



THE LAW SOCIETY
OF NEW SOUTH WALES

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22 September 2025

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

By email: [REDACTED]

Dear Dr Popple,

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION AMENDMENT BILL (NO 2) 2025 (Cth)

The Law Society is grateful for the opportunity to contribute to the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) inquiry into the Australian Security Intelligence Organisation Amendment Bill (No 2) 2025 (Cth) (**ASIO Bill**). The Law Society's Human Rights, Public Law, Criminal Law and Children's Legal Issues Committees contributed to this submission.

The ASIO Bill proposes substantial amendments to the operation of Part III, Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), which governs the compulsory questioning powers of the Australian Security Intelligence Organisation (**ASIO**). The Law Society has consistently expressed concern that ASIO's compulsory questioning regime authorises the exercise of extraordinarily intrusive and coercive powers, which risk undermining a person's right to silence and privilege against self-incrimination. We remain concerned by the significant reduction in safeguards that occurred with the expansion of ASIO's questioning powers under the *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) and are further concerned by the current proposal to extend those powers to additional heads of security.

1. Should the sunset clause for compulsory questioning powers be retained for these powers, noting the proposal to expand their breadth?

The Law Society considers the proposal to extend the application of adult questioning warrants to matters of sabotage, promotion of communal violence, attacks on Australia's defence system, and serious threats to Australia's territorial and border integrity to be an extraordinary expansion of ASIO's compulsory questioning remit. If this proposal is successful, we consider the repeal of the sunset clause premature. In our view, retaining and extending the sunset clause would properly force review of the necessity and proportionality of the expanded questioning powers at a later date.

However, if the proposal to expand ASIO's questioning powers is unsuccessful and the current scope of powers is maintained, we suggest it may be appropriate for the sunset clause to be repealed and replaced with legislation requiring Parliamentary review of Part III, Division 3 of the Act every three years. We suggest

that a legislated regular review may provide for better ongoing scrutiny and evaluation of these powers, including their effectiveness and necessity in Australia's evolving security environment.

2. Should the Law Council support compulsory questioning powers being extended to cover the expanded 'heads of security' as proposed by the ASIO Bill?

At the outset, we note that the task of commenting on national security legislation is complex. While the Law Society does not have the same insight into evolving or emerging national security threats as agencies directly engaged in this work, from a rule of law perspective we consider it critical that any extension of ASIO's compulsory questioning powers is only to the extent necessary to effectively and proportionately respond to identifiable security threats. As a matter of principle, the Law Society is concerned by opaque references to Australia's current "threat environment"¹ being relied on to justify the significant expansion of highly coercive and intrusive powers, where the necessity or reasonableness of such powers is not easily assessable by those external to the national intelligence community.

Further, we note that the additional heads of security are currently either undefined or vaguely defined in the ASIO Act and open to broad interpretation. If the proposal to extend ASIO's questioning powers to the additional heads of security is successful, we consider it critical that the heads of security are defined with an appropriate level of clarity and precision. Clearly defining the scope of each head of security is particularly important in circumstances where ASIO's use of questioning warrants is classified information and not subject to public scrutiny.²

We also note that the Independent National Security Legislation Monitor is presently reviewing Australia's espionage, foreign interference, sabotage and theft of trade secrets offences.³ We suggest that the Government should consider relevant recommendations arising from this review before proceeding with any expansion of ASIO's questioning powers.

3. Is the current test for issuing a warrant under section 34BA of the ASIO Act fit for purpose with an expanded remit?

The Law Society reiterates its previous concerns with respect to the test for issuing a questioning warrant under section 34BA of the ASIO Act. In particular, we consider it problematic that the entirety of the decision-making on the issuing of warrants is vested in the Executive. 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 device warrants, the intrusiveness of Part III, Division 3 questioning warrants,

¹ *ASIO Submission to the Parliamentary Joint Committee on Intelligence and Security Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (Submission to the PJCIS, 1 February 2024) [19] (**ASIO Submission**).

² *Ibid*, see [11]: "... since the changes came into effect in 2020, ASIO has used the powers to compulsorily question three people which yielded high-value intelligence relevant to security. The circumstances under which the relevant questioning warrants were obtained and used is classified."

³ See: Independent National Security Legislation Monitor, 'Review of Australia's espionage, foreign interference, sabotage and theft of trade secrets offences (Division 82 and Part 5.2 Criminal Code Act 1995)', available at <https://www.inslm.gov.au/reviews/review-australias-espionage-foreign-interference-sabotage-and-theft-trade-secrets-offences-division-82-and-part-52-criminal-code-act-1995>.

coupled with the way in which it restricts a broader range of human rights, in our view, may require a different approach. We suggest that it may be preferable, particularly considering the expanded questioning remit proposed, for superior court judges to undertake this role. Tasking superior court judges with this role, acting as *personae designatae*, may improve accountability, provide an additional layer of oversight and ensure that the criteria for issuing the warrant is applied independently and lawfully.

4. Is it appropriate to maintain compulsory questioning warrants for minors from the age of 14 years?

The Law Society does not consider it appropriate for the ASIO Bill to maintain compulsory questioning warrants for minors (**minor questioning warrants**). We have consistently expressed serious concern that ASIO's power to compulsorily question children may undermine Australia's obligations under Article 37 of the *Convention on the Rights of the Child*, which prohibits the arbitrary detention of children and provides for the right to legal assistance.

We note that when the minimum age for a minor questioning warrant was lowered from 16 years to 14 years in 2020, no comprehensive case was put forward in the Explanatory Memorandum to the Australian Security Intelligence Organisation Amendment Bill 2020, or otherwise, as to why intrusive questioning powers for children as young as 14 were warranted. More recently, in 2024, ASIO confirmed that it has never used, nor requested, a minor questioning warrant,⁴ and proposed that its power to obtain a questioning warrant for minors be repealed.⁵ In ASIO's submission to the PJCIS on *Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (Cth) (Review)*, the organisation stated:

It is important that the legislative framework enabling ASIO to perform its statutory functions provides balanced and proportionate capabilities to respond to evolving national security threats. ASIO also considers it vitally important to acknowledge when our powers may not be reasonable, necessary or in proportion to the threat. In this regard, we no longer see a strong case to support the continuance of the power to question minors under warrant.⁶

In our view, ASIO has provided cogent reasons to repeal the power to issue minor questioning warrants. ASIO has confirmed it has a range of alternative investigative methods available to respond to minors who engage, or are suspected of engaging, in activities that may threaten Australia's national security.⁷ As a matter of practicality, ASIO has also observed that by the time a minor engages in activities which reach the threshold required for the Attorney-General to issue a minor questioning warrant, it is typically a matter more appropriate for law enforcement to pursue than ASIO.⁸ Law enforcement agencies, ASIO has suggested, are better positioned to conduct disruption operations or refer relevant minors to extremism intervention programs.⁹

⁴ ASIO Submission [13].

⁵ *Ibid*, [3].

⁶ *Ibid*, [12].

⁷ *Ibid*, [14].

⁸ *Ibid*, [15].

⁹ *Ibid*.

The Department of Home Affairs similarly recommended that minor questioning warrants be reconsidered in its submission to the Review:

As an intrusive and extraordinary power, the carrying out of a minor compulsory questioning warrant would be confronting and difficult for the minor involved, with potentially enduring ramifications. The powers were introduced at an exceptional moment in world and Australian affairs, and the Department suggests it is appropriate to reflect on whether it remains necessary to maintain such an extraordinary and intrusive power.¹⁰

In circumstances where key stakeholders have suggested the repeal of minor questioning warrants, the power to question minors is not considered necessary by ASIO for national security or intelligence-gathering purposes, and ASIO has never requested nor issued a minor questioning warrant, the Law Society suggests there is no basis to maintain this power and that the power to issue minor questioning warrants ought to be repealed.

5. Do the proposed amendments to administrative safeguards and standards make supportable improvements to Part III, Division 3?

Review of Division 3 of Part III

We suggest that section 29(1)(ce) of the *Intelligence Services Act 2001* be amended to require a review of the operation, effectiveness and implications of Division 3 of Part III every three years, rather than before “the third anniversary of the commencement of the *Australian Security Intelligence Organisation 9 Amendment Act (No. 2) 2025*”, and only if the PCJIS resolves to do so, as proposed by the ASIO Bill. As noted above, we consider it important that ASIO’s intrusive questioning powers are regularly reviewed by an independent body to ensure they remain proportionate, necessary and effective in responding to Australia’s national threat environment.

Expanding the disqualifying matters for appointment as a prescribed authority

The proposed amendment to section 34AD(2) of the ASIO Act identifies additional categories of persons who are not eligible for appointment as a “prescribed authority”. We note that prescribed authorities hold broad powers under the ASIO Act, including the power to determine whether a lawyer’s conduct is “unduly disruptive”¹¹ and whether a person should be prevented from contacting a particular lawyer.¹² In our view, the proposed inclusion of these additional categories of persons as ineligible for appointment appropriately recognises that such persons are likely to have, or be perceived to have, an inherent and irreconcilable conflict of interest that would impact upon the proper performance of their duties as a prescribed authority.

¹⁰ Department of Home Affairs submission to the Parliamentary Joint Committee on Intelligence and Security Review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Submission to the PJCIS, 1 February 2024) [53].

¹¹ *Australian Security Intelligence Organisation Act 1979* (Cth), s 35FF(6).

¹² *Ibid*, s 34E(4).

Termination of appointment of prescribed authorities

While the Law Society is supportive of proposed section 34AD(9A), which states that the Attorney-General *must* terminate the appointment of a prescribed authority in certain circumstances, including if the prescribed authority becomes bankrupt or has an interest that conflicts or could conflict with the proper performance of the prescribed authority's duties, we are concerned that the Attorney-General maintains a discretion to terminate the prescribed authority for reasons of misbehaviour or incapacity. In our view, misbehaviour or incapacity of the prescribed authority should warrant termination, unless there are exceptional circumstances, as previously recommended by the Law Council.¹³

Providing reports to the Attorney-General

The Law Society supports the proposed new section 34HA(1)(aa), which requires ASIO's Director-General to report additional information to the Attorney-General about the conduct of questioning warrants. In our view, this provision would ensure the Attorney-General has better oversight of relevant conduct issues that arise in the exercise of ASIO's compulsory questioning powers.

Prescribed authority for post-charge questioning

The ASIO Bill proposes introducing an important safeguard to the conduct of post-charge questioning, namely that only a former judge is authorised to oversee the execution of post-charge questioning. We consider this a critically important safeguard, which will better ensure that an accused person's right to a fair trial is not unfairly undermined by ASIO's compulsory questioning regime.

The Law Society is available for further consultation, if required. Inquiries at first instance can be directed to Jade Fodera, Policy Lawyer, at jade.fodera@lawsociety.com.au or (02) 9926 0218.

Yours sincerely,



Jennifer Ball
President

¹³ Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, '[Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 \(Cth\)](#)' (1 March 2024), [80].