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

[by email to: pjcis@aph.gov.au]

Dear Joint Committee Members

RE: REVIEW INTO THE EFFECTIVENESS OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION AMENDMENT BILL 2020

Civil Liberties Australia (CLA) welcomes this review into the effectiveness of the above Bill and thanks the Joint Committee members for the opportunity to make a submission.

CLA **does not** support the Bill.

First, **we submit that it is not appropriate for the Bill to come forward at this time.** Australia is in the middle of a pandemic emergency. The Parliament is fully engaged in dealing with the immediate health crisis and the economic and social effects that it is having. Parliaments around the country have suspended sittings or reduced their sittings. Similarly, civil society organisations and other experts who would normally analyse the Bill critically are in a poor position to do so thoroughly. We ourselves have not gone through every provision of the Bill and all the details in the supporting documents.

It is an important Bill with significant implications for civil liberties. It deserves thorough examination and proper debate. There is nothing we can see in the Minister's second reading speech or in the explanatory memorandum that explains why this Bill needs to come forward at this time.

However, CLA supports the repeal of ASIO's ability to use questioning and detention warrants (QDWs).

As the Minister reveals in his second reading speech, no such QDW has ever been sought by ASIO. While we welcome this advice given the draconian nature of the questioning and detention powers, we find it extraordinary that it has taken 17 years for such an intrusive power to be repealed. The Minister goes on to explain that these powers 'were introduced in 2003 in response to the growing threat from terrorism after the 11 September 2001 attacks in the United States.' This is a stunning example of how extraordinary powers – introduced on the basis of perceived emergencies – remain on the books nearly a generation later despite a complete lack of evidence that they are useful.

Examples such as this make us especially cautious about assurances by governments that extraordinary and intrusive measures to combat the COVID-19 pandemic – measures that fundamentally restrict the basic human rights of every Australian – will be promptly repealed as soon as the pandemic has passed. Will we, for example, still have on the books 17 years from now pandemic-related measures that control the movements of Australians, control their freedom of assembly, trace their contacts and invade their privacy?

In light of this, **CLA recommends that the Joint Committee ask the Minister to conduct and submit a thorough audit of all powers introduced ‘in response to the growing threat from terrorism after the 11 September 2001 attacks’ with the assumption that all of them will now be repealed unless the Parliament approves their continuance based on convincing reasons as to why those threats cannot be managed under traditional policing and security powers.**

CLA does not support amendments that would allow ASIO to seek questioning warrants (QWs) in relation to children as young as 14. In our view, 14 is an entirely inappropriate age for questioning under compulsion. We take no comfort from the claimed ‘safeguard’ that the Attorney-General will be required to consider the ‘best interests’ of the child when issuing a warrant. We have seen little evidence to suggest that – in this area or in others – the interests of children are given appropriate weight when compared to the claims of security agencies.

Furthermore, this lowering of the minimum age is entirely unnecessary. The Minister gives no explanation for why he thinks ASIO needs such powers to interrogate children. In fact, the Minister himself says the last QW – for a person of any age – was issued 10 years ago in 2010. During all these years, are we expected to believe there has been a cohort of 14- and 15-year-old would-be terrorists who ASIO would have desperately liked to question under compulsion but for the limitations on their powers to do so?

CLA does not support extending the use of QWs beyond terrorism to cover espionage, politically motivated violence (including terrorism) and acts of foreign interference. This is the kind of ‘mission creep’ that Parliament should be especially concerned about. Security agencies that were conferred powers to deal with one threat discover new threats to justify holding onto those powers and even extending them. If Australia faces a heightened risk of these threats that cannot be dealt with under existing powers, that should be considered separately and comprehensively – not introduced in this kind of piecemeal fashion without proper evaluation of those purported threats.

CLA does not support ‘streamlining’ the process for requesting and issuing a QW by enabling the Attorney-General to issue questioning warrants directly (including orally), removing the role of the issuing authority. What the Minister calls ‘streamlining’ is in fact removal of important checks and controls and external scrutiny of the actions of ASIO in its use of intrusive and compulsive powers. If anything, we submit that oversight and control of ASIO needs to be increased, not decreased.

In fact, given that questioning warrants have not been used for 10 years – and given that the Minister gives no evidence that they are important or necessary – **CLA recommends that ASIO’s ability to use questioning warrants be repealed rather than being expanded.** This could happen through the audit process proposed above.

CLA strongly opposes the proposed amendments to the surveillance device framework. In brief, one of the things Australians most treasure is that we live in a country where internal security agents do not run around our communities planting bugs on people, in their handbags or on their cars. In the rare instances where such surveillance is absolutely necessary, the current system – which requires external authorisation – remains entirely appropriate.

The Minister’s speech tries to assure us that the internal authorisation framework will include ‘numerous safeguards, such as oversight and reporting’. What does the reporting amount to? The explanatory memorandum makes clear that the reporting is nothing more than ‘periodic reporting to the Attorney-General in relation to the number of internal authorisations and information pertaining to those activities’. And the oversight? It is ‘the requirement to maintain a register of this information to allow IGIS oversight’. Frankly, calling these arrangements ‘safeguards’ is laughable. We are not reassured by them and we suggest the Joint Committee should not be either.

The explanatory memorandum and the Minister's second reading speech give vague justifications for these proposed powers – like 'modernising' and 'operational agility' – but otherwise give no evidence to support the need for these expanded capabilities. The explanatory memorandum says the current arrangements place ASIO at a 'disadvantage' when it is engaged in joint operations with law enforcement agencies. This makes no sense at all. If ASIO is engaged in joint operations with agencies that have these surveillance powers, then it can be left to those other agencies to perform the roles of planting devices on people and their property, subject to their own authorisation and oversight arrangements. It should be explained to ASIO that that is what 'joint operations' means. Each agency performs different roles and cooperates to achieve the desired objective – they do not all perform the same role and they don't all require identical powers.

The Minister refers in his speech to 'attack planning by small groups or lone actors using easily acquired weapons, who can move rapidly from planning to action'. So, are we to believe that these 'lone actors' will be the target of the proposed surveillance and tracking operations? The Australian public and the Australian Parliament should be highly sceptical of such language by ministers. We have heard it all before. There is now a sufficient track record for the Australian Parliament and the Australian public to conclude with a high degree of confidence that if these amendments are passed, the primary target of surveillance and tracking will be:

- investigative journalists doing their jobs
- whistleblowers who seek to expose wrongdoing and corruption or who might otherwise embarrass governments and officials and
- the targets of commercial espionage that Australian security agencies apparently conduct at the behest of petroleum companies.

The Bill provides no safeguards against this kind of misuse (or 'mission creep') and, likewise, the explanatory memorandum and the second reading speech provide no assurance – not that any such assurance would give the Australian public any confidence.

Defund ASIO

In recent protests in the United States, the cry has gone out: 'Defund the police'. This does not mean abolishing police forces. It means ensuring the police focus only on what is essential to their role in society – within carefully prescribed limits – rather than on acquiring military-style assets and restricting the liberties of law-abiding citizens. Surplus funding and other resources are then reallocated to other services and non-security agencies that work towards building safe and harmonious communities.

CLA believes a similar re-evaluation of Australia's security agencies urgently needs to occur. These agencies went through significant expansion after the September 11 terror attacks as did the range of their powers and the assets and capabilities they acquired. As is made clear by this Bill, some of these powers have not been used for years or were never useful from the start. It should be shocking to the Joint Committee that security agencies are seeking to expand those powers so as to use them against children when surely any security threat those children pose can be managed through traditional non-emergency powers. And it should be shocking that those security agencies propose to skulk about our communities planting surveillance devices with no authorisation save for the say-so of someone within the organisation itself.

Meanwhile, Parliament must be aware of how other powers it has approved over the years have been misused or used for purposes other than those intended. Raids on the homes and offices of journalists, relentless persecution of whistleblowers who expose official corruption, and secret trials of lawyers are only the instances that have come to light. All were based on powers that were sold to Parliament on the basis of 'keeping Australians safe from terrorism'. These are all sure signs that these agencies need to be reined in and their budgets diverted to more useful purposes.

Recommendations

In line with the points made above, CLA makes the following recommendations:

1. This Bill should not come forward at this time. Given that no urgency has been articulated by the Minister, the Bill should not be considered until the public and the Parliament are able to scrutinise it properly and examine the evidence for it, including in public hearings, after the pandemic emergency has passed.
2. ASIO's power to use questioning warrants should be repealed given there is no evidence they have been useful for the last ten years.
3. If ASIO's questioning warrants are not repealed, the minimum age of questioning must not be lowered to 14 given the lack of evidence provided that questioning under compulsion of such young children is necessary to protect the public.
4. If ASIO's questioning warrants are not repealed, they certainly should not be expanded to cover espionage, foreign interference and politically motivated violence. If the Minister considers that Australia faces a heightened risk of these threats and that existing powers are inadequate to deal with them, his evidence should be put to Parliament and the Australian people comprehensively, not in this piecemeal and 'creeping' fashion.
5. ASIO should not be allowed to plant surveillance devices on people or their possessions except in very rare instances and with external authorisation as per the current arrangements.
6. The Minister should be instructed to audit and report publicly on all powers conferred on police, intelligence services and other security agencies since 11 September 2001, with a view to wholesale repeal and reversion to normal pre-9/11 security and policing powers, unless specific justification is made and approved by Parliament for specific powers to be retained.
7. Defund ASIO and other security agencies. In line with the above reduction in powers, the budget (and staffing) of ASIO and other security agencies should be significantly reduced in keeping with the threat now, not the threat as perceived in September 2001. The funds recouped should be reallocated to traditional community policing, community services and the general budget (and towards post-COVID-19 economic recovery for the nation).

Yours sincerely

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President

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Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high standards that Australia has traditionally enjoyed and continues to aspire to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all Australians.