

John Wilson

Submission No.	40
Date Received	M.R.

Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Fax: 02 6277 4427

30 August 2008

RECEIVED
01 SEP 2008
BY: LACA

RE: Inquiry into the preferred model for legislation to protect public interest disclosures within the Australian Government public sector.

Dear Sir,

This is a formal submission to the above inquiry (terms of reference located at http://www.smgs.gov.au/media/2008/docs/Whistleblower_Protection_Terms_of_Reference.pdf).

The focus of my submission is clause 6 in the terms of reference:

the relationship between the Committee's preferred model and existing Commonwealth laws;

I submit that offering protection to Whistleblowers will require significant changes to the Commonwealth legislation that governs ASIO and its oversight by IGIS.

Currently ASIO acts on the assumption it has jurisdiction over Whistleblower's activities, where those activities may or do cause embarrassment, anger or other interpreted harm or threat to government bodies and agencies, corporations or other Australian and in cases foreign interests – ASIO's interpretation of "national interest" is extremely broad. As such, ASIO under current legislation may pursue Whistleblowers freely. In cases where ASIO becomes involved, Whistleblowers have no protection and ASIO acts with impunity, with the consent of IGIS.

There are several negative impacts of ASIO's involvement in pursuing Whistleblowers, including:

1. ASIO frequently acts outside its brief and illegally (as noted by Ian Barker SC). Whistleblowers may currently be subjected to ASIO surveillance and interference programs. Interference extends to violations including blacklisting that results in deprivation of economic means for the Whistleblower, targeted recruitment of or interference with the Whistleblower's family, friends, professional and social networks, gratuitous manipulation of the Whistleblower's bank accounts, share account's and other investment accounts, etc.
2. ASIO involvement in Whistleblower cases creates a culture of fear in the Whistleblowers' "community". Specific industries like media, finance, advertising and government departments, etc that are routinely combed for Whistleblowers have cultures that reflect the

understanding that ASIO will unilaterally punish Whistleblowers. As such, people are afraid to speak out.

3. ASIO acknowledges the routine abuse of human rights in Australia while it carries out its interference programs. The agency states, euphemistically that it performs its interference programs with "regard" to human rights – meaning it is aware of which human rights it is breaching at any point in time but for which it has no inclination to curtail.

ASIO's mandate is excessively broad. Current legislation gives ASIO and IGIS too much latitude to define what is in the national interest and then to determine what actions are required to establish national security.

I submit that necessary changes to Commonwealth legislation to protect Whistleblowers include:

1. Legislation that curtails the wide and discretionary powers given to ASIO and IGIS to define the national interest – in order to restrict their ability to persecute Whistleblowers.
2. The separation of powers such that the definitions of national interest and national security should be narrowly defined in a transparent way by a parliamentary body. The implementation of these definitions should then be passed to ASIO for actioning.
3. ASIO legislation should be amended to ensure Whistleblowing in all cases is exempt from ASIO jurisdiction and thereby give Whistleblowers protection from ASIO.
4. If national security interests conflict with Whistleblower protection, and ASIO takes jurisdiction of the matter (notwithstanding point 3 above), the Whistleblower should have the right to learn of the allegations and defend themselves in a court of law. This should occur before ASIO commences an interference program against the person, or if ASIO intends to extend surveillance beyond some defined period of time (eg 6 months to 2 years) the Whistleblower should then have mandatory access to the courts. In such situations, the Whistleblower should have a right to legal representation and the right to defend themselves against ASIO allegations.
5. ASIO legislation should be amended to require ASIO to take specific actions to protect Whistleblowers where Whistleblowers act in the national interest as defined by parliament.
6. The oversight of ASIO needs to be enhanced and made transparent to ensure that ASIO acts in compliance with its mandate and is not acting outside it.

There are limited processes by which people may attempt to challenge the legitimacy of intelligence agency activities (particularly with reference to ASIO). There is need for clear public processes for the protection of individuals. Currently IGIS is the only accessible oversight body that manages individual's complaints against intelligence agencies. However IGIS's ability to assist in individual complaints appears to be grossly inferior to the courts and IGIS's decisions are neither transparent nor subject to public accountability. The recent Dr Haneef and Ul Haque cases offer strong examples where legal action in the courts has enabled individuals to present their case and be vindicated through this process.

7. The above laws should be enacted retroactively.

The issue of bolstering ASIO oversight is integral to Whistleblower protection. The legitimacy of intelligence agency activities is currently largely untested and the agencies unaccountable, leading to a failure of public justice with no offsetting security benefit. I quote from Ian Barker, QC:

"Any defence lawyer having anything to do with a case involving ASIO will know that its agents habitually act outside their powers and routinely abuse them, always in secret. It is rare indeed for their conduct to be exposed." (Sydney Morning Herald, letters to the editor, 28 December 2007).

My familiarity with this sentiment stems from my ongoing correspondence with IGIS concerning ASIO interference in my career, family and social affairs. This interference follows an analyst report I published on the Freeport McMoran killings in Indonesia while I worked as a securities analyst in NY for SBC Warburg (now part of UBS). There has been no review of this matter in which I have been informed of the allegations, or allowed to defend myself with legal representation and able to cross examine the agencies involved.

There is a need for the courts to be involved in all ASIO Whistleblower related matters and for ASIO powers to be accompanied by increased court oversight. A clear and accessible processes must be established by which Whistleblowers targeted by intelligence agency activity can force the matter and the intelligence agencies to defend their activities before the courts.

In relation to clause 1b of the terms of reference, I submit that the above legislative changes should apply generally to Whistleblowers whether or not they are within the Australian Government public sector, and should extend to private sector employees and individuals.

I have no comment in relation to the other parts of your inquiry.

I look forward to your response.

Yours sincerely,

Mr. John Wilson