

June 2020

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Chair
Parliamentary Joint Committee on Intelligence and Security
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Relationships Australia National Office welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security in relation to the Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill). This submission is confined to provisions in the Bill relating to

- the proposed power to question a minor aged 14 to 18 years old where the minor is the target of an ASIO investigation in relation to politically motivated violence, including terrorism, and
- powers to question persons with disability.

We do not comment on the broader architecture of obtaining warrants, questioning and apprehending adults, or on the proposed reforms to the surveillance device framework.

The work of Relationships Australia

Relationships Australia is a federation of community-based, not-for-profit organisations with no religious affiliations. Our services, provided for over 70 years, are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, living arrangements, cultural background or economic circumstances.

We respect the rights of all people, in all their diversity, to live life fully and meaningfully within their families and communities with dignity and safety, and to enjoy healthy relationships. A commitment to fundamental human rights, recognised universally and without discrimination, underpins our work. Relationships Australia contributes our practice evidence and skills to research projects, to the development of public policy, as well as to the provision of effective and compassionate supports to families.

This submission draws upon our experience in delivering, and continually refining, evidence-based programs in a range of family and community settings, including:

- children and young people
- people with disability
- older people
- people who come from culturally and linguistically diverse backgrounds

- Aboriginal and Torres Strait Islander people
- people who identify as members of the LGBTIQ+ communities
- people affected by intergenerational trauma, and
- people affected by complex grief and trauma, intersecting disadvantage and polyvictimisation.

Minor questioning warrants - rationale for lowering the age threshold

Relationships Australia notes that this Committee supported lowering the minimum age to 14 in its 2018 review of the operation, effectiveness and implications of Division 3 of Part 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (the Act). The Explanatory Memorandum to the Bill points to 'the 2015 politically motivated shooting of a New South Wales Police Force employee by a 15 year old' as demonstrating the necessity of this amendment. We understand that the Committee took the view that, as stated in the Explanatory Memorandum, 'The exclusion of people under the age of 18 years from questioning warrants, including the apprehension power, would leave a significant gap in ASIO's ability to collect crucial intelligence on threats to Australia's security'.¹

Young people under the age of 18 are vulnerable to radicalisation, as they are to grooming for other behaviours that harm them and others. This reflects their neurological development as well as broader psychosocial influences, and may be compounded for young people who are neuro-atypical or who are affected by intersectional disadvantage and polyvictimisation.

Safeguards for minor questioning warrants

The Statement of Compatibility with Human Rights in the Explanatory Memorandum (the Statement) canvasses a range of rights, set out in the Convention on the Rights of the Child,² that are engaged by the Bill.³ To the extent that the provisions of the Bill infringe those rights, infringement must be reasonable, necessary and proportionate to achieving a legitimate objective. The stated objective is national security.

The Bill contains safeguards in respect of all powers conferred, and additional safeguards attach specifically to the power to question minors. The Government regards these safeguards as sufficiently protecting the human rights of young persons in relation to whom ASIO would exercise these powers, noting, in particular:⁴

¹ At paragraph 27 of the Statement of Compatibility with Human Rights in the Explanatory Memorandum (the Statement).

² Including Articles 3, 13, 15, 16, 37 and 40.

³ As well as other more broadly applicable human rights recognised in instruments of public international law.

⁴ See clauses 34BB, 34BD(2), 34FA(1) of the Bill. See also clause 34DD for the requirements relating to prescribed authorities in relation to minor questioning warrants, and clause 34FD for prescribed authorities' directions in relation to minor questioning warrants.

- that a minor questioning warrant can only be issued ‘in relation to politically motivated violence, where the minor is the target of the investigation and where the questioning under the warrant will substantially assist in the collection of intelligence’
- the obligation to consider other methods to collect intelligence which, according to the Statement, ‘ensures that any apprehension flowing from the questioning warrant is a measure of last resort’⁵
- the obligation on the Attorney-General to consider the best interests of the child,⁶ having regard to matters specified in sub-clause 34BB(3) of the Bill and to the extent known and relevant, in deciding whether to issue a minor questioning warrant
- that a parent (or guardian or other appropriate person)⁷ and a lawyer⁸ must be present for questioning sessions (noting that lawyers and non-lawyer representatives may be removed from the interview if they are ‘disruptive’), and
- to take breaks at two hour intervals.⁹

We note that minors have rights under the Bill to take legal advice and to make permitted disclosures to specified entities, and that the protections conferred by the Bill can be supplemented by directions from the independent prescribed authority as to how questioning of a minor is conducted.¹⁰ Further, clause 34BC of the Bill provides that a questioning warrant has no effect in respect of a person under the age of 14,¹¹ and that minor questioning warrants (with their attendant extra safeguards) may be issued where there is uncertainty as to the age of the person to be questioned.

Our primary concern is with nurturing and maintaining the welfare and wellbeing of young persons in relation to whom these powers will be exercised. By definition, the welfare of such young people is significantly at risk: compromised first by having been radicalised¹² and, second, by the daunting process of being questioned by ASIO (however skilful and supportive that questioning might be). In this way, minors are doubly vulnerable – prey, not

⁵ At paragraph 28 of the Statement.

⁶ Cf clause 34BB of the Bill.

⁷ Described as a ‘non-lawyer representative’: cf paragraph 34DD(2)(c) of the Bill.

⁸ We welcome provisions in the Bill enabling financial aid to be given to persons to enable them to obtain legal advice and representation: see clause 34JE of the Bill; paragraph 601 of the Explanatory Memorandum. However, the materials publicly available do not make clear the criteria on which grants of aid may be made or declined, or how such decisions may be reviewed.

⁹ The two hour limit does not affect the permitted questioning time and additional permitted questioning time provided for in clauses 34DJ and 34DK.

¹⁰ Noting that new subsection 34GE(3) creates an offence for contravention of certain kinds of direction made by a prescribed authority; see also Explanatory Memorandum, paragraph 554.

¹¹ See also clause 34DG.

¹² Whether by deliberate grooming by predators, or by accessing radicalising influences of their own initiative.

predators - and, potentially, doubly victimised unless their engagement with ASIO is undertaken with this in mind.

Accordingly, Relationships Australia would urge the Committee to recommend that young people who come to ASIO's attention in this way should be proactively offered intensive and appropriately qualified support and resources to disengage them from radicalisation and predators who would groom them.

Such support and resources will be vital after conclusion of questioning, to support young people to process their encounter with ASIO in healthy and pro-social ways, thus proofing them against future radicalisation and building their capacity to connect and engage constructively with their families and communities.¹³ This would align with Australia's obligations under the Convention on the Rights of the Child by supporting the child's best interests, as well as furthering Australia's national security interests.

Finally, it is well-recognised that people who engage predominantly in adult-focused services and processes, but deal with children and young people more sporadically, need to be equipped with specialist knowledge and skills. These relate to understanding developmental needs, skills in trauma-informed practice, and the application of child-focused practice. Accordingly, Relationships Australia would encourage the Committee to consider recommending that:

- a person must not question a minor unless the person has received training in adolescent development and child-focused practice
- prescribed authorities must also have received training in adolescent development and child-focused practice, and
- prescribed authorities must have available to them access to specialist practitioners in adolescent development and child-focused practice, to support them in preparing directions for use in questioning minors, as well as in undertaking that questioning.

Convention on the Rights of the Child, Articles 37 and 40 – restrictions on lawyers' capacity to fulfil professional duties to vulnerable and victimised clients

The Explanatory Memorandum to the Bill states that Subdivision F:

...outlines the right of a subject to contact a lawyer and to have a lawyer and (where relevant) a minor's representative present at questioning. This subdivision sets out some limited exceptions to these rights where necessary to ensure the questioning of the subject under the questioning warrant is not frustrated.

The Bill confers on independent prescribed authorities powers to restrict:

- **choice of lawyer**, having regard to whether the independent prescribed authority 'is satisfied, on the basis of circumstances relating to the lawyer' that another person involved in activity prejudicial to security may be alerted to the existence of any

¹³ Relationships Australia acknowledges the Living Safe Together Initiative, and its potential in this context.

investigation or material within the scope of the warrant might be 'destroyed, damaged or altered' (see subclause 34F(4))

- performance of the lawyer's duty to advise and represent the young person, through the **prohibition against a lawyer intervening in the questioning or addressing the prescribed authority** before whom the questioning is taking place other than to seek clarification of an ambiguous question or a break in which to advise the young person (see subclause 34FF(3)). The Explanatory Memorandum indicates that this prohibition will ensure that '...a lawyer may not, for example, intervene in questioning to tell a subject how to respond to particular questions' (see paragraph 474), and
- performance of the lawyer's duty to advise and represent the young person, through the power to remove a lawyer who is, in the view of the prescribed authority, '**unduly disrupting the questioning**' (see subclause 34FF(6)).¹⁴ The Explanatory Memorandum indicates that this provision is intended to prevent 'unnecessary delays of questioning', so that 'questioning is not frustrated and can continue in circumstances where it is being used to obtain critical and time sensitive national security information.'¹⁵

The basis on which an independent prescribed authority can be satisfied about a lawyer's 'circumstances' is unclear on the face of the Bill. We would respectfully submit that accountability mechanisms for these decisions (including criteria for disallowing a choice of lawyer) be made clear on the face of the legislation, to support public confidence that young people's choice of lawyers is restricted only sparingly and consistently with the vital national interests in *both* security from politically motivated violence *and* access to justice through choice of legal representative.

We are deeply concerned by limits on how lawyers may discharge their duties to a particularly vulnerable cohort of client – young people who may well have been preyed upon and radicalised. This cohort merits the highest possible standard of legal assistance, rather than a service degraded by opaque and obscure restrictions, operating with minimal public scrutiny or external oversight. Lawyers' duties, developed by and for common law democracies, innately demand that they do, in fact, disrupt the exercise of coercive power by the state and thus counteract the asymmetry of power between individual citizens and the state. Lawyers who do not disrupt and who do not seek to proactively engage with questioning of their clients may, arguably, be abrogating their duties. Accordingly, we submit that:

- the blanket prohibition on intervening should be removed; it disproportionately curtails the rights of the young person to legal advice and assistance. The prohibition should be replaced by a provision that if an independent prescribed authority, in relation to a particular questioning, **takes the view that a lawyer's conduct is intentionally frustrating and obstructive**, then the prescribed authority may direct that the lawyer be removed (engaging the mechanisms for removal and replacement already included in the Bill)

¹⁴ See clause 34FG for the circumstances in which a young person's non-lawyer representative may be removed.

¹⁵ See paragraphs 477-478. Noting, too, that minor questioning warrants must be used only as a measure of 'last resort' (cf Article 37(b) of the Convention on the Rights of the Child and paragraph 28 of the Statement); this suggests that the questioning environment is likely to be fraught for all concerned.

- powers to remove lawyers or restrict their involvement in questioning should be limited only in accordance with clear, objective, public and stringent criteria
- each exercise of the power to remove a lawyer and each exercise of the power to remove a young person's non-lawyer representative, must be reported to the Inspector-General of Intelligence and Security (IGIS), with a short written statement of reasons, and
- to further bolster accountability - ASIO must not use contractors (however described) to question people under 18 years of age.

If these powers are to be exercised only as a 'last resort', then it seems unlikely that including such additional safeguards, while affording enhanced confidence in the integrity of the process, would be unduly burdensome on ASIO.

Questioning by ASIO and the 'last resort' provision

We understand that the proposal to confer these powers on an intelligence agency (rather than policing agencies, who are subject to greater public scrutiny) is anomalous among the Five Eyes countries which share common law traditions and the liberties flowing from those traditions. We note the Minister's statement, in his Second Reading Speech, that questioning powers already conferred on ASIO have been exercised 'sparingly.' If there is an explanation as to why police powers are insufficient, including in relation to post-charge and post-confiscation questioning, the Explanatory Memorandum should be explicit about what that is. More transparency, too, about what is meant by the criterion of 'last resort' would be highly desirable.

Conferral on an intelligence agency of a coercive power in relation to vulnerable and victimised minors places on the Government a heavy onus to justify it as being 'reasonable, necessary and proportionate' to achieve the objective of national security. As they stand, the Bill and the Explanatory Memorandum do not offer a sufficiently clear justification, or an explanation for what is meant by 'last resort' in this context.

Questioning warrants for persons with a disability

We are also concerned about the powers to question people with disability. The Statement says that

There may be circumstances where it is appropriate to issue a questioning warrant in relation to a person who has a disability. The exclusion of people with disabilities from questioning warrants would leave a significant gap in ASIO's ability to collect crucial intelligence on threats to Australia's security.¹⁶

The Statement asserts that the provisions in clauses 34BA and 34BB are sufficient to

¹⁶ Paragraph 84 of the Statement.

...ensure that the ability to question a person with a disability is reasonable, necessary and proportionate and supports such a person to exercise their legal capacity.¹⁷

In particular, the Statement points to

- the Attorney-General's power to impose conditions or restrictions when authorising questioning, noting that this might include a requirement that the person only be questioned in the presence of a lawyer
- the power conferred on independent prescribed authorities to appoint a lawyer, including for an adult
- the responsibility imposed on independent prescribed authorities to explain matters under clause 34DC, and
- the powers conferred on the IGIS enabling them to be present at questioning and to raise a concern under clause 34DM.

We consider that these safeguards, while meritorious in themselves, are inadequate in light of the nature of the power being conferred. It is somewhat surprising that such a 'light touch' analysis of appropriate safeguards is thought to be sufficient while a Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is underway.

The Australian Government is currently funding Relationships Australia to provide a free, independent counselling service for anyone affected by the Royal Commission, including:

- people with disability who have suffered violence, abuse, neglect and exploitation
- parents, guardians and other family members of a person with disability
- carers of a person with disability, and
- others affected by Royal Commission and who require counselling support.

The service includes:

- professional trauma-informed counselling
- warm transfers to other support services if required, and
- information and referrals about other useful services.

Against this background, we respectfully draw to the Committee's attention to the *Issues Paper – Criminal justice system* (Issues Paper) published by the Royal Commission on 14 January 2020. We consider that the issues identified by the Royal Commission in this publication are as enlivened by the powers conferred on ASIO in this Bill as they are in a

¹⁷ Paragraph 87 of the Statement.

criminal justice setting; indeed, arguably more so. For your convenient reference, we note that the Issues Paper observes that

People with disability, including young people, are overrepresented across the criminal justice systems in Australia, and are at a heightened risk of violence, abuse, neglect and exploitation in criminal justice settings. People with cognitive and/or psychosocial disability are significantly overrepresented amongst the group who are charged with or accused of criminal offences....¹⁸

First Nations people with disability face particular disadvantages in the criminal justice system. Research indicates they often experience multiple discrimination due to the intersection of racism and ableism....¹⁹

Research suggests there is a strong causal link between disability and contact with the criminal justice system.²⁰

Research into criminalisation of disability demonstrates that people with disability are more likely to be entangled in the criminal justice system than people without disability...[and] that people with cognitive and/or psychosocial disability are at a particularly high risk of experiencing criminalisation of their behaviour.²¹

The Issues Paper notes that the Australian Human Rights Commission has identified a range of problems that arise for people with disability in the criminal justice system, including:

- systematic criminalisation of disability....discriminatory attitudes of the community and law enforcement towards people with disability can influence their response to behaviours of concern....
- A lack of understanding of the rights of people with disability by those who work in the criminal justice system.
- A lack of cultural awareness and a lack of appropriate support and accommodation....

¹⁸ Issues Paper, 1, citing Eileen Baudry, 'Disability at the margins: limits of the law' (2014) 24(3) *Griffith Law Review* 370, and Ruth McCausland and Eileen Baudry, "I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 293.

¹⁹ Issues Paper, 1, citing Eileen Baudry et al, "It's just a big vicious cycle that swallows them up": Indigenous people with mental and cognitive disabilities in the criminal justice system' (2016) 8(22) *Indigenous Law Bulletin* 10, 11.

²⁰ Issues Paper, 5, citing Law Council of Australia, *People with Disability, The Justice Project Final Report – Part 1* (2018) 18.

²¹ Issues Paper, 6, citing Ruth McCausland and Eileen Baudry, "I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 290-292, and Law Council of Australia, *People with Disability, The Justice Project Final Report – Part 1*, (2018) 4.

- The limited availability of disability-aware legal assistance and services that are tailored to the needs of people with disability.²²

The asymmetry of power which we have noted above, as existing between the state and the individual, is exacerbated for

...people with cognitive or psychosocial disability, who may have difficulties understanding and navigating the criminal justice system without tailored support.... justice agencies may have failed to prevent violence, abuse, neglect and exploitation of people with disability and, in some cases, these agencies may have been perpetrators of violence, abuse, neglect and exploitation.²³

If it is Government's assessment that failure to confer questioning powers in relation to people with disability would leave a 'significant gap' in ASIO's intelligence-gathering capabilities, then we respectfully submit that more explicit protections are required to ensure that the victimisation, observed in the criminal justice system, of people with disability is not replicated in the national security system.

Accordingly, we urge the Committee to recommend that the Government amend the Bill to ensure that persons conducting the questioning, as well as independent prescribed authorities and the IGIS, have specialised knowledge and skills, to facilitate compliance with Australia's obligations under Article 13 of the Convention on the Rights of Persons with Disabilities. We would further urge that, for an additional safeguard, the Bill be amended to include, in relation to adults with disability, a provision similar to section 34BC so that, if the subject of the warrant has a disability, and the Attorney-General, Director-General and/or independent prescribed authority knew or ought reasonably to have known of the disability, then the warrant is of no effect unless the Attorney-General imposes on the warrant conditions and restrictions to ensure that:

- no questioning of the person occurs without the presence of:
 - a lawyer, and
 - such other support or assistance person/s as reasonably necessary to enable the person with disability to understand the nature and effect of the questioning process, the significance of questioning, and the relevant powers of those who are detaining and questioning, as well as to enable the person to engage with the process
- questioning occurs in a place that offers reasonable accommodation and support in relation to the person's circumstances and needs

²² Citing Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, Report (2014), 8.

²³ Issues Paper, 5.

- the independent prescribed authority makes directions as to timing of questioning, and timing of breaks in questioning, that are reasonable and appropriate for the person
- the explanations required under clause 34DC are given by the independent prescribed authority in a way, and by such methods, that are reasonable and appropriate for the person, and
- upon becoming aware that the 'subject' of the warrant is a person with disability, the independent prescribed authority must immediately notify the IGIS so that the IGIS can make a decision on whether to be present at the interview, in accordance with clause 34JB.

Further, we suggest that, if the person to be questioned is a person with disability, and that circumstance only becomes known after the warrant is issued, then no questioning can occur or continue until the Attorney-General has issued a further warrant, subject to the kinds of conditions described above.

A note on language

The Bill refers to 'subjects'. We consider that 'subject' has an effect of de-humanisation and othering that undermines the respect for human rights to which the Government has sought to have regard in designing and providing safeguards in the Bill. Those who would exercise the powers conferred by the Bill should have the personhood of their 'targets' always front of mind – most particularly when engaging with minors and people with disability. It is incongruous that this change is included in the clause which purports to act as the central acknowledgement of the personhood and human rights of those in respect of whom questioning powers are exercised.

CONCLUSION

We thank the Committee for the opportunity to contribute to its work on this inquiry, and would be happy to discuss further the contents of this submission if this would be of assistance. I can be contacted directly [REDACTED]. Alternatively, you can contact [REDACTED] National Policy Manager, Relationships Australia National, [REDACTED] [REDACTED]

Yours sincerely,

[REDACTED]

Nick Tebbey
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