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Submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *Australian Security Intelligence Organisation Amendment Bill 2020* (the Bill)

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Introduction and background

1. The International Commission of Jurists (Victoria) (**ICJV**) welcomes the opportunity to address the Parliamentary Joint Committee on Intelligence and Security regarding the *Australian Security Intelligence Organisation Amendment Bill 2020* (**the Bill**).

2. Constituted primarily of members of the legal profession, ICJV promotes an impartial, objective and authoritative approach to the protection and promotion of human rights through the rule of law. ICJV has provided previous submissions to this effect.

3. While ICJV welcomes the potential repeal of the Australian Security Intelligence Organisation's (**ASIO**) power to detain for questioning, we express considerable concern regarding the expansion of powers proposed in this Bill. The current and proposed coercive powers fail to strike a balance between protecting the community while upholding the rule of law.

4. Lord Bingham, former President of the Supreme Court of the United Kingdom described the 'rule of law' as a composite of several sub-rules. In sum and relevant to this submission, he stated that the upholding the 'rule of law' requires that:

    - The law be accessible, understandable, and predictable;
    - Law, and not discretion, should resolve issues of liability or protections of rights;
    - The law applies equally to all;
    - The law must protect fundamental human rights; and
    - State compliance to international obligations is required.[1]

5. The amendments as proposed in the Bill present significant concerns for each of these fundamental sub-rules of the rule of law. This unnecessary extension of extraordinary powers—particularly as this Bill was introduced in a limited sitting during a global pandemic—undercuts fundamental democratic law-making. It expands questioning power to 'politically motivated violence', a category of offence that is ripe for unpredictability and exploitation. It undermines equal access to legal representation and gives the state the power to censure an individual's choice of legal representative. It potentially inhibits legal professionals from supporting their clients during questioning and it allows children as young as 14 to be questioned extensively. No threat to national security by terrorists or those with extreme political views can justify such a departure from democratic and rule of law processes.

6. Concern regarding the subject of these amendments is not new. We refer to the International Commission of Jurists Australia 2005 submission regarding the same Division and reiterate that:

> [R]especting the rule of law, by, for example, affording even terrorist suspects full fair trial guarantees, is not evidence of weakness, but is a sign of strength of character, culture and identity. If, on the other hand, we take away those rights to an extent that our basic beliefs and principles are

[1] See Lord Tom Bingham, *The Rule of Law*, Penguin Books, UK (13 April 2011).

> compromised, then, in fighting this war on terrorism, we are at a risk of losing the rule of law which underpins democratic society.[2]

7. We also recall the 2017 submission of the Law Council of Australia that ASIO's current questioning and detention powers "are unnecessary to prevent or disrupt a terrorist act, given other powers already in operation."[3]

8. In reference the present legislation, we support the comments of Pauline Wright, President of the Law Council of Australia, who noted:

> The Law Council of Australia is very concerned with some aspects of the proposed amendments to the Australian Security and Intelligence Act 1975 (Cth) (ASIO Act) released today in parliament … The proposal to reduce the age of minors who may be subject to questioning from 16 to 14 years and the conferral of powers on police to apprehend and detain persons for the purpose of bringing them in for compulsory questioning also requires detailed scrutiny by the Law Council, amongst the many other amendments.[4]

9. ASIO's questioning and detention powers set out in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**), are due to sunset on 7 September 2020.

Summary of submissions

10. Foremost, ICJV calls for full Parliamentary scrutiny of such extraordinary powers and proposed powers, to include debate on protection of and commitment to human rights and the rule of law and judicial review of the operation of law through judicial warrants and oversight.

11. In addressing the Bill's content, ICJV has not dealt with every proposed provision, nor with the preceding legislation relating to compulsory questioning. This is because, overall, it is submitted that ASIO's other powers, powers of federal, state and territory police, and those of the Australian Criminal Intelligence Commission (**ACIC**), are sufficient and extraordinary powers should not be extended beyond the current sunset at all.

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[2] International Commission of Jurists Australian Section, Submission to the Joint Parliamentary Committee on ASIO, ASIS, and DSD: Review of Division 3 of Part 3 of the ASIO Act 1979 (Cth), Submission 60, 24 March 2005.

[3] Law Council of Australia, "Time to rethink ASIO's compulsory questioning and detention powers", 9 August 2017 available at https://www.lawcouncil.asn.au/media/media-releases/time-to-rethink-asios-compulsory-questioning-and-detention-powers

[4] Law Council of Australia, Statement on proposed amendments to the ASIO Act by Law Council President, Pauline Wright, 13 May 2020, available at https://www.lawcouncil.asn.au/media/media-releases/statement-on-proposed-amendments-to-the-asio-act-by-law-council-president-pauline-wright.

12. Alternatively, it is submitted that the Bill's proposals should be altered in at least the following three respects:

- Such extraordinary powers should not be extended beyond investigating terrorism;
- Compulsory questioning of all minors under 18 must be removed—compulsory questioning of children should never occur and certainly not without legal representation and appropriate procedural adaptations;
- Provisions allowing the state to remove an individual's chosen legal representative must be removed.

13. In making these alternative submissions, ICJV maintain the overall objection above. If enacted, ICJV calls for a further sunset clause of no longer than 6 months, together with transparent judicial evaluation.

Full Parliamentary scrutiny is necessary, including debate on protection of and commitment to human rights and the rule of law

14. The Bill's Explanatory Memorandum (**the Memorandum**) states that it "contains high-priority amendments to address the changing security environment in which ASIO is expected to work", and that it ensures ASIO's compulsory questioning framework is "fit for purpose, operationally effective and responsive to some of the most serious security threats facing Australia, namely, espionage, foreign interference and politically motivated violence". This suggests legitimate urgency. However, the Memorandum's first paragraph states the Bill is implementing the Government's response to a report by the Parliamentary Joint Committee on Intelligence and Security, a report that was tabled two years ago in May 2018.[5]

15. The Bill's timing is questionable given that it seeks to increase the power of the State and decrease the amount of scrutiny on its actions in a time of emergency. Proposing these changes during a pandemic, and after the removal of the Council of Australian Government, removes the opportunity for meaningful review. These exceptional measures should not be considered in limited parliamentary sittings, but rather by a properly informed Parliament which includes placing the Bill before the Legal and Constitutional Committee, allowing for further community consultation and careful parliamentary deliberation, in line with Australia's human rights obligations. On the Government's own assessment under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Bill engages with obligations regarding thirteen human rights and four international human rights treaties to which Australia is a party, including [at paragraph 16 of the Memorandum]:

- "[T]he right to freedom from torture, cruel, inhuman or degrading treatment or punishment in Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and Articles 2 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);
- the right to humane treatment in detention in Article 10 of the ICCPR;

[5] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO

- the right to freedom from arbitrary detention and arrest, and the right to liberty and security of the person in Article 9 of the ICCPR and the right of the child to liberty and security of person and the freedom from arbitrary arrest, detention or imprisonment in Article 37 of the *Convention on the Rights of the Child* (CRC); … and
- the right of the child to have their best interests as a primary consideration by courts of law, administrative authorities or legislative bodies in Article 3 of the CRC…".

16. Given the numerous rights engaged, rigorous debate is necessary to ensure that fundamental human rights are protected and that there is compliance with Australia's international human rights obligations. As noted by President of the Australian Human Rights and Equal Opportunity Commission John von Doussa QC in 2006 (notably, addressing human rights in an age of terrorism):

> International human rights law was forged in the wake of devastating periods of global conflict and *already strikes a balance between security interests and the rights which are considered fundamental to being human*. Sometimes individual rights need to be balanced against the need to protect collective security.[6] (Emphasis added)

17. Thus, given the Government's assertions that these amendments are "high priority" and their implementation could fundamentally impact the human rights of both adults and children, this Bill must have further scrutiny.

Extraordinary powers should also be subject to independent judicial scrutiny

18. The impartial administration of justice according to law is a power and a duty of government.[7] It is important to recall that ASIO is not a law enforcement agency. These proposals are about state surveillance and coercive questioning powers in a democracy, not during times of war, where the proposals are intended to extend to those potentially engaged in political dissent, including children. Pre-emptive policing is known to be harmful and oppressive, and requiring independent scrutiny.[8] This applies even more so to ASIO.

19. Scrutiny needs to occur at every stage of a state questioning exercise and, in the context of compulsory questioning, this should include systemic judicial oversight and evaluation of ASIO practices. It is not a justification for ASIO to avoid fair process simply because ASIO has a preferred model. ICJV does not support any relaxing of the checks and balances which apply to questioning warrants at present and does not support the use of further extraordinary powers. There is, ICJV suggests, no justification for reducing the level of scrutiny of ASIO activity.

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[6] https://humanrights.gov.au/about/news/speeches/reconciling-human-rights-and-counter-terrorism-crucial-challenge

[7] https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_sept05.html

[8] https://www.law.unsw.edu.au/news/pre-emptive-policing-harmful-and-oppressive-and-requires-independent-scrutiny

20. ICJV endorses the views of Professor Williams to the 2018 Committee[9] that "all criteria should be subject to strict, independent scrutiny by the judicial officer, as such officers 'can bring powers of reason and analysis to the matter that the Attorney-General may lack". [10] A multi-step warrant authorisation process must be maintained.

21. Allowing a Minister to issue warrants is wholly inappropriate. The judiciary should have a primary role in warrant processes particularly in such a draconian context. The role of independent scrutiny of extraordinary powers of the state is crucial. ICJV does not support the concessions made by the Law Council to the 2018 Committee and endorses the submissions by Dr McGarrity and Professor Williams when they submitted:

> 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.[11]

22. Similarly, in relation to personal warrants, ICJV endorses Dr McGarrity and Professor Williams' arguments that having judges serve in this role was 'appropriate and necessary'. They added:

> 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.[12]

Extraordinary powers should not be extended beyond investigating terrorism

23. Schedule 1, Division 3—Compulsory Questioning Powers, Section 34A of the Bill defines the purposes and matters for which the compulsory questioning powers may be used. It defines '*adult questioning matter*' as (emphasis added):

> [A] matter that relates to the protection of, and of the people of, the Commonwealth and the several States and Territories from any of the following:
>
> (a) espionage;
> *(b) politically motivated violence;*
> (c) acts of foreign interference;

[9] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report/section?id=committees%2Freportjnt%2F024080%2F25026

[10] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report, at 3.37.

[11] Ibid at 3.65

[12] Ibid.

whether directed from, or committed within, Australia or not.

Further, s 34A defines '*minor questioning matter*' as (emphasis added):

> [A] matter that relates to the protection of, and of the people of, the Commonwealth and the several States and Territories from *politically motivated violence*, whether directed from, or committed within, Australia or not.

24. Schedule 1, Part 1, s 2, the Bill further envelopes the current Act's definition of '*terrorism offence*' into its definition of '*politically motivated violence*.' Thus, the expansion of the term '*politically motivated violence*' plays a central role in the Bill's amendments.

25. The Government's use of the term 'politically motivated violence' should be greeted with considerable scepticism. Under the Act at s 4, its definition is extremely broad, including:

> (a) [A]cts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or
>
> (b) acts that:
>
> (i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and
> (ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or
>
> (ba) acts that are terrorism offences; [to be substituted with the definition for 'terrorism offences' later in the section] or
>
> (c) acts that are offences punishable under Division 119 of the *Criminal Code* , the *Crimes (Hostages) Act 1989* or Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*; or
>
> (d) acts that:
>
> (i) are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976* ; or
> (ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General.

26. Subsection (a) is the broadest. It raises considerable concern whether and how such a compulsory questioning regime would be available to question political protesters attending rallies at which 'unlawful harm' is alleged. It should be noted that the Commonwealth *Criminal Code 1995* (**Criminal Code (Cth)**) Division 100, s 100.1 excludes political protests that do not intend harm from the classification 'terrorist acts.'

27. The 'politically motivated' element of 'politically motivated violence' must be examined closely as the space for political protest is diminishing. The *International Covenant on Civil and Political*

Rights (**ICCPR**), to which Australia is a party, protects both the right to free expression[13] and the right to peaceful assembly[14]—together constituting a right to peaceful protest. Even before to the introduction of COVID-19 restrictions, States were constricting the right to protest. In 2015, the Australian Law Reform Commission noted a troubling potential use of 'incitement' (as in s 11.4 Criminal Code (Cth)) to restrict peaceful protest on Commonwealth land. It also quoted the Human Rights Committee's concern in relation to 'encouraging terrorism' in s 80.2C Criminal Code (Cth), stating the offence was 'overly broad' and could 'apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience in mind.'[15]

28. In 2016[16] and 2017,[17] the Human Rights Law Centre released two reports respectively documenting the trend in both State and National Government introduction of laws and policies to negatively impact free speech and assembly. In 2018, the Report of the United Nations Special Rapporteur on the situation of human rights defenders (**Special Rapporteur**) on his mission to Australia stated the Special Rapporteur was 'alarmed' at the 'trend of introducing constraints' on protest freedoms including 'what essentially is anti-protest legislation.'[18] And in 2019 CIVICUS Monitor downgraded Australia from an 'open' country to one where civil space has 'narrowed',[19] citing new laws to expand government surveillance, prosecution of 'whistleblowers', and raids on media organisations.[20]

29. While this submission does not condone violence in any way, it does raise concern regarding how ASIO will determine and define 'politically motivated violence' in its compulsory questioning regime. Without adequate scrutiny and little independent oversight, it will largely be left to ASIO to decide where it draws the line. As noted above, upholding the rule of law requires the law to be knowable and predictable. Presently, the amendments are not.

30. As noted above, the definition of 'terrorism' in the Criminal Code (Cth) includes any political, religious or ideological cause. This definition was developed to contain safeguards for civil

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[13] *International Covenant on Civil and Political Rights (1966)* art 19(1).

[14] *International Covenant on Civil and Political Rights (1966)* art 21.

[15] https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/

[16] http://web.archive.org/web/20160224003721/http://hrlc.org.au/wp-content/uploads/2016/02/HRLC_Report_SafeguardingDemocracy_online.pdf

[17] https://www.hrlc.org.au/reports/2017/6/18/report-defending-democracy

[18] https://digitallibrary.un.org/record/1662890?ln=en

[19] https://www.theguardian.com/world/2019/dec/07/australias-civil-rights-rating-downgraded-as-report-finds-world-becoming-less-free

[20] https://monitor.civicus.org/PeoplePowerUnderAttack2019/

liberties.[21] This proposed legislation seeks to erode those protections which are fundamental to Australian values. The proposals are closer to the rule of power rather than the rule of law.[22]

Compulsory questioning of minors must be removed

31. The Bill proposes to decrease the age for questioning minors, permitting questioning of children as young as 14. This is a change from permitted questioning with a warrant of children as young as 16 in ASIO Act s 34ZE. Notably in the current Act s 34ZE(4)(a), a questioning warrant can only be issued where the Attorney-General is satisfied on reasonable grounds that:

> [I]t is likely that the person will commit, is committing or has committed a *terrorism offence* (emphasis added).

32. In s 34BB(1)(b), the Bill states the test for issuing a questioning warrant would broaden to the Attorney-General being satisfied that:

> [T]here are reasonable grounds for believing that the person has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of, and of the people of, the Commonwealth and the several States and Territories from *politically motivated violence*, whether directed from, or committed within, Australia… (emphasis added).

33. The Bill's s 34BB(2) and (3) would require the Attorney-General to take into consideration "the best interests of the person" in granting the warrant.

34. The Explanatory Memorandum provides little evidence this change is necessary. If the risk identified is the use of teens to commit terror, this does not justify coercive powers in relation to children when existing investigative and control powers are already so significant. At paragraph 27, the Memorandum cites: "The need for the lowered age is illustrated by the 2015 politically motivated shooting of New South Wales Police Force employee by a 15 year old." Although the incident itself was a tragedy, such incidents are well within the capability of existing law enforcement and do not justify the removal of fundamental safeguards from oppressive state activity.

35. As a signatory, Australia has notable obligations under the *Convention on the Rights of the Child* (**CRC**). Article 1 of the CRC defines a child as "below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". The 'age of majority' is not the 'age of criminal responsibility'.

36. All children, when subject to questioning, require particular measures to ensure that their procedural rights are upheld and their best interests protected. This is even more so for children

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[21] http://www.austlii.edu.au/au/journals/UWALawRw/2007/5.pdf

[22] https://www.ruleoflaw.org.au/wp-content/uploads/2012/10/Lindgren-Rule-of-Law-Its-State-of-Health-in-Australia-2012.pdf

with additional specific vulnerabilities for whom the right to individual assessment is of special importance.

37. The Explanatory Memorandum at paragraph 29 states that the Bill's requirement for the Attorney-General to take into consideration "the best interests of the person" fulfils Australia's obligations under CRC Article 3 requiring consideration of "the best interests of the child."[23] Consideration of the "best interests of the child" has been incorporated into domestic law: in *Minister for Immigration and Ethnic Affairs v Teoh*, Gaudron J referred to a similar common law principle[24] and as stated by Spigelman CJ in *R v Togias*[25] '[i]nternational treaties and conventions to which Australia is a party, but which have not been incorporated in Australian law, have been invoked in Australian legal reasoning', including as an appropriate influence on the development of the common law.[26] Accordingly, in all actions concerning children, the 'best interests of the child' is a primary consideration, even in contexts of national security.

38. However, Australia also has an obligation under CRC art 40(2)(b)(iv) to recognise and protect a child's freedom from compulsory self-incrimination. Proposed s 34GD removes the privilege against self-incrimination in questioning. Thus, the Bill and Memorandum fundamentally ignore that in *no circumstances* would compulsory questioning of a child under 18 be in their best interests, particularly where the privilege against self-incrimination has been revoked.

39. Addressing the right to freedom from compulsory self-incrimination, General Comment 10 of the Committee on the Rights of the Child states:

> 56. In line with article 14 (3) (g) of ICCPR, CRC requires that a child be not compelled to give testimony or to confess or acknowledge guilt. This means in the first place - and self-evidently - that torture, cruel, inhuman or degrading treatment in order to extract an admission or a confession constitutes a grave violation of the rights of the child (art. 37 (a) of CRC) and is wholly unacceptable. No such admission or confession can be admissible as evidence (article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*).
>
> 57. *There are many other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. The term "compelled" should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child's development, the length of the interrogation, the child's lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: "You can go home as soon as you have given us the true story", or lighter sanctions or release are promised* [Emphasis added].

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23 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**). The CRC was signed by Australia on 22 August 1990 and ratified on 17 December 1990.

24 (1995) 183 CLR 273, 304.

25 [2001] NSWCCA 522.

26 *R v Togias* [2001] NSWCCA 522 [33].

> 58. The child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning. There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. The court or other judicial body, when considering the voluntary nature and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child. Police officers and other investigating authorities should be well trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions or testimonies.[27]

40. As will be discussed below regarding s 34FF, 'access to a legal or other appropriate representative…[and] the presence of his/her parent(s) during questioning' is not guaranteed under the Bill. While access to *a* legal representative is required for questioning, the child's chosen or allocated representative may be removed under the Bill's provisions.

41. While the Explanatory Memorandum states that the Government has ensured adequate protections are in place, this ability to question children 14 or older in relation to a likely expanding definition of 'politically motivated violence' is ripe for over-use and misuse.

Provisions allowing the State to remove an individual's chosen legal representative should be removed

42. The proposed Bill impedes the work of legal counsel and thus impedes access to justice for an individual under questioning. Section 34FF states:

> (1) This section applies if:
>
> (a) the subject of a questioning warrant is appearing before a prescribed authority for questioning under the warrant; and
>
> (b) a lawyer for the subject is present during questioning.
>
> *Breaks in questioning*
>
> (2) The prescribed authority must provide a reasonable opportunity for the lawyer to advise the subject during breaks in the questioning. [Note omitted]
>
> (3) The lawyer must not intervene in questioning of the subject or address the prescribed authority before whom the subject is being questioned, except:
>
> (a) To request a clarification of an ambiguous question; or
>
> (b) To request a break in the questioning of the subject in order to provide advice to the subject.
>
> (4) During a break in the questioning of the subject, the lawyer may request the prescribed authority for an opportunity to address the prescribed authority on a matter. [Note omitted]

[27] https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf

(5) The prescribed authority must approve or refuse a request under subsection (3) or (4).

Removal of lawyer for disrupting questioning

(6) If the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning of the subject, the prescribed authority may direct a person exercising authority under the warrant to remove the lawyer from the place where the questioning is occurring.
…

Section 34FG states:

(1) This section applies in relation to a minor's representative for the subject of a minor questioning warrant who either:
    (a) is, or has been, contacted by the subject as permitted by the warrant or a direction given by a prescribed authority; or
    (b) is, or has been, present when the subject was before a prescribed authority for questioning under the warrant.

(2) If a prescribed authority considers that the minor's representative's conduct is unduly disrupting questioning of the subject, the prescribed authority may, subject to subsection (3) direct a person exercising authority under the warrant to remove the minor's representative from the place where the questioning is occuring.
…

43. Section 34FF(6) and s 34FG(2) are of gravest concern. 'Unduly disrupting' is not defined in the Bill; although the Bill provides the lawyer an opportunity to clarify questions or ask for breaks to give advice, it does not indicate whether necessary repetition of these activities will be permitted. As written, the Bill effectively provides the State to remove an individual's lawyer at its discretion.

44. Seeking to ensure a client is treated with humanity and respect, understands questions put by investigators and is allowed to answer freely, including ensuring that there is proper translation taking place and also objecting at once to oppressive questioning are essential roles for a lawyer when a client is being questioned by a state authority.[28] It may be disruptive but that is an acceptable and essential course for a legal representative to take, particularly when representing children. It upholds the right for equal treatment before the law and plays a valuable role in ensuring the presumption of innocence.[29] Any state control over the of the legal profession is to be abhorred.

45. Access to justice is foundational in the protection of fundamental human rights; it is a cornerstone of the rule of law. It ensures equality before the law and that law—and not discretion—governs our legal system. Australia's international obligations under Article 14 of ICCPR require

[28] https://justice.org.uk/wp-content/uploads/2015/01/Giving-legal-advice-at-police-stations-practical-pointers.pdf

[29] https://www.ohchr.org/Documents/Publications/training9chapter6en.pdf

upholding the right to a fair trial for an accused person. This right, as confirmed by the United Nations Human Rights Committee, extends beyond criminal proceedings.[30] The Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, encouraged the application of these principles to "any judicial or extrajudicial procedure aimed at determining rights and obligations."[31] To enable effective access to the courts and a fair hearing, access to legal information and counsel are essential.[32] This includes timely access to counsel and confidentiality.[33]

46. The UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990,[34] describes principles that are consistent with long-established common law rights.[35] These include the following:

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

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[30] https://www.lrwc.org/international-law-right-to-timely-and-confidential-access-to-counsel-report/

[31] https://www.lrwc.org/international-law-right-to-timely-and-confidential-access-to-counsel-report/

[32] https://www.lrwc.org/international-law-right-to-timely-and-confidential-access-to-counsel-report/

[33] https://www.lrwc.org/international-law-right-to-timely-and-confidential-access-to-counsel-report/

[34] https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

[35] https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/10-fair-trial/right-to-a-lawyer/

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

47. ICJV supports the submission of the Law Council to the Parliamentary Joint Committee on Intelligence and Security set out in the 2018 review of the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act 1979:

> An examinee should have a general right to independent legal representation under any revised ASIO questioning and detention power regime. The Law Council considers that any person compelled to answer questions pursuant to a summons or warrant must be entitled to access an independent lawyer at all stages of the questioning process without that communication being monitored or otherwise restricted. Such access is necessary to ensure the person subject to the summons can exercise their right to challenge the legality of the detention, the conditions of detention and any ill-treatment occurring during the questioning and/or detention process. All communications between a lawyer and his or client should be recognised as confidential and adequate facilities should be provided to ensure the confidentiality of communications between lawyer and client.

48. The proposal in the Bill to remove a chosen legal representative in the context of compulsory questioning goes far outside the accepted values and protections of the Australian legal system and is capable of having the knock-on effect of enabling serious human rights abuses. In *Lee v The Queen* (2014) HCA 20 the High Court reiterated that fair trial rights include fair procedural rights in the context of questioning. [36] Having a chosen lawyer present during the questioning of any person for any reason is an important safeguard for that person and also to ensure that questioners do not go beyond acceptable conduct and that, when they do, the evidence is available. The proposals in the Bill smack of deliberate secrecy and a licence to misbehave.

[36] https://www.ruleoflaw.org.au/hca-formidable-in-lee/

Conclusion

49. Overall ICJV rejects the Parliamentary Joint Committee on Intelligence and Security 'in-principle' support for an ongoing compulsory questioning power for ASIO and implementation of an apprehension framework to ensure attendance at questioning. ASIO should not be handed any greater framework for operation and multi-step authorisation processes should remain and with modern communication facilities are already sufficiently timely. Whilst we accept terrorism of political, religious and ideological causes is a threat and politics can be divisive, none are an emergency that justifies such extraordinary powers.

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