

6 August 2014

Committee Secretary  
Parliamentary Joint Committee on Intelligence and Security  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Secretary

**Submission --  
National Security Legislation Amendment Bill 2014 (Cth)**

Thank you for the opportunity to make a submission on this Bill.

While the Bill raises many serious issues, my submissions are restricted to the interactions between the legislation as proposed to be amended by the Bill – in particular, the increasing of penalties and creation of new offences relating to unauthorised communications of intelligence-related information – and the Commonwealth's recently established whistleblowing regime under the *Public Interest Disclosure Act 2013*.

It was my privilege to be associated with the formulation of many aspects of that regime, as recognised in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector* (2009) which ultimately led to the *PID Act 2013*; the then Attorney-General's media release on passage of the Act (see [http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second quarter/ 26June2013-Whistleblowerlawspassed.aspx](http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/26June2013-Whistleblowerlawspassed.aspx)); and the present Attorney-General's speech in 'strong support' of the Act (see Cth Parliamentary Debates, 26 June 2013, p.4110).

In my submission:

1. The proposed increasing of penalties for unauthorised communication offences in the ASIO Act and the Intelligence Services Act (from two years' imprisonment to 10 years' imprisonment), and creation of new offences, **increases the importance** of ensuring that effective and comprehensive protections from prosecution or conviction apply to officials or other persons whose unauthorised communications or dealings with information constitute public interest disclosures (whistleblowing) under the *Public Interest Disclosure Act 2013* or other common law principles.
2. At present, the breadth of exceptions for 'intelligence agency' conduct and 'intelligence information' under ss. 26 and 41 of the *Public Interest Disclosure Act 2013* means that comprehensive protection is **not available** to officials who make public interest disclosures about wrongdoing in all the circumstances in which it should be, and as such does not deliver adequate relief from the risk of prosecution under the new or increased offences (in particular, in situations of justified external or emergency disclosure).

3. In particular, the submission of the Attorney-General's Department (July 2014, pp.10 & 11) is **not correct** in its statements/implications that the 'safeguards and accountability arrangements' for the proposed special intelligence operations scheme under Schedule 3 of the Bill equate to those applying to law enforcement controlled operations regime under the Crimes Act (as far as freedom of intelligence officials or associates to blow the whistle on wrongdoing is concerned).
4. As such, in my view the Bill **does not comply** with the Joint Committee's view that any 'ASIO authorised intelligence operations scheme should be subject to strict accountability and oversight' and its previous recommendation that the scheme be 'subject to similar safeguards and accountability arrangements as apply to the Australian Federal Police controlled operations regime under the Crimes Act 1914' (par 4.118 and Recommendation 28, Parliamentary Joint Committee on Intelligence and Security, *Report of the inquiry into potential reforms of Australia's national security legislation*, 24 June 2013).
5. This is for three reasons:
  - i. AFP officers who blow the whistle on wrongdoing relating to controlled or other operations of the AFP – or indeed any other Commonwealth officer – have the ability to make not only internal disclosures or disclosures to integrity agencies, but to make further external disclosures **if the internal investigation is inadequate** – whereas under s. 26(1), Table, Item 2, paragraphs (h) and (i) of the *Public Interest Disclosure Act 2013*, protections do **not** extend to any external disclosure of wrongdoing which consists of, or includes, '**intelligence information**'; or where any of the '**conduct... concerned relates to an intelligence agency**';
  - ii. AFP officers who blow the whistle on wrongdoing relating to controlled or other operations of the AFP – or indeed any other Commonwealth officer – also have the ability to make external 'emergency' disclosures in certain circumstances – whereas under s. 26(1), Table, Item 3, par (f) of the *Public Interest Disclosure Act 2013*, protections **do not** extend to an emergency disclosure of wrongdoing where any information consists of, or includes, '**intelligence information**'.
  - iii. While the definition of 'intelligence information' includes 'sensitive law enforcement information' (*PID Act 2013*, s. 41(g)), there is a **major difference** between 'sensitive law enforcement information' as further defined by sub-s.41(2), and the rest of the definition of 'intelligence information' pertaining to intelligence agencies – notably, that the precluded law enforcement information must actually be '**sensitive**' or '**prejudicial**' to real interests, whereas intelligence information under s.41(1)(a) of the *Public Interest Disclosure Act 2013* includes **any** information 'that has originated with, or has been received from, an intelligence agency', including any and all information relating to such an agency, irrespective of whether it involves any risk of harm of any kind to any legitimate security or intelligence interest, or any issue of actual security or sensitivity.
6. The **inconsistencies** in the present regime are emphasised by the fact that while it appears technically possible for an intelligence officer to make an 'emergency' public interest disclosure (since such a disclosure is not subject to the bar on external disclosure of 'conduct which... relates to an intelligence agency'), the current blanket meaning of 'intelligence information' (which does still function as a bar) effectively means the same thing, rendering the theoretical potential for emergency disclosure null and void.
7. Consequently, there are clear differences between the level of accountability applying to equivalent disclosures in these different settings. An **AFP officer** in a controlled

operation who made a justified emergency disclosure of information (e.g. about breaches of procedure causing an imminent threat to the health or safety of one or more persons, which did not prejudice the operation or other sensitive interests) would be protected from prosecution by the *Public Interest Disclosure Act*; whereas an **ASIO officer** making the same disclosure in identical circumstances, would have no protection.

8. In my submission, there is **no justification** for this level of blanket ‘carve-out’ of these agencies from these important elements of the Commonwealth’s public interest disclosure regime, which applies without regard for the actual significance or sensitivity of the information concerned, the seriousness of any wrongdoing which may be being disclosed, or the risks of corruption, procedural failure or error which may prevent effective internal investigation. Such indiscriminate rules may also be at risk of offending the Australian Constitution’s implied freedom of political communication, following the principles in, for example, *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 204 ALR 119.
9. It should also be noted that no State public interest disclosure regime in Australia operates by providing extra restrictions on when law enforcement or similar information may attract whistleblowing protections – it proceeds on the basis that if the information revealed concerns wrongdoing, then it should be disclosed via appropriate channels and dealt with, with protections afforded, even if it is sensitive information.
10. By contrast, the practical effect of the present Commonwealth provisions is that unlawful or improper acts within an intelligence agency or operation can **never** be the subject of a protected public disclosure, even though identical corruption in any other federal or State agency would be, even where the disclosure poses no risk to any operational sensitivity or genuine national security interests. Such inconsistencies have the effect of undermining the credibility of the scheme as a whole, both in intelligence agencies and the wider public sector.
11. These provisions were not the subject of detailed analysis or debate at the time of their passage, and do not serve Australia’s interests well.
12. Given the proposed major increase in penalties, the Committee should recommend **against proceeding** with the Bill until such time as the Commonwealth’s whistleblower protection regime is brought into line with the original objectives of the legislation, and with the Committee’s 2013 recommendation.
13. Improved, alternative formulations of a more workable approach towards the treatment of intelligence and law enforcement information for these purposes – which would be consistent with the Committee’s 2013 recommendation – can be found in sections 31-33 of the *Public Interest Disclosure (Whistleblower Protection) Bill 2012 (Cth)*, and in the Open Society Justice Initiative’s ‘Tshwane Principles’ or *Global Principles on National Security and Freedom of Information*, June 2013 (see <http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>).
14. These principles deal in detail with the challenges faced by the Committee. They affirm that governments may legitimately withhold information in defined areas of genuine sensitivity, such as defence plans, weapons development, operations and sources used by intelligence services, and confidential information supplied by foreign governments that is linked to national security matters; but that non-sensitive information should be subject to the same disclosure systems and tests as other official information, and that in all circumstances, officials who are prosecuted for revealing information about wrongdoing

should be entitled to argue a public interest defence before an independent tribunal.

15. For these reasons, the Committee should recommend review of the *Public Interest Disclosure Act* with a view to making it “Tshwane compliant”, in order to ensure that the Commonwealth’s whistleblowing regime can operate with consistency and integrity across all major areas of public service and administration, before increasing or introducing new offences of this kind.

There are clearly also other aspects of the new and increased offences which run counter to public accountability and integrity – in particular, the risk of journalists and innocent third parties being prosecuted for dealing with non-sensitive intelligence information even in ways or situations that many Australian citizens would consider reasonable or in the public interest. In this respect I support the submissions of other organisations who I am aware are expressing concern to the Committee, including the Law Council of Australia and Australia’s Joint Media Organisations.

As a nation, we can do much better than this, in finding more informed, sophisticated and world-leading ways to balance the different public interests in such questions.

I trust these submissions assist the Committee and wish it well in finding a better solution.

Yours sincerely

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