

**IGIS SUBMISSION TO THE
HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS
INQUIRY INTO
WHISTLEBLOWING PROTECTIONS WITHIN
THE AUSTRALIAN GOVERNMENT PUBLIC SECTOR**

Thank you for your invitation of 14 July 2008 to make a submission to the abovementioned inquiry.

2. I thought that I could best assist the Committee if I commented on three practical areas relating to the Terms of Reference (ToR) for this inquiry, based on my experience to date with staff from the intelligence agencies occasionally approaching my Office on a confidential basis.

3. However, first I should briefly outline the role of the Inspector-General of Intelligence and Security (IGIS).

4. The position of IGIS was created by the Inspector-General of Intelligence and Security Act 1986 (IGIS Act). The IGIS is an independent statutory position which, with the assistance of his or her Office, reviews the six agencies referred to as the Australian Intelligence Community (AIC), namely:

- (a) Australian Security Intelligence Organisation (ASIO)
- (b) Australian Secret Intelligence Service (ASIS)
- (c) Defence Intelligence Organisation (DIO)
- (d) Defence Imagery and Geospatial Organisation (DIGO)
- (e) Defence Signals Directorate (DSD), and
- (f) Office of National Assessments (ONA)

5. The purpose of this review is to hold the AIC agencies accountable in respect of compliance with Australian law and with ministerial directions, the propriety of their activities and respect for human rights. It is done by:

- (a) undertaking a range of inspections of selected AIC activities (akin to compliance audits)
- (b) receiving complaints about AIC activities, and
- (c) either in response to a complaint, a ministerial referral or of the Inspector-General's own motion, undertaking formal inquiries.

6. When conducting formal inquiries the IGIS has access to coercive powers and protections broadly similar to those of a Royal Commission.

7. All staff in the Office of the IGIS have Top Secret (Positive Vet) security clearances and have both familiarity with the activities of the AIC agencies and effective investigative skills.

Procedures in Relation to Protected Disclosures

8. Having regard to the above, I believe that my Office is currently, and should continue to be, the appropriate external recipient of whistleblower reports concerning the AIC.

9. In developing new processes to facilitate protected disclosures, I would hope that whistleblowers continue to be provided with the opportunity to approach my Office directly. However, I would also be supportive of providing whistleblowers with a second option, whereby they could make

public interest disclosures through an internal agency process, with the agency being obliged to report such instances to me.

10. The Committee's ToR 5(d) raises the issue of whether disclosure to a third party might be appropriate in circumstances where all available mechanisms for raising a matter with Government have been exhausted. The ongoing secrecy obligations that apply under the law to persons who are, or have been, provided access to national security classified material argue against this being appropriate for AIC employees and ex-employees.

11. The Committee's ToR 3(b)(ii) also raises the question of what penalties or sanctions might apply to persons acting outside the new procedures. The serious penalties which already apply under the law, to persons who are in breach of their national security secrecy obligations, would seem to be an adequate existing mechanism in this regard.

12. In respect of any training and education about any new arrangements, it should be noted that my staff and I already speak regularly at AIC induction and agency-specific courses and seminars. If required, I would be pleased to expand the content of these presentations to cover protected public interest disclosures.

Employment Related Grievances

13. In relation to item 2(b)(ii) of the ToR it is my belief that grievances over employment matters should generally be addressed through separate mechanisms from those intended for public interest disclosure matters.

14. I would maintain that individual employment-related grievances (essentially those related to promotion, transfer or reduction, termination, discipline, remuneration or other terms and conditions of service, or friction between two individuals) are of a different character from the sort of issues identified in 2 (a) of the Committee's ToR. There is already an established framework for individual employment-related grievances which has features suitable to examining and hopefully resolving such matters. In contrast, issues such as those in ToR 2(a) will require flexibility in approach according to the nature of the particular issue(s). They will also relate much less to personal relationships and possibilities such as mediation between individuals.

15. I say this with the benefit of experience in receiving information and complaints from AIC employees and ex-employees, and having to determine whether their concerns properly fall within my jurisdiction to investigate.

16. When the matter is an individual employment-related grievance, my general practice is to refer such matters (at least in the first instance) back to the agency concerned to be addressed through its internal grievance mechanisms or through procedures for reporting alleged breaches of the relevant Code of Conduct. The Code of Conduct provisions under the *Public Service Act 1999* apply to employees of DIGO, DIO, DSD and ONA; whereas similar arrangements are separately established by determinations made under the *Australian Security Intelligence Organisation Act 1979* and the *Intelligences Services Act 2001* for employees of ASIO and ASIS respectively.

17. Section 8(5) and 8(7) of the IGIS Act generally limit my capacity to investigate employment related grievances within the six AIC agencies. Having said that, I do have some flexibility in regards to situations where:

(a) the complainant has exhausted his or her avenues for internal redress and there are general policy or systemic matters that I can usefully pursue, and/or

(b) a complainant is a former, rather than a current, employee.

18. I have adopted this approach, having particular regard to the ongoing secrecy obligations that I outlined at paragraphs 10 and 11 above.

Confidentially and Anonymity

19. I am aware that in some of the literature on whistleblowing, there are views in favour of whistleblowers being able to remain anonymous, and also that some State legislation features this.

20. It is certainly essential that those with a concern be able to make an initial approach which will be treated as confidential. However, if the person wishes their identity not to be disclosed to the relevant agency or agencies, either expressly or by implication, then it needs to be recognised that on occasions this will significantly limit what investigation can be undertaken into the concern(s).

21. Receipt of allegations where the writer does not disclose their identity, often poses problems for how the issues can be examined.

22. I make these points, not to suggest that the identities of all whistleblowers must be disclosed to the agency or agencies to which the allegations relate, but to caution that if the whistleblower wishes not to be identified, then they need to accept that there may be limits to what investigation can be done. Of course, if there are strong statutory protections for the individual (as per ToR 4), this will lessen the concerns that some whistleblowers may feel about disclosure of their identity.

23. I hope these comments are of assistance to the Committee. As noted earlier, I would also be happy to provide evidence in person during the Committee's inquiry hearings.

Yours sincerely

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Inspector-General of
Intelligence and Security

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