5 October 2017

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

Dear Committee Secretary,

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

Thank you for the opportunity to make a supplementary submission in response to ASIO's supplementary submission 8.6. We make this submission in our personal capacity, and are solely responsible for the views and content contained therein.

We addressed much of the substance of ASIO's supplementary submission 8.6 in our original submission to this inquiry (Submission 5, dated 21 April 2017). Below is a summary of the legislative amendments proposed by ASIO and our responses to each of them.

1. Issuing Authority

ASIO proposes that the Issuing Authority should be the Minister responsible for issuing all other special powers warrants.

The Issuing Authority is currently a Judge who consents to be appointed by the Minister. We believe that the role of an independent body in the issuing process is crucial in light of the extraordinary nature of the Questioning and Detention Regime. Our recommendation is that the role of the Issuing Authority should be *expanded* to require it to consider all relevant criteria

(including those which are currently only taken into account by the Minister in consenting to the making of an application for a Warrant).

2. Prescribed Authority

ASIO proposes that any person who has served as a legal practitioner for at least five years may be appointed as a Prescribed Authority.

We believe that the current requirement that the Prescribed Authority be a retired person who previously served as a Judge of a superior court for at least five years is appropriate and necessary. There are provisions in the ASIO Act to enable alternative people to be appointed if there are insufficient retired Judges available. However, there is no evidence that this has ever been required.

3. Threshold criteria for Questioning Warrants

ASIO proposes that the grounds on which Questioning Warrants (and a Questioning and Detention Warrants if they are retained) may be issued should be expanded to the collection of intelligence about any matter 'that is important in relation to security'.

Questioning Warrants are extraordinary in that they permit the coercive questioning by a domestic intelligence agency of individuals who may not be suspected of any crime. Australia is unique amongst western democracies in allowing such questioning. It was the extraordinary nature of terrorism which was presented as the justification for the enactment of the extraordinary Questioning Warrants regime in 2003. Coercive questioning should only continue to be permitted if it is a proportionate response to the threat of terrorism specifically (and not the broader concept of security). Even the current criteria – which are considerably narrower than the new criteria being proposed by ASIO – are not adequately targeted to this threat. Our recommendation is that these criteria should be tightened by, for example, requiring the existence of a reasonable belief that issuing a Questioning Warrant would substantially assist in the prosecution or prevention of a terrorism offence.

4. Secrecy offences

ASIO proposes that the dual offences of disclosing the existence of a Warrant and disclosing operational information relating to that Warrant should each apply for a period of five years after the expiration of a Warrant.

Our view is that the disclosure offences – as they currently stand – are already overbroad. In the first place, they are inadequately tailored to the counter-terrorism purpose of the ASIO Act. They should prohibit only those disclosures which have the potential to prejudice national security or, at the very least, include a defence for innocent disclosures. Second, the penalties are excessively long. The former Independent Monitor of National Security Legislation, Bret Walker SC, recommended that the penalty for breaching s 34ZS should be reduced from five years to two years imprisonment. Finally, the application of the operational information offence for two years after the expiry of a Warrant makes it difficult to test the legality of a particular Warrant in court or in the public domain. ASIO's proposal would exacerbate this problem by making it an offence to not only disclose operational information for up to five years after the expiry of a Warrant but also the mere existence of a Warrant as well.

In addition to the above, we wish to make some specific remarks about ASIO's proposal that either the current Questioning and Detention Warrant Regime should be retained or an alternative 'compulsory attendance' regime should be introduced.

The reality is that – despite responding to thousands of counter-terrorism leads each year – ASIO has never even considered applying for a Questioning and Detention Warrant. Detention in the absence of a criminal conviction, especially of a non-suspect who does not present any material danger to themselves or the community, is difficult to justify in any democracy, let alone where it is of little utility in responding to the threat of terrorism.

In its supplementary submission 8.6, ASIO presents two scenarios in which a 'more tactically flexible' Questioning and Detention Warrant might prove useful. This is significant because of the conclusion reached by the former Independent National Security Legislation Monitor, Bret Walker SC, in his 2012 Annual Report that '[n]o scenario, hypothetical or real, was shown that would require the use of a QDW where no other alternatives existed to achieve the same purpose'. Neither of these scenarios goes to the core of the argument made by Walker. This is because in each of the scenarios presented by ASIO, the availability of other measures – some criminal, some civil and some administrative – means that it would be unnecessary to rely upon a Questioning and Detention Warrant.

The first scenario concerns a foreign fighter who returns from Syria or Iraq. One option in such circumstances is to charge that person with one of a number of applicable criminal offences, including under the foreign incursions regime, doing an act in preparation for a terrorist act, membership of a terrorist organisation and, finally, travel to a declared area. The last of these

offences was introduced in 2014 specifically to deal with the difficulty in obtaining sufficient proof of activities overseas to sustain a criminal conviction. In the event that there is inadequate evidence for charges to be laid immediately, the Australian Federal Police may use the pre-charge detention regime to hold the person for up to eight days (with judicial approval) for the purpose of undertaking further investigations. A further non-criminal option is to apply for a control order restricting the liberty of the person (for example, from utilising telecommunications and online media and/or contacting specific people) or a preventative detention order to hold the person incommunicado for up to 14 days under a combination of Commonwealth and State legislation. Finally, the authorities might simply rely upon surveillance – human and electronic – to monitor the person's activities upon their return to home soil. The prospect that a Questioning and Detention Warrant would be needed in respect of a returned foreign fighter is minimal at best. Not only are there a range of other options available to the authorities but the Commonwealth Attorney-General, George Brandis QC, himself stated on 27 March 2017 that 'of the 100 Australians currently remaining in the conflict zone', it was likely 'only a small number may attempt to return to Australia' in the future.

In the second scenario presented by ASIO, a major terrorist plot has been interrupted. Many of the people involved have been arrested, however, the location of several explosive devices remains unknown. The suggestion made by ASIO is that friends and family members may need to be questioned and that – in order to prevent the devices being moved or tampered with in some way – incommunicado detention is required. There are two possibilities here. One is that friends and family members are deliberately withholding information with the intention of facilitating the commission of a terrorism offence. The offence in s 101.6 of doing an act in preparation for a terrorist act would capture such a scenario. The other is that friends and family members are innocent in the sense of having no direct or indirect involvement in the terrorism plot. If the latter is correct, then there is only a very slight – if indeed any – risk of disclosure that might prejudice community safety or undermine an ongoing ASIO investigation. The level of risk is insufficient to justify detaining a person for the purposes of questioning, especially in light of the serious offences for giving false information and disclosing even the existence of a Questioning and Detention Warrant. As the former Independent National Security Legislation Monitor, Roger Gyles QC, stated in a 2016 Report, '[i]t is time to accept that the capacity to secretly and immediately detain persons whether or not they are implicated in terrorism is a step too far'.

Neither of the two scenarios discussed above adds anything meaningful to the arguments made by ASIO that a detention power must be retained. It is our view – consistent with the recommendations of both former Independent National Security Legislation Monitors – that the detention aspect of the ASIO Act should be repealed. Both Bret Walker SC and Roger Gyles QC found that Questioning

and Detention Warrants were unnecessary because there are other less restrictive means available to achieve the same purpose.

Turning to the alternative 'compulsory attendance' model raised by ASIO, we are deeply concerned that it would retain all of the problems associated with the Questioning and Detention Warrants regime whilst also whittling away some of the very limited safeguards which currently apply. In particular, the function of authorising the Australian Federal Police to detain a person the subject of a Questioning Warrant would be left entirely to the executive branch of government. There would be no place for an independent body in the issuing process. Whether detention could be authorised by the Minister would depend upon the same three broad criteria as under the Questioning and Detention Warrants regime. In addition to our opposition to the use of detention as a tool for intelligence gathering by domestic intelligence agencies, we have previously argued that these criteria are insufficiently connected to the threat of terrorism. Once a person has been detained by the Australian Federal Police, it would be for the Prescribed Authority to determine whether they should be detained for the period of questioning. As noted in response to 2 above, ASIO proposes that this Authority may be any person who has been a legal practitioner for at least five years.

We appreciate that there may be some circumstances in which it is necessary for a person to be detained pending questioning. However, a determination by the Minister that there are, for example, reasonable grounds for believing that a person may not appear for questioning is an insufficient justification for detention. Our view is that detention is only justified where there is a concrete (as opposed to generalised) risk of a person taking steps which might undermine the effective operation of a Questioning Warrant. With that in mind, we believe that a more proportionate response would be as follows.

- The ASIO Act should make it an offence for a person the subject of a Questioning Warrant to intentionally or recklessly:
    - inform a person involved in a terrorism offence that the offence is being investigated (or urge another person to do so); or,
    - destroy, damage or alter a record or thing that may be requested in questioning (or urge another person to do so).
- In circumstances where the Australian Federal Police has reasonable grounds to believe that the person has engaged or attempted to engage in the aforementioned conduct (being information which would be revealed by close surveillance), the Act would authorise immediate detention.

- Any person who is detained must be brought before a Judge as soon as practicable. The role of the Judge would be to determine whether the Australian Federal Police had reasonable grounds for their belief. If not, the person must be released immediately. If yes, then the person could be detained for the period of the questioning.

If this inquiry supports either the 'compulsory attendance' model or our proposal above, it is imperative that a limit on the period of time in which questioning may occur be included in the ASIO Act. At present, the only limit is that questioning must be conducted in no longer than 8 hour blocks up to a total of 24 hours. This questioning may be spread out across the 28 days in which the Questioning Warrant remains in effect. It would be concerning if the establishment of an alternative detention regime resulted in a significant increase in the period of detention permitted from the seven days which is presently the case to 28 days. Our suggestion is that detention should be permitted for up to 48 hours only. This is consistent with the period of time that a person may be detained under the Commonwealth Preventative Detention Order regime.

If the Committee has any questions in relation to our supplementary submission, we would be happy to give further written or oral evidence. Please do not hesitate to contact Dr Nicola McGarrity on [redacted] or at [redacted].

Yours sincerely,

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