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Australian Government Solicitor
4 National Circuit, Barton ACT 2600
Locked Bag 35, Kingston ACT 2604
T 02 6253 7000 DX 5678 Canberra
www.ags.gov.au

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Mr Bernard Collaery
Collaery Lawyers



Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: 

Dear Mr Collaery

Your proposed book – protecting ASIS information

1. We refer to your letter to the Inspector-General of Intelligence and Security (IGIS) concerning recent media reporting indicating that you propose to publish a book regarding, among other things, your dealings with your client Witness K. You requested the IGIS to pass your letter to relevant agencies and a copy was, accordingly, provided to the Australian Secret Intelligence Service (ASIS).
2. It is not clear whether, or to what extent, the book may include material relating to the activities of ASIS or its staff. To avoid any misunderstanding, we are instructed by the Director-General of ASIS to request that you ensure that any such material is properly constrained having regard to ss 39, 40D and 41 of the *Intelligence Services Act 2001* (Cth) (IS Act), copies of which are attached to this letter.
3. The terms of those provisions are well-known to you. Nonetheless, we are instructed to specifically draw to your attention the following matters.
4. *First*, you are subject to the direct operation of those provisions by virtue of your arrangement with ASIS. That arrangement was approved only to enable you to assist Witness K to make submissions to the Inspector-General of Intelligence and Security about his employment complaint concerning an unsuccessful application for promotion. You do not have the Director-General's approval to make any other or broader disclosures about ASIS staff members and ASIS activities, much less to the world at large.
5. *Secondly*, at the time of entering the arrangement you signed a secrecy undertaking which, among other things, acknowledged ss 39 and 41 of the IS Act. We attach a copy of that undertaking. As you are aware, those provisions have since been amended such that they now carry a maximum penalty of 10 years imprisonment.
6. *Thirdly*, although s.40D was not in force at the time of the arrangement and undertaking, you should pay careful attention to the constraints which that provision imposes on even recording relevant information. This provision carries a maximum penalty of 3 years imprisonment.

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7. *Fourthly*, under s 39 it is an offence if a relevant person 'communicates any information or matter' in the specified circumstances. 'Communicates' captures any communication, even of information which has been previously communicated. Similar observations may be made about the use of the term 'identifies' in s 41.
8. *Fifthly*, ss 39 and 41 are expressed in broad terms because of the very serious implications that an inappropriate communication of information may have for national security, and for the personal safety and security of people who undertake work in that area. For example, the second reading speech for the bill which introduced those provisions (House of Representatives, 27 June 2001) explained that the bill 'seeks to protect ASIS staff, the intelligence it produces and its sources and methods' because the collection of intelligence information 'depends on people who often put their lives and liberties at considerable risk'. We are instructed that the nature of the risks which attend a particular communication, and the way they may eventuate, are not necessarily obvious. The protections in ss 39 and 41 are not, therefore, expressed to depend upon a person's individual assessment of the national security risks or harms which may attend a particular communication.
9. *Finally*, your letter refers to you and Witness K taking steps 'with the support of Senior Counsel in Melbourne'. Depending upon the nature of that engagement the above considerations may be relevant to this. As you are aware, while ASIS supports current and former staff members in seeking independent legal advice in respect of matters relevant to their employment there is a process to obtain the necessary approval to do this so that any disclosure of ASIS information can be made consistent with the requirements of the IS Act. Please let us know if you would like us to seek instructions in this regard.
10. In view of the potential relevance of these matters to Witness K, we will send a copy of this letter to his legal representatives.

Yours sincerely

