



THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Margery Nicoll
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By email: Christina.Raymond@lawcouncil.asn.au

Dear Ms Nicoll,

Australian Security Intelligence Organisation Amendment Bill 2020

Thank you for the opportunity to contribute to a Law Council submission to the Parliamentary Joint Committee on Intelligence and Security review of the Australian Security Intelligence Organisation Amendment Bill 2020 (“the Bill”). The Law Society’s Children’s Legal Issues, Ethics, Human Rights and Public Law Committees have provided input for this submission.

The Law Society has a number of serious concerns about the Bill. Due to the potential effects of the Bill, including in relation to the right to legal representation and the privilege against self-incrimination, the Bill merits close consideration by the Parliament, the legal profession and the community generally.

1. Overview of the Bill

The Bill seeks to expand the powers of the Australian Security Intelligence Organisation (“ASIO”) through a number of amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) (“ASIO Act”). The Bill would also make consequential amendments to the *Crimes Act 1914* (Cth), the *Criminal Code Act 1995* (Cth), the *Foreign Evidence Act 1994* (Cth) and the *Inspector-General of Intelligence and Security Act 1986* (Cth) in relation to video evidence in proceedings for terrorism and related offences, release from detention under a preventative detention order for questioning warrant, and oversight.

The proposed amendments to the ASIO Act would have two key effects:

- Firstly, the Bill would replace the existing detention framework in the ASIO Act with a new compulsory questioning framework. This framework would apply to a greater number of matters, and permit ASIO to, *inter alia*, seek a questioning warrant in relation to children aged 14-17, allow a person subject to a questioning warrant to be prevented from contacting a lawyer of their choice, and remove a lawyer for “unduly disrupting” questioning.
- Secondly, the Bill would amend the surveillance device framework in the ASIO Act, including by providing ASIO with the ability to internally authorise the use of a tracking device without a warrant in certain circumstances, and updating the definition of “tracking device” to include any device capable of being able to

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determine or monitor the specific location of a person or object or the status of an object.

In this submission, the Law Society will focus on the proposed compulsory questioning framework in the ASIO Act.

2. Limitation of a person's right to independent legal representation

The Bill's Explanatory Memorandum states that the Bill would:

strengthen... the right to legal representation during questioning while retaining the ability to prevent contact with specific lawyers due to security concerns, and to remove a lawyer who is unduly disruptive during questioning.¹

Section 34F(1) of the Bill provides as follows:

Right to contact lawyer or minor's representative

(1) At any time after the subject of a questioning warrant is given notice of the warrant in accordance with subsection 34BH(2) or (3), the subject may:

- (a) contact a lawyer for the purpose of obtaining legal advice in relation to the warrant; and
- (b) if the warrant is a minor questioning warrant—contact a minor's representative for the subject.

The Bill contains a number of limitations to this right, and constrains the role of lawyers during questioning, at ss 34F(2), 34F(4), 34F(5), 34FF(3) and 34FF(6).

- 34F(2) Limit on contacting lawyers

(2) If:

- (a) the subject of a questioning warrant is appearing before a prescribed authority for questioning under the warrant; and
- (b) a lawyer for the subject is present during the questioning;

the prescribed authority may direct that the subject be prevented from contacting another lawyer if:

- (c) the lawyer for the subject is not a person (an appointed lawyer) specified in a direction given under paragraph 34FB(2)(a) or 34FC(2)(a) or (3)(b); or
- (d) the lawyer for the subject is an appointed lawyer and the prescribed authority is satisfied that the subject has had reasonable opportunity to contact another lawyer.

- 34F(4) Limit on choice of lawyer

(4) A prescribed authority may direct that the subject of a questioning warrant be prevented from contacting a particular lawyer if the prescribed authority is satisfied, on the basis of circumstances relating to the lawyer, that, if the subject is permitted to contact the lawyer:

- (a) a person involved in an activity prejudicial to security may be alerted that the activity is being investigated; or
- (b) a record or other thing that the subject has been or may be requested, in accordance with the warrant, to produce may be destroyed, damaged or altered.

(5) To avoid doubt, subsection (4) does not prevent the subject from choosing another lawyer to contact, but the subject may be prevented from contacting that other lawyer under another application of that subsection.

¹ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020, 3.

- 34FF(3) The lawyer must not intervene in the questioning of the subject or address the prescribed authority before whom the subject is being questioned, except:
 - (a) to request clarification of an ambiguous question; or
 - (b) to request a break in the questioning of the subject in order to provide advice to the subject.
- 34FF(6) Removal of lawyer for disrupting questioning

If the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning of the subject, the prescribed authority may direct a person exercising authority under the warrant to remove the lawyer from the place where the questioning is occurring.

The Bill's Explanatory Memorandum provides some guidance as to when a lawyer's conduct may lead to their removal.

This may be the case where, for example, a lawyer repeatedly interrupts questioning (other than to make reasonable requests for clarification or a break to provide advice), in a way that prevents or hinders questions being asked or answered.²

The Bill has the potential to limit a person's right to legal representation in a number of ways:

- Section 34F(2) may limit a person's choice of legal representative to an "appointed lawyer" specified by the prescribed authority.
- Section 34F(4) empowers a prescribed authority to prevent a particular lawyer from being contacted. The inclusion of the word "may" and the phrase "satisfied, on the basis of circumstances relating to the lawyer" provide a broad discretionary aspect to this power.
- Section 34FF(3) expressly constrains the actions a legal representative can take while their client is being questioned.
- Section 34FF(6) permits the removal of a person's chosen legal representative if the lawyer "is unduly disrupting the questioning of the subject". This provision has the potential to be interpreted broadly. Section 34FF(7) provides that if a lawyer is removed, a person must be offered the opportunity to contact another lawyer. Subject to the passage of time that "the prescribed authority considers reasonable", however, questioning of the person can proceed in the absence of a lawyer.
- Section 34JE(1) provides that a person may apply to the Attorney-General for financial assistance in relation to their appearance before a prescribed authority, for example to assist with legal representation.³ This is a discretionary power, and the Attorney-General is under no obligation to grant the request.

The Law Society is of the view that any person questioned under ASIO's compulsory questioning framework must be entitled to access an independent lawyer at all stages of the questioning process, without that communication or access being restricted. This is necessary in order that the person subject to the questioning can challenge the legality and conditions of their apprehension and receive legal advice. As the Law Council have recognised, access to a competent and independent lawyer of choice is a key principle of the rule of law.⁴

We also note that the provisions in the Bill relating to legal representation have the potential to impinge on a lawyer's professional obligation to act in the best interests of his or her client. Under the Bill, a lawyer may be removed from questioning where they repeatedly interrupt

² Ibid 90

³ Ibid 112.

⁴ Law Council of Australia, *Policy Statement: Rule of Law Principles (March 2011)* principle 4.

questioning or prevent or hinder questions from being answered, which may include circumstances where they are advocating on behalf of their client and ensuring that their client only responds to legally permissible questions. This is the case regardless of whether this is done in a professional, lawful and courteous manner and in accordance with the solicitors' duties to act in the best interests of their client. This may result in a lawyer facing a choice over whether to participate less fully in the questioning process, or otherwise risk removal by the prescribed authority.

3. The role of the prescribed authority

The "prescribed authority" holds broad powers under the Bill, including the discretion to determine whether a lawyer's conduct is "unduly disruptive" for the purpose of s 34FF(6), and whether a person should be prevented from contacting a particular lawyer under s 34F(4).

Under s 34AD of the Bill the Attorney-General may, in writing, appoint the following categories of people as a prescribed authority:

- A person who has served as a judge in one or more superior courts for a period of at least 5 years and no longer holds a commission as a judge of a superior court.
- A person who holds an appointment to the Administrative Appeals Tribunal as President or Deputy President and has been enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory for at least five years.
- A person who is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has practiced for at least 10 years.

This third category is not included in the existing ASIO Act, and would be a significant expansion of the potential pool of people who can be appointed as a prescribed authority.

The position of prescribed authority is described as "independent" in the Bill's Explanatory Memorandum,⁵ and there is a requirement at s 34AD that a prescribed authority cannot be an ASIO employee, ASIO affiliate, an AGS lawyer, an IGIS official, a staff member of a law enforcement agency, a person referred to in s 6(1) of the *Australian Federal Police Act 1979* (Cth) or a staff member of an intelligence or security agency.

Despite these exclusions, there is no statutory tenure or terms of engagement attached to the appointment likely to promote independence, and the Attorney-General may terminate a prescribed authority's appointment for a set of reasons contained at s 34AD(9). There is also no process for the disclosure of an appointment, or for the publication of a public list of prescribed authorities.

4. Expansion of the scope of questioning powers

The Bill proposes to repeal ASIO's existing questioning and detention warrant framework – which has not been used since 2010⁶ – and replace it with a new compulsory questioning framework.

Whereas the current framework applies only to terrorism, the proposed compulsory questioning framework would apply to a broader range of matters including espionage and acts of foreign interference. The new framework would also apply to 'politically motivated violence', which includes terrorism offences contained at Subdivision A of Division 72, or Part 5.3 of the *Criminal Code Act 1995* (Cth). The definition of politically motivated violence at s 4

⁵ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020, 3.

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2020 (Peter Dutton, Minister for Home Affairs), 3230.

of the existing ASIO Act also encompasses “acts that threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General”. This suggests that actions which are not offences could be the subject of compulsory questioning powers, at the discretion of the Minister.

The term ‘espionage’ appears to be undefined in the Bill or the ASIO Act. It may therefore arguably apply to intelligence gathering of any kind, including by corporations and individuals, either foreign or domestic. The term ‘acts of foreign interference’ is defined at s 4 of the ASIO Act as follows:

activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:

- (a) are clandestine or deceptive and:
 - (i) are carried on for intelligence purposes;
 - (ii) are carried on for the purpose of affecting political or governmental processes; or
 - (iii) are otherwise detrimental to the interests of Australia; or
- (b) involve a threat to any person.

The Law Society is of the view that it is not appropriate for the expanded scope of the powers proposed in the Bill to be either undefined or vaguely defined, given the extraordinary powers that the Bill provides for. We also note in this regard that s 34BA of the Bill provides that the compulsory questioning framework would not only apply to people suspected of an offence, but also to people who may substantially assist the collection of intelligence in relation to an espionage, foreign interference, or politically motivated violence matter. If the scope of the questioning powers in the ASIO Act is to be extended beyond terrorism, the categories should be clearly and narrowly defined.

5. Additional human rights considerations

4.1. The privilege against self-incrimination

In a 1982 High Court judgment, Murphy J stated that the privilege against self-incrimination is a “human right, based on the desire to protect personal freedom and human dignity”.⁷ The following year, the High Court described the privilege as follows:

A person may refuse to answer any question, or to produce any document or thing, if to do so ‘may tend to bring him into the peril and possibility of being convicted as a criminal’.⁸

The Australian Law Reform Commission have clarified that the privilege against self-incrimination “is available not only to persons questioned in criminal proceedings, but to persons suspected of a crime, to persons questioned in civil proceedings and in non-criminal contexts”.⁹

⁷ *Rochfort v Trade Practices Commission* (1982) [1982] HCA 66; 153 CLR 134.

⁸ *Sorby v Commonwealth* (1983) 152 CLR 281, 288. The Court cited *Lamb v Munster* (1882) 10 QBD 110 at 111.

⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Interim Report 127, 2016), 12.4

Section 34GD of the Bill would abrogate the right against self-incrimination by requiring all subjects of questioning warrants, including children, to answer every question asked, or face a penalty of up to five years' imprisonment. The Explanatory Memorandum justifies this as follows:

It is necessary to exclude the normal privilege against self-incrimination to maximise the likelihood that information will be given that may assist ASIO to collect vital intelligence in relation to politically motivated violence, espionage or foreign interference.¹⁰

The Explanatory Memorandum further states that “the strict limitations on the admissibility of any information given during questioning will mitigate the risk of unfairness to a subject in future criminal proceedings”.¹¹ To this effect, s 34GD(6) of the Bill provides that:

- (a) anything said by the subject, while appearing before a prescribed authority for questioning under the warrant, to comply with the request; and
 - (b) the production of a record or other thing by the subject, while appearing before a prescribed authority for questioning under the warrant, to comply with the request;
- are not admissible in evidence against the subject in a criminal proceeding

There are, however a number of scenarios where statements made at the questioning stage could be admissible in subsequent proceedings. Section 34GD(6)(c) provides that answers, records or things given in questioning will be admissible against the subject in most confiscation proceedings. Sections 34E, 34EA, 34EB, 34EC, 34ED, 34EE, and 34EF outline a number of circumstances where material obtained during questioning may be disclosed to prosecutors or a proceeds of crime authority. This material can then be used by prosecutors to make a decision whether to prosecute the subject, and also used to prosecute the subject (s 34EE(1)). As one example, s 34EC(1) of the Bill provides that:

Court may order that material may be disclosed

(1) A court may, on application or on its own initiative, order that questioning material or derivative material may be disclosed to prosecutors of the subject for the material if the court is satisfied that the disclosure is required:

- (a) in the interests of justice; and
- (b) despite any direction given under subsection 34DF(1).

The order may specify the prosecutors (by any means), and the uses to which the prosecutors may put the material.

The Law Society is concerned at the potential for the provisions at ss 34E, 34EA, 34EB, 34EC, 34ED, 34EE, and 34EF of the Bill to be interpreted broadly, in a way that would unreasonably abrogate the privilege against self-incrimination.

4.2. Rights of the child

Article 37(b) of the *Convention on the Rights of the Child* (“CRC”), to which Australia is a party, prohibits arbitrary detention of children, and states that detention of a child should only occur as a measure of last resort and for the shortest appropriate period of time. Article 37(d) of the CRC provides for the right to legal assistance and the right to challenge their detention. Those obligations apply even to children charged with or convicted of serious crimes.

The existing detention warrant framework in the ASIO Act can be applied to children aged 16 and over. The new compulsory questioning framework proposed by the Bill would apply to

¹⁰ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020, 99.

¹¹ Ibid 100.

children aged 14 and over. There are safeguards in the Bill that apply specifically to children, including:

- A provision that limits the ability to obtain a warrant and apprehend a child to circumstances where the child is the target of an investigation in relation to politically motivated violence (s 34BB).
- A requirement that a parent, guardian or other suitable representative be present (s 34BD(2)(a)) and in addition that a lawyer be present when a child is questioned (s 34FA(1)). However, both the minor's representative and their lawyer can be removed and replaced if they are unduly disrupting questioning.
- Questioning may only occur for continuous periods of two hours or less, separated by breaks (s 34BD(2)(b)).
- In considering whether to issue a warrant for a child aged 14 or over, the Attorney-General must consider their best interests, including in relation to their age, maturity, background, physical and mental health, and right to receive an education (s 34BB(3)).

Notwithstanding these safeguards, the Law Society is concerned that the provisions in the Bill relating to children fall short of the standards in the CRC. While questioning can only occur for a continuous period of two hours or less, the total questioning period applicable to all subjects, including minors, is initially 8 hours, extendable up to 24 hours (s 34DJ). A person questioning a minor may request the prescribed authority to extend the questioning period in the absence of the minor's representative (s 34DJ(6)(c)). If an interpreter is present, the permitted questioning period is up to 40 hours (s 34DK). Time taken to rest or recuperate, receive legal advice, receive medical attention, as well as other activities outlined at s 34DL(b) does not count towards the questioning period. As a result of these provisions, a minor may be in the custody of ASIO for two days or more, without any arrest having been made, and potentially without legal advice from their preferred lawyer. This appears to bring the Bill into conflict with the CRC.

Should you have any questions or require further information about this submission, please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,



Richard Harvey
President