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TRANSCRIPT OF PROCEEDINGS

**INDEPENDENT NATIONAL SECURITY LEGISLATION
MONITOR**

**AUSTRALIAN NATIONAL UNIVERSITY
ACTON, AUSTRALIAN CAPITAL TERRITORY**

**THE HON ROGER GYLES, AO, QC
Acting Independent National Security Legislation Monitor, Presiding**

PUBLIC HEARINGS

10.07 AM TUESDAY, 28 APRIL 2015

5 MR GYLES: As I have indicated, we have opened the first session today
of the inquiry into section 35P. This session is set aside for the public
policy, academic and research sector. The first person appearing is
Mr Paul Kniest, Policy and Research Coordinator of the National Tertiary
Education Union. As I have indicated, this is an opportunity for you to
10 explain or highlight, your submission, to comment upon any other
submissions and for us generally to understand what your point is, or
points are.

15 MR KNIEST: Thank you for the opportunity to appear. I work for the
National Tertiary Education Union, which represents the professional and
industrial interests of about 28,000 staff working in Australian universities
and research organisations.

20 Our concern about section 35P and a number of other changes to the
national security legislation over the last number of years is that it has the
chilling effect, or has the capacity to have a chilling effect, on academic
freedom, or freedom of intellectual inquiry. Freedom of intellectual
inquiry is fundamental to defining what a university is and, in fact,
universities that are in receipt of government funding under
25 section 19-115 of the Higher Education Support Act 2003, for example,
“must have a policy that upholds free intellectual inquiry in relation to
learning, teaching and research”. In other words, there’s a legislative
requirement for universities to actually have policies to uphold free
intellectual inquiry.

30 Therefore, we are concerned about the extent to which section 35P and
other recent changes to the national security and counter-terrorism
legislation have on university staff rights, or, some people might actually
say, obligations, to actually exercise their learning, their teaching and their
research, exercising academic freedom or freedom of intellectual inquiry.

35 Our submission actually relates to a response that we got from a letter we
wrote to the Attorney-General in January this year, where - what we were
suggesting - again, I guess, I make the point that we’re opposed to
section 35P, so our preferred position would be that - - -

40 MR GYLES: No 35P.

45 MR KNIEST: Yes, no 35P, but, given that 35P exists, we just thought
that one thing that you might do or the advice that you might give the
Attorney-General, and the Attorney-General hasn’t ruled this out, or at

least the letter that we got in response to our inquiry - was that he could extend his direction under section 8 of the Public Prosecutions Act that currently applies to journalists, i.e. that the Attorney-General needs to give permission before any prosecution takes place - that be extended to academics because academics are exercising the same sorts of responsibilities to keep the government accountable, et cetera, et cetera. Again, we urge you, if that's part of your responsibility, reviewing section 35P, to consider to make that sort of recommendation.

MR GYLES: Sorry, I should just interrupt and make one point. As you'll understand, the reference I've had from the Prime Minister relates to journalists. However, it seems to me that the position you're putting is very helpful in exploring the proper limits of the section, and I don't propose to take a narrow view of what I should look at.

MR KNIEST: We appreciate that. The other things that came up in the letter that we got back from the Attorney-General's office - and, again, it might be useful, I think, if there's some greater clarity around this issue. We were advised in that letter, in that response, that academic writing and research satisfies the conditions of what would not be unjustifiable under section 35P of the ASIO Act, and that, therefore, it could be used as credible evidence against any sort of prosecution.

I just went back and read that response again but it seems to me that it's not the act of, actually, academic research and writing that would not make that unjustifiable but it's in fact acts that people would require to mitigate against that being - including contacting ASIO to find out whether it was a special investigation, intelligence operation, whether they sought legal advice, et cetera, et cetera. Again, we'd like to get a little bit more clarity about how to interpret that particular sort of - - -

MR GYLES: You'll understand, that was a response to a letter, which doesn't bind anybody really.

MR KNIEST: No. I understand that. Again, we're just sort of saying - - -

MR GYLES: I can understand that you may wonder what effect that might or might not have on your - - -

MR KNIEST: On our members, yes.

MR GYLES: Yes. Quite.

MR KNIEST: In a sense - it's just something we'd like further

consideration of.

MR GYLES: Yes.

5 MR KNIEST: A number of other recommendations were made in our
submission to you: (1) the extension of the direction made under section 8
of the Director of Public Prosecutions Act to academics; (2) some greater
clarity on what is not unjustifiable and what is credible evidence against
10 prosecution under section 35P. We've also recommended that you expand
the scope of the National Legal Direction made by the Commonwealth
Director of Public Prosecutions in December 2014 to include practices and
activities consistent with the exercise of academic freedom.

MR GYLES: Yes.

15 MR KNIEST: That you modify the Prosecution Policy of the
Commonwealth to include public interest considerations for individuals
acting in a manner consistent with their professional duties and
responsibilities. Lastly what we recommended in our submission to you is
20 inserting a public interest defence for journalists and academics against
unauthorised disclosures under section 35P.

That's the general tenor of where we're coming from.

25 MR GYLES: Yes. Some of these matters deal with legislation, some deal
with actions under legislation, but I think that sort of thing has been
canvassed by all the submissions, including those from the relevant
authorities, so I will be certainly taking a look at that sort of issue.

30 The academic writing and research aspect, I think, is a matter, as I would
understand it, for, ultimately, the DPP rather than the legislation itself
because - I just want to clarify one thing with you as to how you see the
legislation affecting your members. Section 35P prohibits disclosing
information. There may be a legal argument as to what that means: does
35 it mean disclosing for the first time? There may be two views about that
but it does carry the - it doesn't say "publish" or "republish"; it says
"disclose", and there's a difference. Under what circumstances would it
be likely that a researcher or academic would disclose information, let us
say, for the first time?

40 MR KNIEST: It could well be that a whistleblower contacts them, for
example, so they may actually go to a journalist for that sort of purpose
but they also may go to an academic.

45 MR GYLES: They may go to an academic who's known in that field,

perhaps.

MR KNIEST: Yes, who has a reputation; there are public commentators and - - -

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MR GYLES: Is that part of their academic work?

MR KNIEST: Under academic freedom, we would argue that it is. It's part of their responsibility to investigate. Academic freedom, in a sense, doesn't constrain what they can do in that regard. I'm assuming what the letter, the response we got from the Attorney-General, says is that, if someone came to you with information, it would be your responsibility to undertake a number of steps to mitigate against the possibility of being prosecuted under section 35P. We just think that that has a chilling effect on academic freedom.

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Section 35P is an example of the broader sort of policy changes over the last decade or so, including the anti-sedition laws from a number of years back. We're concerned about the sort of chilling effect it has on particularly people teaching and researching in areas around counter-terrorism, et cetera, terrorism but even just legal academics who are teaching - if you're trying to teach about national security legislation. Again, your point about what does disclosure mean, if it was disclosed by somebody else, the operation - if that wasn't in a court of law - if it was in a court of law, as I understand it, you're covered, you can't be prosecuted but if it was in a newspaper article or a blog or something - - -

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MR GYLES: Or a coffee shop.

MR KNIEST: Yes, whatever. Are you then protected? Your point about whether disclosure is just for the first time or is it every time you disclose; it's not clear to use how that legislation would be interpreted. Even though the Attorney-General said that - I think it was the Attorney-General who said that he didn't think you would be prosecuted if it was already in the public domain, but it's not clear to us, on a reading of the legislation, that that would necessarily be the case, so, again, some greater clarity around that - and I think you've already alluded to the point that you would do that.

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The other point about just the chilling effect - and I think that what happens is you get a lot of sort of self-censorship amongst academics; they won't pursue certain areas because it becomes problematic or they could get caught up in legal wrangles, you know, universities will go through certain legal processes and legal clearances to occur before they can actually publish, which just has that chilling effect on people's

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capacity to undertake research in areas that may be of interest to them and what they think is in the public interest.

5 MR GYLES: Yes. The concern you're expressing relates to an academic who publishes material which may, or does, relate to, perhaps unwittingly, a special operation. Do I gather from what you've said that you don't see the course of asking ASIO what the story is to be an appropriate one?

10 MR KNIEST: Firstly, to what extent would an academic be aware of the fact that they need to do that? Again, someone has come to me with this - they think that something illegal or improper has happened and they want someone to explore that - depending on what the area of expertise of the person is, it may or may not be that they're aware of the operation of section 35P. They may in fact think that - - -

15 MR GYLES: Assume they are for the moment.

20 MR KNIEST: Okay, but they still may think that they're protected by academic freedom anyway, so, in a sense, they can sort of pursue this without danger of prosecution. In a sense, our original response was that, when the Attorney-General - we sort of - even though we disagree with section 35P more broadly, the fact that the Attorney-General was prepared to make the concession that journalists have a particular role in our society as the fourth estate, as the public accountability - academics, in their exercise of academic freedom, do a very similar sort of role and that sort of, at least at a minimum, if section 35P is going to proceed - that that sort of - the use of section 8 of the Director of Public Prosecutions Act, i.e. you need to get a tick-off, or however you would best describe it, from the Attorney-General before you proceed with the prosecution - or at least be

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30 the minimum extra layer of protection, so that the - - -

MR GYLES: Yes, plus the National Legal Direction of the CDPP.

35 MR KNIEST: Yes.

MR GYLES: One thing that occurs to me, forget for a moment ASIO and forget 35P, thinking about the concern that you have, each time an academic receives information from a whistleblower or an insider, shall we say, is there not the risk that that insider will be breaching secrecy provisions of one sort or another - - -

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MR KNIEST: They may well be.

45 MR GYLES: - - - where there's no out for disclosing matters to a journalist or an academic? In other words, what is different about ASIO

from general public service secrecy requirements or defence department, et cetera? It's "Publish at your own risk" in those circumstances, I would have thought.

5 MR KNIEST: I'm not sure - - -

MR GYLES: I'm just trying to explore in my own mind what - - -

MR KNIEST: Yes.

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MR GYLES: I heard a lot from the press yesterday and obviously I'm thinking about the situation more generally.

15 MR KNIEST: I guess one of the issues for the press is protection of their sources; I presume that's an issue.

MR GYLES: Yes.

20 MR KNIEST: Whether the same sort of thing extends to academics in terms of - again it's problematic. In a sense, what we're saying is that academics performing the duties and responsibilities that they have are actually obliged to pursue these sorts of issues. That's sort of part of their function, so therefore they would differ from a public servant, for example, who is bound by other sorts of laws and secrecy, et cetera, et cetera, whereas academics are actually - the legislation says the university should have policies to actually encourage free academic inquiry. The question, I guess, is "What's the limit?"

30 Clearly there have to be limits. Anything that sort of endangers national security, clearly, is problematic and I think people have to exercise their making inquiries judgment in relation to that. Our concerns would be, where there's something - a special intelligence operation that has occurred that is outside the bounds of legality or whatever - someone sort of comes to an academic to try and pursue that to get this on the public record - we would then think that they actually have an obligation to pursue it. It doesn't have to be, from our point of view, an academic - that wouldn't be restricted to publishing a refereed journal article, for example, because - academics also have an obligation to comment on public policy, et cetera, et cetera, so it wouldn't be limited to that, we don't think, but if

40 they're sort of - if they're acting within that sort of - their responsibilities and duties, we just think that there should be some sort of consideration in the law given to that, so people, you know - - -

45 MR GYLES: There may be a question as to how far those duties extend but - - -

MR KNIEST: Indeed.

5 MR GYLES: - - - that's a matter for consideration. All right. I think I follow your general points fairly clearly. Is there anything else you want to add at this point?

10 MR KNIEST: No, not at this point. Again I apologise, I haven't read any of the other submissions, so I can't comment on anyone else's.

15 MR GYLES: That's all right. I've got to do it. What we're now going to do is - you're free to stay, of course. We will be hearing from the witnesses from the Gilbert + Tobin Centre at the University of New South Wales. That's going to be done by teleconference, publicly. Then, later on in the morning, the various Commonwealth agencies will appear, and that will take place around about 12 o'clock. We'll just briefly adjourn, so that we can set up a conference situation.

20 MR KNIEST: Again, thank you for the opportunity.

MR GYLES: Thank you for coming.

25 **ADJOURNED** **[10.27 am]**

RESUMED **[10.41 am]**

30 MR GYLES: Good morning. We're in the session dealing with the hearings aspect of the inquiry I'm conducting. The session has been set aside for the public policy, academic and research sector. I believe that we have Professor George Williams. Is Dr Keiran Hardy also with you, or not?

35 DR HARDY: Yes, I'm here.

40 MR GYLES: Good. Thank you. From the Gilbert + Tobin Centre of Public Law. This is an opportunity for you to draw to my attention any aspects of your submission that you would particularly like me to take on board. I've read it but I've also read 30 others, so I can't pretend to have absorbed every detail of it. Also, it's the opportunity, if you wish to, to comment upon submissions of other parties that you've had access to. If you'd like to lead off, that would be good.

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PROFESSOR WILLIAMS: Thank you, Mr Gyles. It's George Williams here. We do appreciate the opportunity to provide evidence to your process and, also, thank you for receiving it via teleconference; unfortunately, we couldn't get to Canberra today due to teaching
5 commitments. We also recognise, having looked at some of the other submissions, that many of the issues in your inquiry have been dealt with fulsomely by a range of submissions. We won't endeavour to repeat that information.

10 Obviously you can discern from our submission that we do have some very specific concerns about this provision. Our view is that it does need amendment and ought not to remain on the statute book in its current form. Those concerns relate particularly to questions of overbreadth but
15 also what we see as an excessive penalty attached to the regime. We note that this is not a regime or a penalty that is found in other like jurisdictions, notably, the United Kingdom, the United States or Canada, though Canada is debating some of these measures at the moment.

We would also say that, quite apart from the specific concerns with the
20 drafting of the provision noted in our submission, Australia is unlike those other countries, in that it does not provide external checks upon a provision of this kind. There is no free speech guarantee in our constitution that is likely to assist, the implied freedom of political
25 communication not being well directed to prevent some of the overbreadth of this position. We also don't have strong protections within whistleblower laws that might provide a check against the problems of this provision. We have also noted in our submission that the combination
30 of this provision with the new metadata legislation opens up a range of possibilities with journalists' sources and otherwise that are also of concern.

We submit in our submission that the amendments that you might want to consider are:

35 Firstly, relating to introducing a public interest defence. We don't support that being limited to media or journalists; we think it ought to apply generally. If nothing else, it's not only the journalists that need protection from disclosure but whistleblowers, for example, who make that
40 information available to journalists. In the new environment, the journalist profession itself is an evolving one and we think it should be more broadly framed.

Secondly, we think that a level of intent should be involved in the primary
45 offence, that merely doing this without intent should not give rise to the severe penalties involved.

5 Thirdly, we say that the penalty of five or, potentially, 10 years is excessive when looked at comparable statutes, particularly that involved for police. A two-year penalty is applicable there and we think that two years would also be appropriate here, as part of a modified offence.

10 MR GYLES: Just a couple of points, if I may. I haven't studied, myself, the overseas situation and I note what you say but I'm wondering - I'm informed that there may be some legislation in the UK which - perhaps going back a step, there are two aspects of this. First of all, the substantive provisions of Division 4 of Part III of the ASIO Act authorise the specialist intelligence operation; that's the key provision, or the key provisions - 35P flows from that, if you like. I am anxious to understand how that regime operates overseas, in comparable countries, both as to the substantive authorisation, if you like, plus any equivalent of 35P, if you're following me.

20 PROFESSOR WILLIAMS: I am. Firstly, on the substantive regime, the short answer is that there is no regime like it in place in the United States, the United Kingdom or Canada, and I think the submission of Clive Walker is instructive in that it demonstrates that a regime of this kind would simply be thought to be inappropriate in those jurisdictions, given how they perceive the proper role of intelligence agencies. I was also recently in Washington, discussing these and other matters, including with representatives of their intelligence agencies, and, again, it's just not thought to be a regime that should apply outside of law enforcement agencies, and the covert nature of intelligence agencies make it thought to be inappropriate to even apply such a regime. As I've indicated, this is a live debate, though, and Canada, for example, may well follow the Australian path but at the moment there's no comparable regime in like countries that we can refer you to.

35 What we can say is, as a result, of course, there is no equivalent for section 35P but, where they do provide for limits on disclosure in other contexts, they do not provide a provision of this kind. Again, Clive Walker's submission is useful. Typically, provisions of this kind differ in that they would contain a more nuanced, limited form of offence, containing an intent requirement, potentially to do damage, they would also pay far greater respect to free speech limits and, of course, they must do so because in each of those countries there is some form of human rights protection, a human rights Act or Bill of Rights. Indeed, I don't think there's much doubt that the Australian provision could be struck down, for example, in the United States, because of non-compliance with free speech guarantees. So, they've got a different context, where they don't have the regimes in the first place, and what limits they do have are

drafted far more carefully with respect to those free speech and human rights considerations.

5 MR GYLES: I've been informed that there is a UK Regulation of Investigatory Powers Act 2000. I don't know anything about it myself. Is that something that you're familiar with?

10 PROFESSOR WILLIAMS: No, we're not. Both of us are aware of that Act but I must admit, here, we're relying particularly upon Clive Walker's submission. Perhaps what we can say is Keiran might be able to have a look at that and we can do some research and get back to you on what we can find as to whether it is an appropriate comparison to what you're inquiring.

15 MR GYLES: The other point that I should mention is that I have been told that in the US there are Attorney-General's Guidelines to the FBI on Covert Human Sources. Of course that's not legislative but that deals with, I think, the basic regulation of the activities of the agency.

20 It strikes me that it is possible that the overall effect of Division 4 of Part III of the ASIO Act is to place limits upon the investigation powers of ASIO, compared with those places where it's unregulated, or unregulated by statute.

25 PROFESSOR WILLIAMS: I think you make a very good point and I think that's why, in particular, particularly some of the American agencies were wondering why Australia would want such a regime in the first place, because, as you say these things tend to be regulated by far more informal processes and procedures and we haven't gone down that path.
30 Equally, I think, there's a clear recognition in the US and the UK that it's simply not appropriate to give intelligence agencies this immunity from prosecution in this broad way. It's one thing to have informal arrangements, it's another to have a legislative scheme of this kind, particularly when it's twinned with such severe criminal sanctions for
35 people who might end up reporting on those matters. Of course, in the American context, those informal matters simply don't give rise to these sort of potential gaol terms for journalists.

40 MR GYLES: Yes. As to the whistleblowing aspect, as you recognise, of course, there is provision for disclosure, including to the IGIS. What's wrong with that; why isn't that the equivalent of complaints to the Ombudsman or other means of bringing to the attention of somebody other than the organisation itself breaches of the law, or of administrative
45 overreach?

DR HARDY: We do recognise that, in the Public Interest Disclosure Act, the ability to disclose information to the IGIS or a lawyer is useful protection, good protection. I guess we would say that there might be a situation where that disclosure process still doesn't shed light on some kind of major abuse by the intelligence agencies and it might be because IGIS is still required to keep the information classified. I guess there might be a situation where there should be greater scope for intelligence officers to reveal information: it might not be irresponsibly, to the general public; it might be to, maybe, a respected journalist or media organisation, it might be another member of Parliament or even a Judge. Perhaps a greater ability to do that in some limited sense in that scheme could provide a useful counterweight to the 35P provision.

PROFESSOR WILLIAMS: If I can add, even recognising the value of that avenue, we would simply say that there are circumstances where mere disclosure to another arm of the executive is not sufficient and that the public interest occasionally is in broader community scrutiny of these matters. Australia, like other nations, has very clear examples of where agencies have engaged in matters that do deserve to be debated publicly and do deserve to be subject to the sunlight that comes from public disclosure and, if you forever remove that as a possibility, that's a very serious concern because it means that you're not likely to get a policy and other developments that will follow from a public debate, as opposed to revealing these matters purely to IGIS.

MR GYLES: I have just a couple of comments there. IGIS - I don't think it's quite adequate to describe it as a member of the executive. IGIS is a statutory function. I suppose it's not legislative and it's not judicial but I'm not sure that it's properly described as executive. It's certainly not part of the executive that ASIO is. However, I understand the other point you make.

The public interest defence, how do you suggest that would be framed?

DR HARDY: It could take a number of forms. I guess the most general would be just to say "information disclosed in the public interest" and it would be up to a court to decide what that might mean. I think the previous test in *Commonwealth v Fairfax* has suggested there wouldn't be much scope for journalists or other people to reveal information if this offence was framed in that way, and that's down to even - under a public-interest defence, it would be unlikely, I think, for a court to say that any currently operational information was in the public interest. Some other ways you might do that might be to define "the public interest" in a similar way to how it's defined in the Public Interest Disclosure Act; that references things like the extent to which the disclosure promotes the

integrity and accountability of the public service weighed against defence and security considerations and the like, including the seriousness of the conduct as well.

5 An even narrower version of that might be to say that a public interest
defence might be framed narrowly according to serious crimes and
misconduct, so you might say there's a defence available where a
journalist or other person, any person, revealed information that discloses
10 unlawful behaviour outside the terms of the operation or other serious
misconduct, serious corruption, wrongdoing or some specified serious
misconduct along those lines.

MR GYLES: Yes. Getting back to 35P as it stands, with the recklessness
standard of proof, is it practical to have a system whereby ASIO can be
15 asked, with an obligation to answer, whether or not the information would
relate to an SIO?

PROFESSOR WILLIAMS: My view is that would not be practical, for
the reason that the breadth of the provision is such that it's a very difficult
20 judgment to know whether a particular media story or disclosure relates to
a special intelligence operation. Of course, the story may be somewhat
ancillary to that operation but nonetheless have a relationship to it that
may mean it falls within the scope of the provision. It also means that you
really need the ASIO or other agency to have full access to the story;
25 you'd almost need it to be proofed by them, legally proofed, as lawyers
commonly do within newspapers, because it may even be that a single line
or a single piece of fact may be the particular problem. So, I can't see that
that is likely to be effective.

30 Of course, the problem also with the recklessness standard is that a person
may not even be fully aware they should make such an inquiry in the first
place and they may be acting recklessly in that regard, so they may be
caught in circumstances where an inquiry just didn't seem a reasonable
thing to them, personally, to undertake.

35 MR GYLES: Yes. Are there any comments that you have to make about
other submissions, either positive or negative?

PROFESSOR WILLIAMS: One of the things that I would like to add
40 about a point that's come up in a number of submissions is with regard to
what checks might exist by virtue of the discretion in the Attorney and the
prosecutors as to whether to proceed with a prosecution under this
offence. Again, that's welcome in the sense of providing some sort of
check but we don't see it as effective and, indeed, if there is a need for a
45 check it should, we think, be very plainly written into the text of the

statute. That's because it's a basic law concern, if nothing else. Whether or not someone breaches the criminal law should not be subject to executive discretion; it should be subject to the terms of the statute as interpreted by a Court. There's a very real risk that there will be a chilling effect because, even though a journalist might hope that an official might not prosecute, there's no certainty about that, it's not something itself - wouldn't be subject to legal proceedings and be subject to a discretion that may never be exercised. We see it as a very frail shield indeed and, indeed, an inappropriate development when you're dealing with an offence that could involve 10 years in gaol. If we do follow the logic of that concession, if you like, surely it means that an appropriate protection should be built into the statute so that, upfront, there's a greater degree of certainty and understanding from participants as to how the law ought to be applied and how far it extends in this area.

MR GYLES: Thank you. There's just one legal issue that I'd raise with you. It's been referred to, I think, in some of the submissions, including some comments by the Attorney-General. If you take 35P, the text of it, "A person commits an offence if ... the person discloses information," that is not a description which would neatly describe publication in the media. I'm wondering if you have any thought about that.

PROFESSOR WILLIAMS: We have seen some of those comments, for example, that it might only apply to the initial disclosure of information by an intelligence officer to the media.

MR GYLES: There's certainly authority, which I had occasion to look at in quite another field, in the taxation field, actually, where it was held that "disclose" means "disclose", as it were, "for the first time". It's arguable to say that might apply here because maybe you're disclosing to a different class of person but it's a very strange way of dealing with what's ancillary. I mean, your basic offence, surely, is the person who discloses it for the first time. It's an odd way of picking up subsequent republications.

PROFESSOR WILLIAMS: It is an odd way but it seems inescapable to us that it would, in many circumstances, capture those subsequent publications. If an intelligence officer reveals information only to a journalist, the journalist then reveals it to the world at large, then surely there has been a disclosure to all of those people, who weren't privy to the initial disclosure and, if nothing else, if it didn't cover the subsequent media disclosure, the intent of the provision would be frustrated in seeking to prevent this information becoming public in this way. I certainly recognise what you say about that other context, and there's no shortage of legal maxims that might be used, such as legality, to restrict

the operation of the section but, here, the intent is very clear and (indistinct).

5 MR GYLES: Why is it very clear? It's not clear to me, reading the section. It may be clear to me, reading some of the commentaries on it.

10 PROFESSOR WILLIAMS: I think, looking, for example, at some of the context of the SIO regime, the context being that this is a covert, secretive regime that, in all circumstances, ought not to be subject to public disclosure, it would be inconsistent with the nature of that regime to criminalise a disclosure from one person to another but not the world at large, by the media. I think that's also reinforced by the Second Reading Speech and other material, which again emphasises the secretive nature of this regime, as against all forms of disclosure. I agree with what you say, 15 there is an ambiguity there about the persons who disclose this information but I just don't think it's a reasonable interpretation of that provision to limit it to the initial disclosure. It seems to me to be different for some of those other taxation and other contexts.

20 MR GYLES: Yes. Anyway, that's a matter of debate. The other point to be made, it seems to me, again, reading the statute, is that there is no obligation that this be a covert operation, except insofar as basically all ASIO operations are. That's not part of the statutory scheme at all.

25 PROFESSOR WILLIAMS: No, you're right and in some ways it's an odd omission. I suppose, though, again in the broader context of the statute, when it's twinned with the very broad offences that apply to ASIO officers who disclose operational information, the fact also that it's a criminal offence to even reveal the identity of an ASIO officer - there's a range of contextual information which, I suppose, underpins this but 30 nonetheless, you're certainly correct, there's no direct provision in this subpart of the legislation that makes that clear.

35 MR GYLES: Yes. Any other topic that we haven't mentioned that you would wish to highlight for the purposes of these submissions?

PROFESSOR WILLIAMS: No, Mr Gyles. That covers the key points we wanted to raise.

40 MR GYLES: Incidentally, you may appreciate, there's a transcript being taken and that transcript will be made public, as all of the other submissions, except those that I will be taking later, in private session, from some of the Commonwealth organisations, where, at least in the first instance, they need to be kept private.

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PROFESSOR WILLIAMS: Yes. We understand.

MR GYLES: Thank you for your submission and for your appearance today.

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PROFESSOR WILLIAMS: Thank you for the opportunity.

DR HARDY: Thank you.

10 MR GYLES: We'll adjourn now until the Commonwealth authorities are ready to appear. That may be as late as 12.00 but it may be a bit earlier.

ADJOURNED [11.06 am]

15

RESUMED [11.51 am]

20 MR GYLES: Good morning, all. This is the opening of the second session today, Tuesday, in relation to my inquiry into section 35P. It's a session which has been allocated to government agencies, and we have representatives of the Attorney-General's Department, the Australian Federal Police, the Australian Security Intelligence Organisation, and the
25 Commonwealth Director of Public Prosecutions. I wonder if those who are here could identify themselves for the sake of the transcript.

MR BRUCKARD: Monitor, my name is Scott Bruckard. I'm from the Commonwealth Director of Public Prosecutions; I'm a deputy director,
30 looking after organised crime and counter-terrorism. I appear this morning with Stefanie Cordina from my office.

A/G DEPUTY COMMISSIONER CROZIER: Monitor, my name is Peter Crozier. I'm a Commander of the Australian Federal Police. I'm
35 currently AFP's Manager for counter-terrorism operations.

A/G COMMISSIONER PHELAN: Michael Phelan, Acting Commissioner of the Australian Federal Police.

40 MR LEWIS: Duncan Lewis, Director-General of Security.

MS HARTLAND: Kerri Hartland, Deputy Director-General, ASIO.

45 MS LOWE: Jamie Lowe, the First Assistant Secretary of the National Security Law and Policy Division in the Attorney-General's Department.

MS TAYLOR: Julie Taylor, Acting Assistant Secretary of the division that Jamie heads.

5 MR GYLES: Thank you very much indeed. First of all, I have read the submissions from each party but I have had to read about 26 others and I've now seen a number of individuals appearing to those submissions, so my head is spinning a little at the moment and I don't pretend to have every nuance of your submissions in my mind. This is an opportunity to
10 have each organisation in this public arena draw attention to any aspect of their submission that they wish to, to explain any aspect which they feel has not been properly grasped, and indeed to answer or deal with any matters that have been raised by other persons making submissions.

15 I should make clear that I have indicated that I will see some or all of the public authorities in private session later to deal with matters which, at least in the first instance and perhaps for all time, should be kept private and I don't propose at this hearing to trespass into that area but the debate so far has been very wide-ranging and I'd be most interested in the
20 perspectives that your organisations bring to the inquiry. I will, of course, ask some questions as we go along but it would be helpful, I think, if each organisation says what they wish to say, to a greater or lesser extent, and we'll see where we go from there.

25 Logically, I think, probably, the agency which - I was going to say "has the benefit of" but it's not quite the right way of putting it. It's the Australian Security Intelligence Organisation Act and I think perhaps that's a logical starting point.

30 MR LEWIS: Mr Gyles, thank you very much. Duncan Lewis, Director-General Security. Thank you for the invitation to appear here this morning; I do value the opportunity to make some remarks. I'd like to use the time to highlight the continually evolving security environment and the challenges that ASIO faces at this time of heightened tempo. This
35 is absolutely critical to understanding the requirement for special intelligence operations. The case that I want to put this morning is that we are in very changed circumstances, to explain to you what is different about the current circumstance as opposed to what we've had in the past.

40 Let me start by saying I recognise the interest in security intelligence and the expectation of the Australian public that our organisation, ASIO, should be held to high account, should act lawfully and should act always in a balanced and proportional way. Those guiding principles exist and we follow them. It's entirely appropriate that the Australian Security
45 Intelligence Organisation should be highly accountable. In order to do

this, we need to abide by the law, as well as ensure that we protect our people and our capability to conduct our operations.

5 The SIO scheme was introduced and enacted pursuant to the
recommendations of the Parliamentary Joint Committee on Intelligence
and Security, both in its 2013 report and its 2014 report. The scheme, the
SIO scheme, the Special Intelligence Operations scheme, is designed to
ensure that ASIO has the ability to collect useful intelligence in relation to
10 threats to security by obtaining close access - I want to just stress the issue
of close access; this is a theme that I'd like to carry through the discussion
- to persons or entities of security interest, with appropriate legal
protections for the participants in those intelligence operations.

15 The security environment remains complex and my organisation continues
to be stretched in meeting the threat from terrorism. We are an
organisation that is extended currently in order to address the current
challenge. On 12 September last year, as you will recall, the national
public alert level for Australia was increased to high, meaning that a
terrorist attack is assessed as likely. Since then, a number of planned
20 terrorist attacks have been thwarted. Since last September, 20 people have
been arrested and charged as a result of six counter-terrorist operations
around Australia. That represents one-third of all terrorist-related arrests
since 2001, so, within the last six months we've had one-third of the
arrests that we have in the preceding 14 or 15 years.

25 These operations have included: the arrest on 18 April of individuals
planning an attack against police on or around Anzac Day - that's the most
recent one, just a couple of weeks ago; the random beheading that was
planned in Sydney in February of this year, an attack that was thwarted;
30 and attack planning by individuals in Brisbane and Sydney in September
of last year.

35 The high-priority work for ASIO is the identification and, where possible,
the prevention of Australians travelling to theatres of conflict, such as
Syria or Iraq. Most worrying are those who have sought or undertaken
training with terrorist organisations and terrorist groups, and our principal
concern, of course, is that those people will return to Australia with a
reinforced commitment to the violent jihad cause that they follow and they
will have, of course, both military training and experience that will be
40 required to conduct an attack here on Australian soil.

45 ASIO currently has around 400 high-priority counter-terrorism
investigations. That's more than double the number a year ago. Related
to these investigations, ASIO has identified around 90 Australians
currently fighting with or supporting the Islamic extremist groups in the

Middle East. Further, more than 25 Australian citizens have been killed in Syria or Iraq because of their involvement in the conflict.

5 I want to be clear that the legislation which enables special intelligence operations is vital to ensuring that ASIO can effectively combat this terrorism threat that I have mentioned. It also has application, of course, in the counter-espionage space. The legislation provides the necessary protection for our officers, as well as those who assist us; it protects those who are involved in our most important operations against people seeking to perpetrate terrorist attacks.

10 Because the special intelligence operations are used to gain close access - here's these words again, close access - to our most important targets, disclosure of any information about them carries a very real and inherent risk to the safety of our officers and to the effectiveness of our operations. This risk, the risk of harm to either the mission or to the officers involved, exists regardless of the motivation, the position or indeed the profession of the person making the disclosure. It also continues to exist well beyond the duration of any specific special intelligence operation; in other words, it has life well beyond the immediate life of the operation - it is an enduring issue.

15 We are a security intelligence organisation and the covert nature and the secrecy of our work is widely understood in the Australian community, and the need for the secrecy and the need for the covert work is understood. I want to emphasise that special intelligence operations are reserved for the most serious, high-end and high-dividend investigations and they most commonly involve the placement of a human source in a very high-risk environment.

20 Again, I want to just say a few words about the environment, to make sure that I have this on record. Today our community faces a real and direct threat to the safety and the wellbeing of our friends, our family and to our society norms. This is new - this is the point that I was making at the beginning. This is new. This is a threat here, at home, and it relates to violence in our streets. We have not faced this situation before. We have had threats to our community, many, many years ago, but we have not before, in the memory of our current society, experienced a threat of violence on our streets such as we've seen played out in some of our like-minded allies and friendly countries - thinking of France and the United Kingdom and so on. This is different.

25 More than a decade ago, international terrorism struck us a terrible blow in the Bali attacks and various attacks in Jakarta and other locations. We passed laws at that time - or following those attacks, we passed a number

of laws in this country to meet the new threat. In fact, it was these new laws that gave rise to concern within our organisation, within ASIO, that some of our necessary intelligence-gathering activity could potentially contravene those laws; they were new and specific laws and our activities
5 looked as though they could well contravene the laws. That is indeed, of course, why we ended up with the legislative package that we have in front of us today.

It was very obvious to us a couple of years ago that becoming a member,
10 for example, of a terrorist organisation, which may be a necessary act in order to penetrate the organisation, would in fact contravene these new terrorist laws. We actually proscribe terrorist organisations and say, “Well, this organisation,” or “that organisation”, “is illegal. It is, ipso
15 fact, a crime to be a member of such an organisation and if you’re trying to penetrate the organisation as an intelligence agent you may well end up having to become a member or you may be assisting or abetting the activities of that organisation, you might be providing a funding base for it, you might be doing all sorts of training with the organisation, or
20 whatever. There are a range of activities which very obviously would put us potentially in contravention of these new counter-terrorist laws, so we have addressed that matter in order to remain lawful by having the package in front of us now.

The target group has changed. We don’t have now, as we had in the past,
25 some reasonable lead time to identify that a threat was about to play out with an act of violence. If you take your mind back to a decade ago, or even five years ago, typically the threat was a vehicle-borne bomb, for example. That sort of target provided us with a certain amount of lead time. You can’t create such a weapon without having technology, without
30 having expertise, without having to acquire the precursors for the particular explosive device, or whatever, so we had lead time. The challenge we face now, of course, is that we don’t have lead time. We are talking about random acts of violence, by individuals who may or may not be known to us, on the street, without warning. So it’s a very different
35 target.

In order for us to have any understanding of such reduced lead-time situations, we need to be as close as we can to the groups that would
40 contemplate such action and in - I got back to these words - close proximity. We are in close proximity now in a way that we had not been in the past with target groups and, of course, it goes without saying that, in being in close proximity, we are therefore at a heightened degree of risk, should our operations be divulged or discovered. So we come to the issue of the secrecy and the security that is required around these operations.
45 My officers need protection if they are in turn to protect to our

community.

5 I need to be clear, Mr Gyles, that not all ASIO activities could or should
be the subject of a special intelligence operation. SIOs are aimed at
occasions when unlawful conduct is potentially required to enable access
to the most sensitive information. Any such conduct must be justified in
the circumstances and limited to the maximum extent possible. They can
only be sought when the success of an operation hinges on the conduct of
a specified unlawful activity, with limitations on the types of activity
10 allowed under the ASIO Act.

15 In summary, with the increased complexity and severity of the security
threat facing our community, ASIO special intelligence operations are
vital and are required to ensure that we can continue to respond in a timely
way to the threat that faces our community. The introduction of
legislation provides us with an increased ability to do our important job
effectively and efficiently.

20 It's been evident recently that Australia is not insulated from events
overseas, and ASIO's counter-terrorism workload is a testament to that.
The conflict in Syria and Iraq has shown how effective extremist groups
have become in exploiting and radicalising individuals to commit barbaric
acts of terror. The events we've seen carried out in Australia and
throughout other countries, such as France and Denmark, have become in
25 many ways the new norm.

30 As director-general, my primary concern is always for the safety of my
officers. It is a duty of care that I have and I take very seriously. They
need protection in the conduct of their duties and it's in Australia's
interests and the interests of the Australian people to see they get that
protection.

35 Mr Gyles, I thank you again for the opportunity to comment and I'm
happy to either take your questions or we'll continue on with the briefings.

40 MR GYLES: Thank you. I think we'll continue with the briefings for the
moment. I'll call on the Australian Federal Police. I understand that the
Federal Police is not strictly involved in 35P and it's fair to say, I think,
that many of the submissions which I've received from organisations and
individuals see 35P as part of a package, as it obviously is, as the
Director-General has said, and therefore one has got to look at it through
that prism. That doesn't mean that I'm going to widen my immediate
inquiry but it does mean that I'll be looking at 35P closely in relation to
related matters.

45

Of course, the immediate matter of interest is the genesis of the SIOs, including 35P, was the controlled operation regime, I believe.

5 A/G COMMISSIONER PHELAN: Thank you, Mr Gyles. Mike Phelan, Acting Commissioner of the Australian Federal Police. First, let me say that I've heard Mr Lewis and I concur, from an operational perspective, with all of the things he's been saying, particularly from a security perspective. If I may just put our discussion in a little bit of context. Of course, the Australian Federal Police have been working within the regime
10 of controlled operations now for approaching 20 years, since the decision in *Ridgeway* of the High Court in 1995. Over that time, it's been judicially considered a number of times and there have been changes to that legislation, et cetera, in interpretation but also by legislation, and we've got to a stage now where the legislation is very robust, particularly
15 in terms of oversight from the Ombudsman and in terms of the implementation we do of the Ombudsman's findings in relation to how we conduct our controlled operations.

20 Over time, the controlled operations regime has morphed from *Ridgeway*, where we were effectively talking about controlled deliveries of narcotics, through to its use now in major fraud investigations, money-laundering and, of course, counter-terrorism operations in the new paradigm that we're facing now. We have erred very much on the side of being conservative when it comes to our operations under the controlled
25 operations legislation, in terms of, if we think something is slightly or can be interpreted as unlawful, and that goes down to, even, officers being in possession of narcotics when they're being delivered to a third party, then we'll consider that as potential unlawful activity and seek a controlled operation.

30 Similarly, when the legislation was amended in 2010 to allow informants to be part of controlled operations, if the informant has discussions with the potential targets, again, we will seek a major controlled operation for those aspects, so that we can protect any potentially unlawful information
35 that's gained and we can use that in evidence in Court.

40 Similarly, that's extremely important to us for the regime that faces ASIO now because what we want in terms of our counter-terrorism investigations, which are very joined-up and I expect the people and the Commonwealth no doubt expect us to be like that - there may very well be evidence obtained by ASIO, under an SIO, that at a later stage we want to be able to use in a criminal prosecution, down the trail. The last thing we want to do is to have that not being admitted because it was potentially
45 unlawful. That's why, in terms of the coalescing of the legislation, in an operational sense, between the AFP and ASIO, it's extremely important.

5 The other couple of points that we've made in our submission is that the disclosure regime that was brought out in 2010, in the Crimes Act for controlled operations, also protects the information and the way we conduct the investigations. That's essentially threefold, off the top of my head: one is protecting sources and informants, which is becoming completely necessary, given the changes to the legislation that allow us to use informants; secondly is protecting any civilian participants in an investigation and the disclosure of their details; thirdly, which is extremely important, is police methodology and the way in which we actually conduct the operations - and I won't go into those details now, of course. The way we conduct investigations varies markedly from job to job, depending on the circumstances, also from crime type to crime type. It's extremely important that those methodologies are kept private and not for public disclosure.

20 To draw a line through that in terms of what we would do in a court case, and the Director of Public Prosecutions may be able to say more about this, certainly in terms of police methodology and the way we conduct our investigations when we get down to the detail, we would claim public interest immunity on a lot of those matters when we get to court and try and fight those claims and to keep the methodology secret.

25 The other is that the disclosure risk does not end when the investigation finishes or when the job finishes because, again, it's about methodology, it's about protecting informants and sources, and none of that risk dissipates when an investigation is finished; it is an enduring risk that goes well beyond an investigation being closed. That's the issue for us in terms of potential sunset clauses that may be anticipated in the legislation. They, in my view, would have a detrimental effect not only for people coming forward and so on but also the conduct of our investigations because, as criminals and indeed terrorists become more and more sophisticated, we have to employ more and more robust and complex investigative techniques to counter these activities, and that is part of the controlled operations regime in our major investigations where we use controlled operations certificates, so it is extremely important that we protect that methodology.

40 The other is around disclosure generally. Of course, the Australian Federal Police has investigated disclosures on a number of matters over a period of time and, given that we do the Commonwealth investigations for disclosure, for public officials, et cetera. The important thing to note around any disclosure is, even if it's made public, generally, either those who are ending up publishing the material or those that disclose the material in the first place from an agency or somehow get hold of it are

invariably not aware of all the facts that surround the investigation. They may believe they are but invariably they aren't. So, whilst they may believe that it's in the interests of the public to disclose material, if they're not privy to all the facts surrounding the whole investigation, at times, it can place people in danger and seriously put people at risk of their lives being put at threat because, even if it's someone well-placed within an investigation, they may not know all the second and third-phase matters that exist within an operation, including offshore operations, from partner agencies, anything that's occurring offshore as well. There's always the potential with any disclosure to put people in harm's way.

The legislation is robust in relation to controlled operations disclosures, because we disclose them in the annual report every year, in the Ombudsman's report - they are redacted components of the controlled operations certificate. That process is pretty robust in terms that we are deliberately redacting material that cannot put people at risk, and they are, you'll find, enduring, will stay forever, that component in the material.

The only other point I wanted to make, following on from that particular point, is about disclosures allegedly in the public interest. I have no doubt that, when someone discloses material if they believe it's in the public interest, they're essentially applying their own subjective test to that material, without the full knowledge of everything that's going on. Obviously, if we were to prosecute someone for that, we have to go to an objective test as to whether or not that disclosure was in the public interest but I would submit that, by the time it gets to prosecution, the horse has already bolted. The purpose of any of this legislation is to stop disclosures in the first place. If we put a regime in place where people have a defence that the disclosure is in the public interest and if someone applies - whether they be an individual, an insider employee or even someone who is going to publish the material - their own subjective test to that, then whether we prosecute or not is actually irrelevant because the material is gone and, once it's gone, the harm is done; people are in harm's way or the investigation methodology and so on is comprised. It's important to keep the legislation as it is, without a public interest test that someone can apply subjectively, in my view.

Thank you.

MR GYLES: Thank you very much. I think it's probably logical to leave the Attorney-General's Department till last. If the representatives from the Commonwealth Director of Public Prosecutions would like to expand on any of the highlighted matters that you think are important.

MR BRUCKARD: Yes. Thank you, Mr Gyles. I might just say that the

Commonwealth Director of Public Prosecutions is an independent statutory office which prosecutes Commonwealth crime on behalf of the Commonwealth. The Prosecution Policy of the Commonwealth is a publicly available document. It's served us very well for the last 30 years and it carefully sets out how we approach the decision-making in respect to all of the matters that are referred to us for prosecution. Clearly, as part of that, we carefully consider public interest in relation to all matters that are referred to us in that sense.

10 I might just, perhaps, amplify the comments made by the Director-General and the Acting Commissioner insofar as they relate to the admissibility of evidence that might be derived as a result of controlled operations. Certainly, our experience, over a lengthy period of time, is that we've relied very heavily upon the fact that the police can obtain controlled operations certificates to render admissible, in important organised-crime prosecutions, for example, evidence that's gathered by police in circumstances where they may have otherwise engaged in conduct which could be deemed to be unlawful. The evidence that's derived from that process is vital for many prosecutions that we conduct and, from our point of view, we think that's a very effective regime to ensure that we're best placed to obtain that evidence we need to prosecute those cases.

In terms of our submission, we've filed a quite lengthy submission responding to the questions that you've raised in relation to a range of matters. Whilst I'm happy to take any questions that you may have in relation to the matters that we've set out there, including matters pertaining to our national legal direction in terms of 35P and other related offences, I don't propose to go into those matters in any detail at this stage.

30 MR GYLES: I must say the request was quite detailed and your answers were quite detailed, so that was that. One thing I will ask you to comment upon, perhaps not now - I'm just a little surprised at the, either express or implied, statements as to the width of public interest in relation to prosecutions. Perhaps I'll come back to that with you.

MS LOWE: Thank you, Mr Gyles. The Attorney-General's Department is a policy agency that administers a range of legislation. My division, amongst other activities, administers the ASIO Act, which is why we've been responsible for making any changes to that Act, including the changes that give effect to the provisions that we're currently talking about here today.

45 The genesis for many of the amendments to the ASIO Act, as with any other piece of legislation, is the agencies come to us describing their

operational circumstances and we work with them to identify legal policy solutions. It could also come from inquiries such as the one that's currently being conducted and, of course, Parliamentary inquiries. The 35P provisions are part of a package of legislation that went through Parliament in 2014 that responded to a Parliamentary inquiry and a range of recommendations made by the Parliamentary Joint Committee on Intelligence and Security, and in particular the SIO scheme is enacted on the recommendations of that committee, which asked that we address limitations in ASIO's collection capability arising from participants' exposure to legal liability in certain intelligence operations and in the admissibility of intelligence as evidence. The director-general has set out the circumstances in which those kinds of concerns were made apparent.

Reiterating the comments made by the Director-General of Security, the vast majority of ASIO's intelligence operations will not be SIOs. They're a very exceptional range of powers and capabilities that can only be applied in certain circumstances.

I've had the benefit of reading perhaps not all but most of the submissions that have been put to you, and the submissions raise quite genuine concerns about the operation of the offence provisions, but you obviously can't read the offence provisions in the absence of the other provisions and, in particular, the circumstances in which an SIO can be authorised. I think, when you read the offence as a standalone, there is some concern, quite legitimate concern, that it may be applied in a range of circumstances that are neither envisaged by the SIO arrangements nor captured by the legislation.

Special intelligence operations are authorised by the Attorney-General and are subject to legislative oversight mechanisms, including legislative reporting to the Attorney-General and the Inspector-General of Intelligence and Security, and, of course, the IGIS, under her existing powers, can, of her own volition, make inquiries and review of ASIO's activities that it conducts under its legislation.

We also allow for disclosure of any suspected wrongdoing regarding special intelligence operations and they are made under the IGIS Act or the Public Interest Disclosure Act, as appropriate.

Special intelligence operations don't have retrospective application; the authority must be sought prior to an activity, so it can't be used as a way to address illegal behaviour that has already occurred where that wasn't already anticipated in the SIO application. They also can't be used to avoid getting a warrant or an authorisation in other circumstances where ASIO already has a legitimate and lawful mechanism for getting access to

information or participating in activities.

5 35P sets out offence provisions in relation to a very circumscribed set of circumstances in which an SIO can be sought and granted - and reflect the very unusual circumstances of the particularly high risk that ASIO officers are exposed to in participating in the SIO activities.

10 I think it's important to reiterate that the harm that section 35P is designed to address, the personal risks to ASIO officers in particular and risk of exposure of capability - is not designed and won't operate to criminalise media reporting or academic research about the operations of the organisation generally and, in fact, in relation to the vast majority of the operations of ASIO.

15 Just in terms of the circumstances in which an authorisation for an SIO can be obtained from the minister, and again I reiterate that it has to occur prior to occurring - I've seen quite a lot of scenarios described in which people have assessed that perhaps an SIO could have applied in certain circumstances. The criteria are actually quite specific in the legislation.
20 The minister must be satisfied that matters that are set out in section 35C(2) - and effectively it is that the SIO is justified in circumstances that any unlawful conduct will be limited to the maximum extent consistent with conducting an effective SIO, and, importantly, that it will not involve conduct causing death or serious injury, torture, sexual offences or significant loss or damage to property.
25

I may leave it there because that, effectively, sets out the legal regime that supports the SIO regime. But I would just like to reiterate that the offence provisions can't be viewed in isolation of the broader definitions. I think
30 I've seen some examples put forward that perhaps aren't very cognisant of the fact that they can really only be used in very circumscribed situations.

MR GYLES: Perhaps that's a good departure point to raise with you some issues that have exercised my mind. You understand I'm not going
35 to raise every matter that's been put to me by so many people; it's there to be read, and your responses read. The matter you touch on is very important, I think, because, reading 35C, I don't really see that it's limited in quite the way you're putting, or the director-general put, at least not expressly. It's not related to human-source activity only.
40

MS LOWE: No.

MR GYLES: It doesn't necessarily involve a truly covert infiltration, it may not involve a modus operandi which is of any particular concern. I'm
45 not suggesting it would be lightly given or that it's not a special situation

but I don't read, in 35C, the limitations that are being put to me. That's the starting point really: What is a special intelligence operation? The second thing which strikes me about the whole issue is, when you understand what a special intelligence operation is and what the authority amounts to and you take into account the fact that it is a special situation, as you've said, why is there the need for a special provision about disclosure, compared with many of the other activities of ASIO which do involve real people doing real things and involve a modus operandi? It's put that SIOs are a very special type of operation and will only be used very rarely. That means 90-odd per cent of the work that's being done does not receive a 35P protection. It has other protections, I might say, but the question is, why don't those other protections operate satisfactorily?

They're a couple of key things that are exercising my mind about the situation.

MS LOWE: Mr Gyles, the examples that we gave of where it might help, might operate in practice, the idea of infiltrating a terrorist organisation - they're practical examples and, you're quite right - - -

MR GYLES: Yes, and they're persuasive, of course, but - - -

MS LOWE: The legislation itself doesn't prescribe those specific activities. What it does set out are the circumstances in which an SIO authority can be sought. The policy drivers, for the purpose of the SIO regime, have been deliberately limited to specified conduct that would otherwise be unlawful, such as, for example, infiltrating an otherwise - a listed terrorist organisation, for example. That would be - in other circumstances, that would be an offence. The SIOs are designed specifically to address that behaviour, which would otherwise be unlawful. That's what makes it quite different to - - -

MR GYLES: I understand that but it's not so limited by the - I understand your point; I'm just wishing to put on the table another way of looking at it. That leads me also to raise this issue, or this question: these provisions have had their genesis in the police provisions. I'm not sure what the genesis of those provisions was, and I'll ask in a moment. I've seen, in some of the submissions, reference to overseas experience. We've done a little bit of looking at that ourselves but not very much, to date, and some of the material I've seen is not entirely consistent. Is that something where there has been any substantive work done by anybody, about the overseas comparators?

MS LOWE: You're quite right, the genesis for what we have before us is

the controlled operations scheme because it has been tested and been operational for a number of years. We have looked at overseas models, I wouldn't say in any great detail. Our preference is always to look at models that are operating domestically, where they've proven to be effective. I can't tell you what the genesis for the original controlled operations model was. What I do know, though, is that - I think one of the points of difference between what we have in place and what perhaps is in like-minded countries - very generally, not getting into the specifics - is that the range of powers that are available under equivalent schemes in other countries are quite broad and that the oversight arrangements that we have in place reflect the very constrained nature of the powers that are available.

I think another way that the powers are constrained is not simply by the definitions of special intelligence operations, for example, but also by the very function of the organisation itself. In terms of ASIO's functions, they're very carefully and specifically set out in the ASIO Act. In terms of the definition that we put in place for the term 'special intelligence operation', we made very specific reference to not even - all the very particular functions of ASIO, so that we've constrained it. Generally speaking, I would say that we have some constraints and limitations in our scheme that aren't necessarily replicated in other schemes.

MR GYLES: If there's something that you think can be usefully said to me about the overseas matters, please do so. It may be that the organisation itself has knowledge about these things.

MR LEWIS: Mr Gyles, if I could go to your question, which is quite proper, about what is it that it is special and different about these operations and to what degree are they different to what I would describe as more-routine ASIO operations. I mentioned in my opening remarks that we are a security intelligence organisation and, therefore, everything that we do, with the exception of some of our administrative activities, is the subject of protection in some way; it is either covert or it is of a secretive nature.

MR GYLES: Incidentally, sorry to interrupt, I think I'm right in saying there's no definition of "intelligence" in the Act. Is that right? I haven't been able to find one, anyway.

MS LOWE: Yes. I think that's correct.

MR GYLES: Yes.

MR LEWIS: To try and focus specifically on what is different about this,

the genesis, in our mind - notwithstanding the inspiration of controlled operations from the police - the genesis, in our mind, is the issue of close proximity, which is the point that I raised in my opening remarks. The thing that singles out the characteristic of a special intelligence operation, notwithstanding the provision about whether it is lawful or not, is the issue of close proximity because it is the proximity that actually brought us to the question of lawfulness. To be proximate to the current target set is to be unlawful in many respects, as you can imagine - to be a member, to be aiding and abetting, to be assisting.

5
10

MR GYLES: Yes.

MR LEWIS: The issue of proximity is inseparable, in our mind, from the legality issue. The legality issue - I explained that golden thread of how we came to the legality point, because of the raft of counter-terrorism legislative measures over the last 10 years and the fact that we were increasingly running the risk, in fulfilling our mission, of running foul of those laws. This legislation is designed, obviously, to address that matter.

The close proximity is, in the case of a special intelligence operation, by orders of magnitude, more dangerous for the individual than the vast majority of our other operations, all those thousands of operations which we conduct; they're of varying degrees. If it's a technical issue, then the individual may have no proximity to the target, you have absolutely no exposure, you're sitting behind your desk, but when you're in the business of close proximity you are at significant personal risk; the risk is not only to the individual but also to their families frequently and to relatives and loved ones. The individual is in a place of potentially great harm, were their operation to be divulged to the people that are creating the threat. The protection, therefore, is necessary under the law. We need to be protected if we are to conduct our mission successfully.

To go to the Acting Commissioner's point about the divulgence and the issue of whether divulgence is in the national interest, there is a big difference, as we all know, between being in the national interest and of interest, and I think it's that particular distinction that needs to be very carefully protected and addressed in the law. We've attempted to do that. Obviously I'm not a lawyer but, from a practitioner's point of view, the provisions of this law, as it stands, do provide the levels of protection that I would seek for my people.

MR GYLES: Could I just ask what the genesis of the controlled operations is?

A/G COMMISSIONER PHELAN: Could I try and add some guidance to

that, Mr Gyles?

MR GYLES: Yes.

5 A/G COMMISSIONER PHELAN: Unfortunately, I haven't got a - the
amendments that came through in 2010, as I understand it, when these
provisions came in, the non-disclosure provisions, were also proximate to
the amendments to the controlled operations regime that allowed us to use
10 registered informants as part of investigations. Perhaps we could have a
look at the - I don't have the Explanatory Memorandum or the Second
Reading Speech with me but I'm sure it would be instructive.

15 Having said that, some of the discussions you just had then around the
normal defence provisions, for example, for disclosing AFP information
in our standard operations, there are offences in the AFP Act for doing
that and there are obviously defences for doing that as well. There's a
specific regime within a controlled operations framework that was brought
in in 2010, at the same time that, I suppose, the level of involvement
within major controlled operations moved to a different level.

20 MR GYLES: You're saying that until then the controlled operations
regime did not have a 35P equivalent?

25 A/G COMMISSIONER PHELAN: That's my understanding. It was just
standard release of information of AFP operations, which - and, of course,
the offences that now exist have an aggravated offence, where there's a
10-year penalty for threat to life and so on. I don't know - I am guessing
when - I have to go back and have a look at the legislative reform and so
30 on but it does seem quite coincidental to me that those provisions came in
at the same time as we were able to up the ante, for want of a better word,
in terms of the risk to our major controlled operations. We were able to
get registered informants, which - we have a very, very robust non-
disclosure regime around registered informants, for obvious reasons; even
35 individuals in our organisation don't know who they are. You could
appreciate that the disclosure of that information would have a serious
effect on the individuals, notwithstanding what it may do to the action
operation itself, and the risk to their families, et cetera.

40 I'd have to check for in terms of the proximity - sorry, I know it's the
same time but - the actual reasons - - -

45 MR GYLES: Yes. May I just note generally that I think there is a legal
question as to what is meant by "disclose" in this provision. It appears
from the commentary, it's assumed by most, that it includes publication
and republication, but it's an unusual way of prohibiting that. Has the

Attorney-General's Department looked at that matter?

5 MS TAYLOR: We would say that it is intended to cover - that disclosure, in the use of the word in the provision, is definitely intended to cover on disclosure as well and - - -

MR GYLES: You mean republication?

10 MS TAYLOR: Yes. Because it's - it's really designed - about deterring and preventing the risk of harm that comes from disclosure of the information relating to an SIO, in addition to the protection of participants, et cetera. We would say that it is - as Jamie has mentioned, while the provision seems very broad, on its face, and the term "relates to" seems very broad, in fact, it's in the context of that very narrow operation
15 of the SIOs.

MR GYLES: That brings me to the real nub of most of the complaints, and that is, how would anybody know whether it is or it isn't? That means that they really can't publish anything about an ASIO operation.
20 That's the problem that everybody is complaining about. Why aren't they right? Why doesn't it really, in practice, mean that they risk prosecution every time they publish something about an ASIO operation?

MR LEWIS: Mr Gyles, if I could try to address that, we have a process in
25 place by which - let's take a member of the media, for example - it could be anybody else in the public but let's take a member of the media because that seems to be the point of some focus in the submissions that you've received. A journalist is able to make an inquiry regarding one of our operations, and they do regularly and we have engagement with a
30 group of journalists that work in the national security space, typically, so these people are generally known to us and they know us.

Typically, an ASIO media request from a journalist is submitted and their
35 inquiry comes in a written form, they normally write in, sometimes it can be telephonic. Our media unit provides the information to the relevant line area within the organisation. The line area checks to see whether the information relates to a current intelligence operation, including, I might add, a special intelligence operation. If the information doesn't relate to
40 an operation, ASIO will not provide any public comment, obviously, it's not our business, but if the line area believes that there are national security sensitivities around the information that the journalist intends to publish, then, we could decide, with the cognisance of the Attorney-General's office, to provide a confidential briefing to the
45 journalist, which happens, and has happened, to provide the context of those sensitivities - this is the context that the deputy police commissioner

was speaking of a moment ago. In such instances, the journalist will be contacted by me or one of the deputies in the organisation and invited to receive such a briefing to explain just how our national security would be prejudiced.

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Our precise approach would obviously be on a case-by-case basis. In a sense, from my point of view, if a matter is sensitive and going to be in breach of the national security or national interest, it wouldn't really matter if it's an SIO or some other sort of operation. I've tried to make this clear, that the distinction of an SIO, and that's what we're talking about here, is that that usually relates to the potential harm to the officers or the associated officers of ASIO that are involved. There is a process there where a journalist is quite free and able to ring.

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If the journalist has no idea that they've stumbled on something and they publish, my understanding of reading of the Act, and again I explain I am not a lawyer but it's very clear to me, by reading, if it's unintentional and there is no intent - or recklessness, I think, is currently the measure - there is no case to answer. It's really in those circumstances where it's pretty clear to the journalist that there is an ASIO operation at stake here that we would seek to engage that journalist and have a discussion about how we might manage that.

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A/G COMMISSIONER PHELAN: Similarly, Mr Gyles, we operate in the same environment. Often, as you can appreciate, journalists get hold of a lot of information and, more often than not, and I do say, the vast majority do contact the AFP and talk about what they've got, and then we will step them through the same issues as to whether or not it's going to be a risk to the operation, methodology, all that sort of thing; get the journalist in, talk to them one-on-one. I must say that, by and large, the vast majority of the media organisations have been very, very good on this front. They realise what they're doing and what potential damage they could do, and they don't publish.

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In essence, if something is accidental or they don't know, they probably wouldn't have come to us in the first place. They've probably met the requisite standard of recklessness if they've rung the AFP and said, "We've got this information. Is it going to hurt you?" and so on. The intent is probably made out for those and then we'll talk to them. Like I said, it's very, very rarely that those items are published. As a matter of fact, I can't think of one off the top of my head where we've had those briefings where it's been published.

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MR LEWIS: I think, if I might, Mr Gyles, I should come back to complete the picture, that, if a journalist were to contact us and we were to

say, “We would not want you to make public this fact that you’ve discovered or this circumstance you’ve discovered” and there was some notion in the mind of such a journalist that there was wrongdoing or that ASIO had been out of line in some way or there had been a terrible miscarriage of justice or there’d been a terrible mistake made in the operation, then there are, as you know, two avenues for appeal. That journalist can very easily go to the IGIS and make a complaint, and the IGIS is obliged, under her legislation, to review that, or indeed the PID provisions - - -

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MR GYLES: Can the journalist do that?

MR LEWIS: Yes.

MR GYLES: How could a journalist do it? That’s not a statement; I’m asking the question. I haven’t studied it.

MS HARTLAND: Mr Gyles, the IGIS can look at any issues that are raised by any member of the public; it’s not just about looking at internal operations of the organisation; so, any member of the public, including journalists. Quite frequently, our interactions with the IGIS are around complaints from the public that she’s looking at.

20

MS LOWE: Mr Gyles, just to clarify, the public interest arrangements only apply to Commonwealth officials under the current - current and former Commonwealth officials, whereas the IGIS is, of course, available to anyone.

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MR GYLES: Yes. I see. The PID would be disparate.

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MS LOWE: Yes. That’s right.

A/G COMMISSIONER PHELAN: It might be worth noting, Mr Gyles, and I can get the exact figures for you, that the AFP does a vast number of controlled operations, both major and standard controlled operations, a year.

35

MR GYLES: Yes. I think I might have the information.

A/G COMMISSIONER PHELAN: In the period that the legislation has been in in relation to the non-disclosure offences, there must be at least a few hundred, three to four hundred, and we’ve done no investigations at all in relation to disclosure.

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MR GYLES: No. The answer may be that they’ve all been too frightened

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to publish.

5 A/G COMMISSIONER PHELAN: Or they've come to us and talked beforehand about the investigation, and we've talked to them, which is more than likely the case, rather than they're too frightened to publish. I haven't met too many journalists yet who are too frightened to publish what they think.

10 MR GYLES: Incidentally, I put to the various press representatives and so on the point that you're making about checking with ASIO and they've given their answers as to why it's not satisfactory. I'm not here to cross-examine everybody about every point but they've given their version as to why they don't think that's appropriate. The wrongdoing point is the one at the heart of it. Their most attractive way of looking at it is to say, "We are really shut out from examining wrongdoing except through the IGIS, either directly or indirectly."

20 Can I just come back to the question of public interest. I was just looking at the submissions and having a glance again at the policy. I can understand the public interest consideration which would say an officer of ASIO, acting in accordance with the directions of the superior, where there is no suggestion of any corruption or maladministration and so on - you might well say the public interest does not lie in prosecuting that person for doing something which was technically illegal. It's a bit surprising to me that the DPP would be deciding who amongst the general public ought or ought not be prosecuted, not because of the circumstances of the crime, or the alleged crime, but for what might be called political considerations. I'm quite surprised at that; it's not my recollection as to how those matters were approached previously.

30 MR BRUCKARD: When you say "political considerations - - -"

MR GYLES: Yes, I do say that. Why wouldn't you prosecute a journalist if there's a breach?

35 MR BRUCKARD: I think the example we gave in our submission, Mr Gyles, was - we painted two scenarios, at two extreme ends of the spectrum, so to speak. The second scenario involved what could be described as a clear breach of protocols by the officer involved, where there was some allegation of very serious criminal conduct. We regard the public interest criteria under the prosecution policy as something which needs to be very flexible and very broad and we reserve the right, in those circumstances - - -

45 MR GYLES: Very dangerous, I'd say.

MR BRUCKARD: - - - to consider cases where it would be not in the public interest to prosecute somebody for such a breach.

5 MR GYLES: I'm not here to rule on that. I was just surprised to see that such a wide discretion is taken on board by the DPP to say, "There's been a breach of the law here" - I can understand illness, I can understand people with dementia, I can understand age, I can understand all sorts of things but I just can't understand, if there's a breach to the law by
10 somebody and there is no circumstance which would tend against a fair trial, why they wouldn't be tried. Anyway, that's just my recollection as to what used to be the approach. If that's changed, it's changed.

I think I've laid out some of the major considerations which the other
15 organisations have raised. Is there anything which people would like to say by way of clarification? Anything which we've raised which people have taken on notice, we're happy to receive it, promptly, obviously, but we do bear in mind that, in relation to at least the operational agencies, we'll be speaking to them privately later.

20 I thank you all for your attendance, it's been much appreciated, and I'm certainly better informed. Whether I'm wiser is another issue. That completes the public hearings. I thank everybody, not just those who are here now but others who have been here either as contributors or who
25 have observed. If you could, as I've said to you, and this applies generally, give your responses, where you've promised them, promptly, that would be appreciated. It would be appreciated within a week but obviously there's got to be some flexibility.

30 You'll see that a transcript is being taken. The transcript will be published on the website. Anybody who has spoken will be provided with a copy of a proof and, if there are any corrections, it would be grateful if they could be made promptly.

35 I therefore declare the hearing closed. Thank you very much.

ADJOURNED INDEFINITELY

[12.57 pm]