



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: HRC/PuLC:CBsb101123

10 November 2023

Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
PO Box 5350  
Braddon ACT 2612

By email: [Janina.Richert@lawcouncil.au](mailto:Janina.Richert@lawcouncil.au)

Dear Dr Popple,

**Review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979***

The Law Society is grateful to the Law Council for the opportunity to contribute to a submission to the Parliamentary Joint Committee on Intelligence and Security's (**Joint Committee**) Review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**Act**). The Law Society's Human Rights and Public Law Committees have contributed to this submission.

At the outset, we note that the task of commenting on national security legislation is difficult. As outsiders to the national security community, we do not have an in-depth understanding of evolving national security threats and therefore are unable to fully assess whether the scope of powers conferred on ASIO are necessary and proportionate. Further, the unique mission of ASIO means that it is difficult to draw relevant comparisons to other legislative schemes where the state has compulsory questioning and information gathering powers, such as occurs in the criminal justice or anti-corruption schemes.

The 2022-23 Annual Report of the Inspector General of Intelligence and Security (**IGIS**) states that IGIS was not notified of any use of ASIO's compulsory questioning powers, and therefore did not attend any questioning sessions during the reporting period.<sup>1</sup> Even if the powers are used sparingly and with the oversight of IGIS, it is important to be attuned to the human rights implications of the compulsory questioning framework. Particular attention should be paid to the way in which it interacts with numerous rights contained in the *International Covenant on Civil and Political Rights*, for example the right to freedom of movement (Art 12), the right to privacy (Art 17) and the right against arbitrary detention (Art 9).

The Law Society is of the view that a compulsory questioning regime, which provides for the exercise of intrusive powers, must contain strong safeguards to protect individuals, particularly children, as well as preserving the right to legal representation and the privilege against self-incrimination. We remain concerned by the significant reduction in safeguards that occurred

---

<sup>1</sup> Inspector General of Intelligence and Security (**IGIS**), [Annual Report 2022-23](#) (Report, 25 September 2023) 98.

with the expansion of ASIO's questioning powers under the *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) and set out our primary concerns below.

### **Compulsory questioning powers in relation to children**

The Law Society remains concerned that the Act falls short of Australia's obligations under Art 37(b) of the *Convention on the Rights of the Child (CRC)*, which 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 time. Art 37(d) of the CRC provides for the right to legal assistance and the right for children to challenge their detention, even if they are charged with, or convicted of, serious crimes.

The minimum age that a person may be subject to a questioning warrant was lowered in the 2020 amendments from 16 years to 14 years.<sup>2</sup> At that time, no comprehensive case was put forward in the Explanatory Memorandum to the Bill, or otherwise, as to why intrusive questioning powers for children as young as 14 were necessary, particularly as mechanisms exist in the criminal law for children to be questioned by police in relation to terrorism offences.<sup>3</sup> Further, the Government provided only cursory explanations around the necessity of extending the breadth of questioning powers from terrorism-related matters to 'politically motivated violence'.<sup>4</sup>

Some safeguards are included in the legislation, for example that the Attorney-General must consider the best interests of the child when considering whether to issue a warrant,<sup>5</sup> and there are restrictions regarding the length of questioning and a requirement that a parent, guardian or other suitable representative be present, as well as a lawyer, when the child is questioned.<sup>6</sup>

Even with these safeguards, however, children who may be questioned under this framework remain highly vulnerable. For example, the Attorney-General must consider the best interests of the child, including characteristics such as physical and mental health, only to the extent such matters are known and relevant.<sup>7</sup> We submit that additional safeguards are necessary, for example requiring a support person for the child where another non-lawyer representative is not present; requiring the child's best interests to be the foremost consideration throughout the whole of the warrant and questioning process; and constraining the ability to remove the child's lawyer/limit the child's lawyer's role in questioning.<sup>8</sup>

### **Lack of oversight and accountability**

The Law Society remains concerned by the fact that the 2020 amendments removed the role of the independent issuing authority. This means that under Division 3, the Attorney-General can directly issue questioning warrants.

It is problematic that the entirety of the decision-making on the issuing of warrants is vested in the Executive. It would be preferable for superior court judges, acting as *personae*

---

<sup>2</sup> *Australian Security and Intelligence Organisation Act (ASIO Act)*, s 34BB(1)(a), as amended by *Australian Security Intelligence Organisation Amendment Act 2020* (n 38) sch 1 item 10.

<sup>3</sup> The Revised Explanatory Memorandum referred to the 2015 politically motivated shooting of New South Wales Police Force employee, Curtis Cheng, by a 15-year-old. However, no data was provided as to the magnitude of the threat posed by children below the age of 16. See Revised Explanatory Memorandum, ASIO Amendment Bill 2020 at [36].

<sup>4</sup> See, for example, Revised Explanatory Memorandum, ASIO Amendment Bill 2020 at [71].

<sup>5</sup> ASIO Act, s34BB(2) and (3).

<sup>6</sup> ASIO Act, s34BD(2).

<sup>7</sup> ASIO Act, s 34BB(4)

<sup>8</sup> See further discussion in Save the Children, Submission No 21 to the Parliamentary Joint Committee on Intelligence and Security, *Australian Security Intelligence Organisation Amendment Bill 2020* (26 June 2020); and National Legal Aid, Submission No 27 to the Parliamentary Joint Committee on Intelligence and Security, *Australian Security Intelligence Organisation Amendment Bill 2020* (30 June 2020).

designate, to undertake this role to ensure a sufficient level of independence is brought to the task.

While we recognise that other ASIO powers rely on internal authorisation by the Attorney-General, for example in relation to search warrants, computer access warrants and surveillance devices, the intrusiveness of the Division 3 questioning warrant, coupled with the way in which it restricts a broader range of human rights, in our view requires a different approach. An independent issuing authority would provide an additional layer of oversight, and help to improve accountability by ensuring that the criteria are applied lawfully and appropriately. Such an approach is also in line with what occurs in other Five Eyes jurisdictions.<sup>9</sup>

Further, we have some concerns that a subject may be limited in their ability to raise issues regarding conduct during the questioning. While a subject has the right to make a complaint to the Inspector-General or the Ombudsman during questioning, this depends on whether the prescribed authority gives a direction to defer questioning (s 34DI(1)(d) of the Act). This means that, unless the Inspector-General is, for example, present during the questioning, the discretion to enable a subject to make a complaint to the Inspector-General and possibly to suspend questioning where there is some impropriety or illegality occurring sits with the prescribing authority.

### **The right to legal representation**

We continue to hold significant concerns around the limitations on access to legal representation for persons questioned under the compulsory questioning framework as set out below:

- Section 34F 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;
- 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";
- 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 considered 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. This is a discretionary power, and the Attorney-General is under no obligation to grant the request.

We maintain the view that any person subject to the compulsory questioning framework must be entitled to access an independent lawyer of their own choosing at all stages of the questioning process, without communication or access being restricted. This is necessary for the person subject to the questioning to be able to challenge the legality and conditions of their apprehension.

---

<sup>9</sup> See IGIS, Submission No 32 to the Parliamentary Joint Committee on Intelligence and Security, *Australian Security Intelligence Organisation Amendment Bill 2020* (3 July 2020).

The very fact that this framework involves the exercise of exceptional powers suggests the need for lawyers to represent their clients in a robust and meaningful way in the course of proceedings. It is a matter of considerable concern if, in the course of protecting the interests of their client and objecting to inappropriate questioning, lawyers may be characterised as 'unduly disrupting the questioning of the subject' and removed.

### **Use of intelligence gained under Division 3**

We echo the concerns set out in the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security dated 3 July 2020 regarding the various uses of the questioning material or derivative material acquired under Division 3, particularly in light of the explicit ability for questioning to be undertaken post-charge. While added protections have been built into the legislative regime (see s 34EC which deals with a court's powers to order disclosure and to ensure a fair trial), we remain concerned that what should be an intelligence gathering activity for the purposes of protecting national security can be applied for a broader purpose in the criminal law.

It is also problematic that in cases where the questioning subject has not been charged and charges are not 'imminent', ASIO is free to disclose any information obtained by it through the compulsory questioning powers to other agencies, including the Australian Federal Police. Such information may in turn be relied upon in criminal prosecutions or as the basis to exercise criminal investigative powers.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or [sophie.bathurst@lawsociety.com.au](mailto:sophie.bathurst@lawsociety.com.au).

Yours sincerely,



Cassandra Banks  
**President**