

## MR GYLES' RECOMMENDATIONS

	BASIC OFFENCE	AGGRAVATED OFFENCE
Insiders	No change.	No change.
Outsiders	<ul style="list-style-type: none"> <li>- <b>Additional harm requirement</b> (i.e. that the disclosure of information will endanger the health or safety of any person, or prejudice the effective conduct of an SIO).</li> <li>- <b>Fault element for the new harm requirement will be recklessness.</b></li> </ul>	<ul style="list-style-type: none"> <li>- <b>Knowledge, rather than recklessness, will be the fault element for the non-intentional harm requirement</b> (that disclosure will endanger the health or safety of any person, or prejudice the effective conduct of an SIO).</li> </ul>
	<p><b>Defence of prior publication</b> if the following are satisfied:</p> <ul style="list-style-type: none"> <li>- the information had been previously published;</li> <li>- the person was not involved in the first publication; and</li> <li>- the person had reasonable grounds to believe that the second publication would not be damaging.</li> </ul>	

government may have been motivated by Mr Gyles' argument (contained in an appendix) that section 35P infringes the implied constitutional freedom of political communication.<sup>27</sup> In order to ward off a constitutional challenge which, in the view of at least one senior judge, might be successful, the government's acceptance of the recommendations may be more expedient than principled.

However, the government has indicated that it will make one change to the recommended amendments. It will not adopt the defence of prior publication in the recommended form. To enliven the defence, the government will require subsequent publishers to:

*"...take reasonable steps to ensure the proposed publication is not likely to cause harm."*<sup>28</sup>

Michael Bradley points out that this:

*"...turns a passive requirement of reasonable grounds for belief into a positive obligation to make sure that no harm will occur."*<sup>29</sup>

However, Mr Bradley overstates the standard which journalists will need to meet. They will not need to *make sure* that their publication *will not cause* harm. That would be practically impossible. Rather, they need only to *take reasonable steps* to ensure that it is *not likely to cause* harm. Nevertheless, Mr Bradley

is correct to point out that the government response is more onerous than Mr Gyles' recommendation.

Other organisations, such as Electronic Frontiers Australia (EFA) and the Media Entertainment Arts Alliance (MEAA), said the recommendations did not go far enough. The EFA said there should be protections for whistleblowing insiders.<sup>30</sup> The MEAA derided the public interest defence on the basis that it creates a "game of chicken" as to who will publish first, and lamented the possibility that any journalist should face imprisonment for doing their job.<sup>31</sup> Others expressed disappointment that Mr Gyles had not recommended a general public interest exemption.<sup>32</sup>

The government has not indicated when it will make the amendments to section 35P, although practitioners should keenly watch this space.

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<sup>27</sup> Report, Appendix J.

<sup>28</sup> Government Response, response to recommendation 6.

<sup>29</sup> Bradley, above.

<sup>30</sup> Electronic Frontiers Australia, EFA welcomes proposed amendments to section 35P, 4 February 2016, <<https://www.efa.org.au/main/wp-content/uploads/2016/02/Section-35P-release-160204.pdf>>.

<sup>31</sup> MEAA, Journalists still face jail under ASIO Act changes, 3 February 2016, <<https://www.meaa.org/mediaroom/asio-redraft-signals-need-for-rethink/>>.

<sup>32</sup> Keiran Hardy, 'Despite changes, terror law will still curb press freedom,' The Conversation, <<http://theconversation.com/despite-changes-terror-law-will-still-curb-press-freedom-54122>>.