</sup> This assessment was made on the basis of the absence of a harm element and the application of the fault elements of strict liability and recklessness. It was also made on the basis of parity with similar offences.<sup>43</sup>

63. If the Law Council's recommendations above are accepted regarding the inclusion of a harm element and the removal of strict liability, a 5 year term of imprisonment may not be inappropriate. This would be consistent with the basic offence penalty recommended by the INSLM regarding section 35P of the ASIO Act.

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<sup>41</sup> Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015).

<sup>42</sup> Independent National Security Legislation Monitor, *Annual Report*, (2012) Recommendation IV/5, 83.

<sup>43</sup> *Ibid.*

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.