



Australian Government
Office of National Assessments
Director-General

Submission No.....	37
Date Received.....	M.R.

File No. INT08/53

27 August 2008

Mr Mark Dreyfus QC MP
Chair
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

RECEIVED
29 AUG 2008
BY: LAcA

Dear Mr Dreyfus

I write regarding the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into whistleblowing protections within the Australian Government public sector.

I attach a submission from the Australian intelligence community (AIC) addressing the Terms of Reference of the inquiry. The submission represents an agreed view of AIC agencies – the Australia Security Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Signals Directorate, the Defence Intelligence Organisation, the Defence Imagery and Geospatial Organisation and the Office of National Assessments.

In particular, the submission reflects on the need to strike the right balance between protecting national security information and providing statutory protection for whistleblowers to ensure legitimate complaints are investigated.

Yours sincerely

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Australian Government

***Australian Intelligence Community Submission
to the
House of Representatives Inquiry into Whistleblowing***

Introduction

1. This submission responds to an invitation from the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) to address the Terms of Reference (ToR) of the Committee's Inquiry into whistleblowing protections within the Australian Government public sector (the Inquiry).

2. This submission represents the agreed view of the Australian Intelligence Community (AIC). The AIC covers the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Defence Signals Directorate (DSD), the Defence Intelligence Organisation (DIO) the Defence Imagery and Geospatial Organisation (DIGO) and the Office of National Assessments (ONA).

3. The AIC acknowledges that in some circumstances whistleblowing on issues of legitimate public interest can be an important mechanism for maintaining the integrity of public administration in Australia. We consider that any new legislative provisions for whistleblowing that would apply to the Australian Government public sector should carefully balance the benefits of public disclosure against the public interest in protecting sensitive intelligence and national security matters.

4. The AIC also notes that existing legislation empowers the Inspector-General of Intelligence and Security (the IGIS) to inquire into allegations of illegal or improper conduct by AIC agencies. The statutory independent role of the IGIS already provides an avenue for the investigation of allegations concerning the AIC, while at the same time ensuring that national security is not prejudiced by the improper disclosure of security and intelligence information.

ToR 1: The categories of people who could make protected disclosures

5. The AIC has no specific comment on this ToR.

ToR 2: The types of disclosures that should be protected

6. The AIC supports the protection of legitimate public interest disclosures, as broadly described in ToR 2(a) such as allegations of illegal activity, corruption and dangers to public health and safety, within agreed procedures that also protect national security information. It would clearly not be appropriate to provide protection for disclosures that were undertaken for vexatious or other inappropriate reasons, such as for the dominant purposes of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit.

7. The AIC considers it appropriate that grievances over internal staffing matters should be subject to arrangements separate to those in place for public interest disclosures. We note that processes currently exist under *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) (sections 8(5) – 8(7)) to inquire into some internal staffing matters within AIC agencies.

TOR 3: The conditions that should apply to a person making a disclosure

8. The AIC considers that protections for legitimate public interest disclosures should not extend to protect disclosures which are made for vexatious or other inappropriate reasons. Section 11 of the IGIS Act sets a threshold for inquiries by the IGIS into complaints about the AIC. Specifically, section 11 gives the IGIS discretion not to inquire into a complaint in a range of circumstances including where the complaint is frivolous or vexatious or was not made in good faith and where, having regard to all of the circumstances of the case an inquiry into the action is not warranted. Section 11 also gives the IGIS discretion not to inquire into a matter where some other course of action is open to the complainant (such as review by a court or tribunal).

9. Further, the AIC considers that where a public interest disclosure materially fails to comply with the procedures under which such disclosures are to be made or a person knowingly or recklessly makes a false allegation, existing legislative provisions on secrecy relevant to intelligence and national security should apply (see paragraphs 10-12).

ToR 4: The scope of statutory protection to be available

10. The improper disclosure of national security information can have very serious consequences for the operations, capabilities and effectiveness of Australia's security and intelligence agencies. The AIC considers that unauthorised disclosure of national security information should be subject to existing legislative provisions on secrecy relevant to intelligence and national security. In particular, the AIC considers that whistleblower protections should be subject to the secrecy provisions in the *Crimes Act 1914* (sections 70 and 79), *Australian Security Intelligence Organisation Act 1979* (ASIO Act) (sections 18 and 92), and the *Intelligence Services Act 2001* (Intelligence Services Act) (sections 39-41).

11. The AIC considers that this existing statutory protection strikes the right balance between protecting national security information and providing statutory protection for whistleblowers to ensure legitimate complaints are investigated. IGIS currently provides an appropriate mechanism for whistleblowing by a member of the AIC that is consistent with national security requirements. Where the IGIS is conducting an inquiry and exercises powers to obtain information or documents a person who provides such information or documents to the IGIS is protected from penalties under Commonwealth and Territory laws in relation to that disclosure (see section 18(9) of the IGIS Act).

12. It may also be of use for the Committee to note that under the ASIO Act and Intelligence Services Act prosecution of an offence for disclosing information that has come into the knowledge or possession of the person by reason of his or her being a staff member (or former member or contractor) of ASIO, ASIS, DIGO or DSD (including the identity of an ASIO or ASIS officer) may only be instituted by the Attorney-General or with the Attorney-General's consent. This could cater for exceptional circumstances where, in the opinion of the Attorney-General, an otherwise unauthorised disclosure should not lead to criminal prosecution.

ToR 5: Procedures in relation to protected disclosures

13. As stated above, the AIC considers that the IGIS currently provides an appropriate mechanism for whistleblowing in relation to the AIC. The IGIS Act empowers the IGIS to examine, in respect of AIC agencies, a broad range of matters including:

- the compliance by AIC agencies with the laws of the Commonwealth and of the States and Territories;
- the compliance by AIC agencies with directions or guidelines given by their responsible minister;
- the propriety of particular activities of AIC agencies;
- the effectiveness and appropriateness of the procedures of an agency relating to the legality and propriety of the activities of AIC agencies; or
- an act or practice by AIC agencies that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the *Age Discrimination Act 2004*, the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*, being an act or practice referred to the Inspector-General by the Human Rights and Equal Opportunity Commission.¹

14. The IGIS Act gives the IGIS broad powers to investigate complaints. These include the power to take information on oath and to enter any AIC premises. It is an offence for a person to fail to give information to the IGIS (sections 18 and 19 of the IGIS Act).

15. The AIC supports the continuation of the arrangement where the IGIS has the primary carriage for the consideration of whistleblower activities related to the AIC. Given the risks and practicalities of handling national security information appropriately, it is submitted that if any new 'integrity agency' is created the responsibilities and powers of that agency should not extend to investigating matters that come within the scope of the IGIS's remit. A model for other bodies referring matters to the IGIS exists in the *Human Rights and Equal Opportunity Commission*

¹ *Inspector-General of Intelligence and Security Act 1986*, Sections 8(1) relating to ASIO, 8(2) relating to ASIS, DIGO and DSD, and 8(3) relating to DIO and ONA.

Act 1986 (see section 11(3) and 21(2) of that Act). The AIC understands that the IGIS also supports continuation of his carriage of whistleblowing inquiry responsibilities for the AIC.

16. The Defence intelligence agencies also note that they have access to the Defence Whistleblower scheme as an alternative and independent way to make a protected disclosure relating to alleged misconduct or unethical behaviour involving a member of the ADF, a public servant employed by Defence, a supplier of goods or services to Defence. The Defence Whistleblower scheme is covered in more detail in the Department of Defence submission to the House of Representatives Inquiry into Whistleblowing.

ToR 6 and 7

17. The AIC does not have any specific comments, which are not covered above, on these ToRs.

27 August 2008