



Inquiry into section 35P of the *Australian Security Intelligence Organisation Act 1979*

Submission to the Independent National Security Legislation Monitor

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Introduction

The inquiry by the Independent National Security Legislation Monitor is considering any impact on journalists in the operation of section 35P of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). Section 35P creates two offences relating to disclosure of information in relation to a Special Intelligence Operation (SIO).

While I am not in a position to comment on whether section 35P has any impact on journalists, I offer a brief submission outlining the role of this office in providing oversight of ASIO and its use of SIOs.

Role of the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer who reviews the activities of the Australian intelligence agencies:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Australian Signals Directorate (ASD)
- Australian Geospatial-Intelligence Organisation (AGO)
- Defence Intelligence Organisation (DIO)
- Office of National Assessments (ONA).

The Office of the IGIS is situated within the Prime Minister's portfolio. The IGIS is not subject to direction from the Prime Minister, or other ministers, on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) should be carried out. The Office is not part of the Department of the Prime Minister and Cabinet and has separate appropriation and staffing.

The IGIS Act provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General's own motion or at the request of a Minister.

The overarching purpose of IGIS's activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights. A significant proportion of the resources of the office has in the past been directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. OIGIS staff have access to all documents of the intelligence agencies and the IGIS is often proactively briefed about sensitive operations.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve highly classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a particular complaint or systemic matter within an agency.

IGIS oversight of Special Intelligence Operations

I intend to pay very close attention to ASIO's use of SIOs, as the ability to give ASIO staff and other people immunity from Australian law is a significant new power for ASIO.

A number of provisions in the ASIO Act in relation to SIOs are designed to facilitate oversight of SIOs by my office.

- ASIO is required to notify the IGIS when an SIO is approved by the Attorney-General.
- ASIO must also provide a report to the Attorney-General and to the IGIS after six months, and at the conclusion of an SIO.
- The section 35P offence for unauthorised disclosure contains exceptions to enable disclosure of information that could reveal details of an SIO to be made to an IGIS official.

I have established an inspection program to provide oversight of ASIO's use of SIOs. At present, my staff will inspect each SIO that is approved by the Attorney-General, and this oversight will cover the full duration of each SIO. As with all IGIS inspections, my staff will have access to all documents relating to an SIO and the purpose of the inspection is to consider whether the SIO is conducted with legality, with propriety and with due regard to human rights. The inspection will have regard to the SIO authorisation documentation as well as any activities undertaken in reliance on the authorisation.

As noted above, the IGIS's role is to consider issues of both legality and propriety. My staff look at whether ASIO complies with relevant legislation as well as the Attorney-General's Guidelines, made under section 8A of the ASIO Act. Among other things, the Guidelines include a requirement of proportionality – that is that any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence.¹ Additionally, we also consider ASIO's compliance with any relevant internal policies, and I may engage in dialogue with ASIO should I feel that there is a need for greater guidance to be provided to staff in relation to particular matter.

Some of the areas that my staff will pay close attention to in our inspections of SIOs will include:

- The justification for the SIO – I would check to see whether an SIO satisfies the statutory requirements (subparagraph 35C(2)(b) requires the Minister to be satisfied that 'the circumstances are such as to justify the conduct of a SIO'), is consistent with the Attorney-General's Guidelines (including the requirement of proportionality), and falls within any internal policies providing further guidance on when SIOs should be considered.
 - This would include checking whether an SIO had been sought outside the stated policy parameters or for an improper purpose (for example, it would not be appropriate to have SIOs authorised just to ensure that section 35P applied.)
- Variations and cancellations, or changes in circumstances that may make it appropriate for the SIO to be varied or cancelled.
- Communication with the authorised persons, particularly to ensure they are made aware of variations or cancellations promptly.
- If relevant, source handling, including training.
- That ASIO has sufficient internal monitoring and compliance arrangements in place.
- Compliance with any conditions specified in the SIO authorisation.
- Conduct done in reliance on the authorisation.
- Urgent applications (if any), and
- Sufficiency of record keeping.

Where issues are identified in inspections my usual practice is that they are raised with relevant senior officers and reported to the Director-General of Security. Should serious concerns arise, I may consider it appropriate to advise the Minister responsible for ASIO and/or the Prime Minister.

IGIS provides an Annual Report to Parliament each year. While there will be limits on what can be said in an unclassified report, it is my usual practice to comment on inspection activities, including noting whether any issues of legality or propriety have been identified.

Complaints and Inquiries

In addition to regular inspections, my office investigates complaints and conducts formal inquiries under section 9 of the IGIS Act. Inquiries may be conducted of the Inspector-General's own motion, in response to a complaint or at the request of the relevant Minister or the Prime Minister. IGIS also has a role under the *Public Interest Disclosure Act 2013* (PID Act) to receive authorised disclosures in relation to the Australian intelligence agencies. The PID scheme protects the confidentiality of disclosers and provides statutory protections against reprisals.

Any person may make a complaint to my office under the IGIS Act. It is not restricted to employees or agents of the intelligence agencies, and could include a member of the public or journalist who had concerns about the activities of an intelligence agency.ⁱⁱ Should my office receive a complaint about an SIO, or conduct that may be related to an SIO, this would be taken very seriously. Section 11 of the IGIS Act provides that where a complaint is made to the IGIS in respect of action taken by an intelligence agency and the matter is within the IGIS' functions, the IGIS shall, subject to certain considerations, inquire into the action.ⁱⁱⁱ It is the usual practice when a complaint is received to make preliminary inquiries with the relevant agency to ascertain the nature of the issue and determine whether a formal inquiry is warranted.^{iv}

As noted above, the exceptions in section 35P of the ASIO Act ensure that there is no doubt as to the ability of a person to disclose information relating to an SIO to the IGIS or a member of the IGIS staff. There are also strong secrecy provisions in section 34 of the IGIS Act, which protect information provided by a complainant from unauthorised disclosure by the IGIS or IGIS staff. The secrecy provision extends to preventing information being disclosed to or compelled by a court, offering the complainant significant confidentiality in respect of any information they provide to my office.

ⁱ Attorney-General's Guidelines in relation to the performance by ASIO of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security, 2007, clause 10.4(a).

ⁱⁱ Part II Division 2 of the IGIS Act does not place any limitations on who may make complaints to the IGIS under the IGIS Act. This should not be confused with the IGIS' role as an authorised disclosure recipient under the *Public Interest Disclosure Act 2013*, which applies to former or current Commonwealth public officials.

ⁱⁱⁱ IGIS Act subsection 11(2) outlines circumstances where the IGIS has discretion not to inquire, or further inquire, into a complaint about an action taken by an intelligence agency. This includes the complainant becoming aware of the matter more than 12 months prior to the complaint being made; the complaint being frivolous, vexatious or not made in good faith; or having regard to all the circumstances, an inquiry or further inquiry is not warranted. Considerations relevant to the person having a right to pursue a cause of action in a court or tribunal are also dealt with in subsections 11(3) and (4) of the IGIS Act.

^{iv} IGIS Act section 14 provides that where a complaint is made in respect of action taken by an intelligence agency, the Inspector-General may make inquiries of the head of the agency for the purpose of determining whether the IGIS is authorised to inquire into the action or determining whether the IGIS should inquire into the action.