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

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Dear Committee Members,

Re: Submission to PJCIS Inquiry – *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth)

Thank you for the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the *Australian Security Intelligence Organisation Amendment Bill 2020* (the Bill)

The Bill provides an extensive array of new powers for the Australian Security Intelligence Organisation, **principally by extending ASIO questioning warrants beyond the present discrete circumstances** 'that the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence' (ASIO Act s.34 E (1) (b)) to include *the much broader subject matters* of espionage, politically motivated violence and acts of foreign interference, whether directed from, or committed within, Australia or not (in the case of adult questioning warrants) and 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 (in the case of minor questioning warrants)

In addition, the Bill provides for **extensive warrantless, internal ASIO authorisation powers relating to the authorisation, installation, use and maintenance of tracking devices** (any device capable of being used (whether alone or in conjunction with any other device) to track a person or an object. The proposed warrantless tracking device powers *are at odds with the longstanding and ministerially accountable Attorney General's warrants and warrant process* applicable to the suite of secret and intrusive ASIO powers, such as telecommunications interceptions, premises searches, computer access warrants, other surveillance device warrants and inspection of postal and delivery articles warrants.

The Bill's removal of ASIO questioning and detention warrants is a welcome development. The abolition of ASIO questioning and detention warrants was supported by two previous Independent

National Security Legislation Monitors – the Hon Roger Gyles AO QC[1] and Brett Walker QC.[2] Such abolition was also recommended by the PJCIS in 2018.[3]

The present submission analyses and focuses upon some (but not all) issues of legislative overreach of the Bill and **proposes various amendments** that should be of interest to members of the PJCIS.

The intention in this analysis and proposed changes to the Bill is **twofold**:

First it is to ensure that adequate checks and balances are installed in the Bill commensurate with the values of Australian liberal democracy that national security measures must always address and protect.

Consistent with such foundational values, the Bill must meet standards of legal clarity, necessity, reasonableness (ie rationality) and proportionality. It presently fails to do this. It should be accordingly amended.

If these principles are not substantively adhered to in the terms, operation and effect of the Bill when enacted as legislation, then that democratic system, its culture and practices are ultimately undermined by the same legislation which ironically purports to be protective of Australian democratic systems and practices.

Second, accountability of exceptional Executive based intelligence powers is essential to trust and confidence in the Australian polity and the Australian community in how such powers are applied to underpin, and not erode, Australian liberal democracy.

Community and institutional confidence in the legitimacy and proportionality in the application of such intelligence powers is critical to a successful underpinning of such a system. Needless to say such trust and confidence in Government institutions and Government practices, and in particular the agencies and organs of Executive government, has been shown to be significantly challenged and contested in recent times.[4]

This reality provides compelling reasons for exceptional intelligence powers in the Bill to be **better calibrated, more balanced and be made further accountable**, through significantly improved drafting.

This submission now proceeds in **Part One** (pages 3 to 18) to analysis and reform recommendations relating to Schedule 1 of *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth) – Amendments relating to compulsory questioning powers - Division 3- Compulsory questioning powers.

It then proceeds in **Part Two** (pages 18 to 20) to analysis and reform recommendations relating to Schedule 2 of *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth) –

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[1] Independent National Security Legislation Monitor *Certain Questioning and Detention Powers In Relation to Terrorism* (October 2016) 39-42

[2] Independent National Security Legislation Monitor *Declassified Annual Report 20 December 2012* (2012) Chapters IV and V, 106.

[3] Parliamentary Joint Committee on Intelligence and Security *ASIO's questioning and detention powers Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (2018) Recommendations 1 and 2, xi, 27, 41.

[4] ANU Election Study 'Trends in Australian Political Opinion Results from the Australian Election Study 1987-2016' (2016); Andrew Marcus, *Mapping Social Cohesion The Scanlon Foundation surveys 2017* (Scanlon Foundation, 2018), 36-45; Danielle Wood and Kate Griffiths *Who's in the room? Access and influence in Australian politics* (Grattan Institute Report September 2018); Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy In Australia Democratic decline and renewal* Democracy 2025 Report No 1 (Museum of Australian Democracy and University of Canberra December 2018)

Amendments relating to tracking devices SUBDIVISION DA – Use of tracking devices under internal authorisation

PART ONE:

Schedule 1 of *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth) – Amendments relating to compulsory questioning powers

Division 3- Compulsory questioning powers

Subdivision A – General provisions

I. A threshold limitation is required as the Bill's new broad questioning warrant inclusions of espionage, politically motivated violence and acts of foreign interference extend far beyond existing terrorism offence questioning powers

The Bill replaces ASIO questioning warrants presently confined to the satisfaction 'that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a **terrorism offence'** (s.34 E) to the **very broad categories** identified in the proposed definition of 'adult questioning matter' (clause 34 A) namely (a) espionage (b) politically motivated violence and (c) acts of foreign interference, - all, whether directed from, or committed within, Australia or not.

The scope of the expanded reach of questioning warrants is best comprehended by the existing ASIO Act s.4 definitions – (a) **espionage** is not defined;

(b) **politically motivated violence** is broadly defined to mean:

(a) Acts 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; 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 b3, 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.

Similarly, (c) **acts of foreign interference** is broadly defined to mean

Activities relating to Australia that are carried on by or on behalf of, or are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that

(a) are clandestine or deceptive and
    (i) are carried on for intelligence purposes
    (ii) are carried on for the purpose of affecting political or governmental processes; or
    (iii) are otherwise detrimental to the interests of Australia; or
(b) involve a threat to any person

The breadth of these referred categories for questioning warrants (being a simple adoption of the definitions used for a multiplicity of existing purposes in the *ASIO Act 1979* (Cth)) **requires qualification** to prevent abuses of power, ensure rights of peaceable political protest and to properly prioritise and allocate ASIO resources.

This is of pressing relevance in relation to **politically motivated violence**, which was originally introduced into the ASIO Act (following the 1977 and 1984 Hope Royal Commissions) to remove surveillance intrusion into legitimate political activity, under the previously abused concept of subversion.

Paragraph (a) of the definition of politically motivated violence, when linked to questioning warrants, is particularly problematic:

. There is no requirement of **serious or substantial acts** or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere (the broader category), nor does such a requirement apply to 'including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere (the narrower example category given in the definition)

. It is submitted that questioning warrants indiscriminately linked to such a potentially low threshold of violence are not proportional, reasonable or necessary in balancing the competing interests of intelligence collection against political expression, nor an effective prioritisation of ASIO resources.

. Indeed these low threshold acts of violence are properly the province of the police and police investigation, with a view to possible prosecution for relevant offences, and should not be the subject of intelligence gathering on an ASIO questioning warrant

Suggested amendments to more carefully calibrate questioning warrants in relation to politically motivated violence are:

. Exclude entirely paragraph (a) of the existing s.4 ASIO Act definition of politically motivated violence from (b) politically motivated violence in 'adult questioning matter' in the clause 34 A definition in the Bill

. Alternatively, limit the meaning of (b) politically motivated violence in the clause 34 A adult questioning matter to 'serious and substantial acts of politically motivated violence', linking that criterion to offences carrying a penalty of five or more years of imprisonment

. Alternatively, require explicitly under the Bill's questioning warrant provisions that s.8 A ASIO Act Guidelines (the performance by the Organisation of its functions or the exercise of its powers) specifically implement a higher level threshold of violence in relation to the availability and utilisation of an ASIO questioning warrant, again applying the terminology of serious and substantial acts of politically motivated violence.

Adoption of the above amendments to the Bill will more readily cohere with the overarching obligation of s.17 A of the *ASIO Act 1979* (Cth) regarding ASIO functions and powers, namely:

This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

II. Abolition of issuing authority – the continuing and renewed need for Executive-independent assessment of grounds for the issue of a questioning warrant

. The staged protections of the existing methods in s.34D and 34E of the *ASIO Act 1979* (Cth) for requesting and issuing questioning warrants – consent sought by the DG from the AG and subsequently a request from the DG to an issuing authority, who may issue the questioning warrant if the requirements of s.34 E (1) (a) and (b) are satisfied – with the issuing authority a judge (as independent of the Executive, and a member of a court created by the Commonwealth Parliament) appointed as a persona designata – s.34 AB – are removed in the Bill.

. Instead, the issuing authority in the Bill for a questioning warrant becomes the Attorney General, a member of the Executive. Further, oral requests are able to be made 'if the Director-General reasonably believes that the delay caused by making a written request may be prejudicial to security – orally in person, or by telephone or other means of communication' (Clause 34 B (2)(b) of the Bill)

The *ASIO Act 1979* (Cth) other warrant issuing provisions – Part III, Division 2 – Special Powers – allow the Attorney General to issue warrants, but only for a range of surveillance and access matters that *do not involve an obligation of personal attendance* of the subject of the warrant before the prescribed authority for questioning, and for which the subject of the warrant will be unaware that actions under the warrant will be undertaken.

This differentiation of the warrant issuing authority – having an independent persona designata - ***signalled the seriousness and intrusiveness of the questioning warrant on individual autonomy, freedom and the obligation to answers questions without derivative use immunity***.

Nothing in the present background circumstances has changed – indeed, the **scope of circumstances in adult questioning matters has been very substantially expanded** to include espionage, politically motivated violence and acts of foreign interference. This broadening of the subject matter of questioning warrants strengthens the need for Executive-independent scrutiny of the criteria for the issuing of questioning warrants.

Accordingly, the Bill should **be amended to re-instate the role of the judge as a persona designata issuing authority for questioning warrants.**

In the event of constitutional incompatibility doctrine issues regarding the role of a judge as a persona designata, the existing legislation should be maintained to allow that 'regulations may declare that persons in a specified class are issuing authorities' (s.34AB (3) ASIO Act)

III. Oral warrant – Attorney General should make written record, not just Director General. The Bill's proposal allows slippage and elision from properly accountable standards, not being confined to genuinely emergency circumstances

Under Clause 34 B (2) (b) of the Bill, the Director General may make an oral request to the Attorney General to issue a questioning warrant where the Director General 'reasonably believes that the delay caused by making a written request may be prejudicial to **security**'.

This is a broad, sweeping power, and needs to be limited to:

. Demonstrably emergency situations only – its current setting weakens the assessment and accountability framework of the Attorney General's ability to apply the s.34 BA test for a questioning warrant criteria – the 'prejudice to security' should be amended to be **serious and substantial**

. Further, the oral request mechanism mentions 'prejudice to security' – **security** then meaning, under the s.4 ASIO Act definitions section – a range of no fewer than eight (8) items – whereas the adult questioning matter (the subject matter of an adult questioning warrant) is not directed as an intelligence gathering mechanism towards these eight items, but rather to three (3) items:

Clause 34 A definitions

Adult questioning matter means 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;
whether directed from, or committed within, Australia or not

. The oral warrant application process (if retained) should be amended to limit **it to substantial prejudice to the ability to acquire information** as to (a) espionage (b) politically motivated violence and (c) acts of foreign interference, whether directed from, or committed within, Australia or not (the content subject matters of the questioning warrants)

. There should be a further obligation on the Attorney General, when issuing a questioning warrant on the basis of an oral application from the Director General, to make a prescribed written record of the details of that granted warrant, a copy of which, as soon as practicable and no later than 48 hours after request is made, to be provided to the IGIS.

. This additional measure will provide a useful auditing cross checking tool for the IGIS, having received details of the DG oral request under Clause 34 B (6).

IV. Who constitutes the Prescribed Authority – third tier Prescribed Authority appointments have inadequate qualifications and a lack of independence. There are also issues around the lack tenure of the Prescribed Authority and the ability to remove the prescribed authority

The Bill weakens the status and qualifications of existing classes of Prescribed Authorities to supervise and make decisions and directions in relation to questioning under a questioning warrant. This proposed change is under the guise of removing the constitutionally vulnerable (through the incompatibility doctrine) category of s.34 B (2) serving State or Territory Supreme Court or District Court judges.

The first difficulty is in the *frankly undistinguished and ill-suited new third category for appointments as Prescribed Authorities in Clause 34 AD (c), p*rincipally lacking any evident experience as a legally independent authority who has performed significant and authoritative adjudicative and determinative roles:

(c) a person who:

(i) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and
(ii) has engaged in practice as a legal practitioner for at least 10 years and
(iii) holds a practising certificate granted under a law of a State or Territory

. The clause 34 AD (3) that the 'Attorney General must not appoint a person to whom paragraph (1)(c) applies unless the Attorney General is satisfied that the person has the knowledge or experience necessary to properly perform the duties of a prescribed authority' – provides little assurance as the decision to appoint is clearly a personal choice.

. Further, the lack of independence of the prescribed authority is evident in some of the grounds in clause 34 AD (9) under which the Attorney General may terminate the appointment of a prescribed authority.

. This third category of appointees should therefore be removed from the bill

. Alternatively, more specifically identified professionally discharged experience of an adjudicative and determinative character eg mediation, conciliation, arbitration experience etc, or private tribunal work, should be written into the necessary qualifications for appointment as a Prescribed Authority.

V. Who cannot constitute the Prescribed Authority – the categories of persons who are ineligible to be Prescribed Authorities are too narrow

Clause 34 AD (2) of the Bill states that a person is not eligible for appointment under subsection (1)(as a prescribed authority) if the person is

(a) an ASIO employee or an ASIO affiliate; or
(b) the Director- General; or
(c) an AGS lawyer (within the meaning of the *Judiciary Act 1905*); or
(d) an IGIS official; or
(e) a person referred to in subsection 6 (1) of the Australian Federal Police Act 1979; or
(f) a staff member of a law enforcement agency (other than the Australian Federal Police); or
(g) a staff member of an intelligence or security agency

There are several problems with the drafting of this clause, which require amendment.

There are insufficient safeguards in the appointment process (as a persona designata) as a Prescribed Authority, as the assessment of conflicts of interest is again left solely to the Attorney General

Clause 34 AD (5) states:

Before appointing a person as a prescribed authority, the Attorney-General must have regard to:

(a) whether the person engages in any paid or unpaid work that conflicts, or could conflict, with the proper performance of the person's duties as a prescribed authority

A clearer amendment would prohibit both *past and present appointees* of the offices held in (a) to (g) of Clause 34 AD (2) of the Bill. As the clause presently reads, it leaves open the appointment of retired or resigned office holders of (a) to (g) of Clause 34 AD (2).

Other amendments necessary to broaden the categories of persons who are ineligible to be Prescribed Authorities include the prohibition of appointment of serving Commonwealth government lawyers as prescribed authorities.

. Clause 34 AD (1) (c) of the Bill makes an AGS Lawyer (within the meaning of the *Judiciary Act 1903* (Cth)) ineligible for appointment as a prescribed authority. The meaning of an AGS Lawyer is set out in s.55 I of the *Judiciary Act 1903* (Cth) as meaning

(a) the AGS (The Australian Government Solicitor)
(b) a person:

(i)whose name is on the roll of barristers and solicitors of the High Court kept under the Rules of Court, or the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory; and

(ii) who is a person in the Attorney-General's Department who is engaged under the Public Service Act 1999; and

(iii)who ordinarily performs work for clients of the AGS under the supervision or direction of the AGS.

. Clause 34 AD (2) of the Bill clearly leaves as eligible for appointment as a Prescribed Authority other lawyers, engaged under the *Public Service Act* who are not in the Attorney-General's department.

. The possibility of such an appointment (in tandem with Clause 34 AD (1) (c) should be eliminated by an amendment to Clause s.34 AD (2) of the Bill

. Clause 34 AD (2) (f) makes a staff member of a law enforcement agency (other than the Australian Federal Police) ineligible. Law enforcement agency is defined in s.4 of the ASIO Act 1979 (Cth) as meaning 'an authority of the Commonwealth, or an authority of a State, that has functions relating to law enforcement'. Clearly, this definition linked to Clause 34 AD (2) of the Bill would NOT preclude the appointment of a Territory law enforcement agency (however created) employee as a Prescribed Authority, if such agency is not part of the Australian Federal Police. Again, this clause needs to be amended.

. Clause 34 AD (2) (g) makes a staff member of an intelligence or security agency ineligible for appointment as a Prescribed Authority. Intelligence and security agency is defined in s.4 of the ASIO Act 1979 (Cth) as including *only five of the ten agencies* of the newly identified National Intelligence Community. ASD, ASIO, ASIS, AGO and DIO (Defence Intelligence Organisation) and the Australian Criminal Intelligence Commission are the intelligence agencies; Austrac, AFP, Department of Home Affairs and the Defence Department (other than AGIO or DIO) are the agencies with an intelligence role or function. Collectively, these ten agencies constitute the National Intelligence Community: see definitions of 'national intelligence community', 'intelligence agency' and 'agency with an intelligence role or function' in s.4 of the *ONI Act*.

. The clause should be amended to make ineligible all members of the *National Intelligence Community* for appointment as Prescribed Authorities.

VI. Written statement of procedures – consultation with AHRC – link to s.34 AG Humane treatment of subject of questioning warrant. The likelihood or possibility of Quasi Detention through connected operation of the Bill's provisions means other important amendments should be considered and included

Whilst the Bill repeals the ASIO questioning and detention warrants (Part III, Division 3, Subdivision C) of the *ASIO Act 1979* (Cth), it contemplates a **lengthy questioning regime** – with questioning warrants valid for 28 days (Clause 34 BF (4)) and with **progressive extensions in the permitted questioning time from 8 hours up to 24 hours.**

If not carefully circumscribed**, these provisions of the Bill have the potential to produce a form of Quasi-detention.**

. Clause 34 DJ (2) of the Bill states that the subject of a questioning warrant must not be questioned under the warrant by a person exercising authority under the warrant for longer than the permitted questioning period

. Clause 34 DJ (3) states that for the purposes of subsection (2) the permitted questioning period is

(a) 8 Hours or
(b) if a prescribed authority before whom the subject is being questioned has extended the period in accordance with subsection (4) or (5) – that longer period

. However, Clause 34 DJ (4) states

If

(a) the subject has been questioned under the warrant for a total of less than 8 hours; and
(b) the prescribed authority before whom the subject is being questioned is satisfied of the matters in subsection (7);

the prescribed authority may, just before the end of the 8 hours, extend the permitted questioning period to 16 hours

. Further, Clause 34 DJ (5) states

If

(a) the subject has been questioned under the warrant for a total of more than 8 hours and less than 16 hours; and
(b) the prescribed authority before whom the subject is being questioned is satisfied of the matters in subsection (7);

the prescribed authority may, just before the end of the 16 hours, extend the permitted questioning period to 24 hours.

. Likewise, the Bill creates an obligation to appear before a prescribed authority for questioning under the warrant (Clause 34BH (2) (b) and (2) (c)) and a penalty for failure to appear before a prescribed authority for questioning in accordance with (a) the warrant, or (b) a direction given under subsection 34DE (1) (Clause 34GD) Penalty: Imprisonment for 5 years

. Given these obligations to appear, subject to a substantial penalty, with the capacity to extend questioning for up to 24 hours, the ASIO questioning warrant scheme, if not carefully administered, **can take on the appearance and reality of a quasi-detention scheme.**

. In this context, the requirement of a **written statement of procedures** – clause 34 AF in the Bill (and see also existing *Statement of Procedures – warrants issued under Division 3 of Part III ASIO Act* (16 October 2006)), for detention and questioning warrants) **becomes of great importance**.

. Accordingly, Clause 34 AF of the Bill – Written statement of procedures – requires amendment as follows:

. The Director General **should be obliged to prepare** a written statement of procedures to be followed in the exercise of authority under a questioning warrant – the present wording of sub clause (1) is “may’

. Given the relevant obligation in Clause 34 AG – Humane Treatment of subject of questioning warrant – replicates Article 10 of the International Covenant of Civil and Political Rights as (2) ‘The subject must be treated with humanity and respect for human dignity, and must not be subject to torture or to cruel, inhuman or degrading treatment, by any person exercising authority under the warrant or implementing or enforcing the direction’:

– Clause 34 AF (2)of the Bill 'Consultation' should be amended to include the requirement that the Director General must also consult the Australian Human Rights Commissioner about preparation of the statement.

_ The requirements for approval of the written statement of procedures **should include the specific requirement to develop a set of procedures to ensure** that the questioning regime, in the interaction between the Clause 34 DJ capacity to extend questioning up to 24 hours– with the Clause 34 BH obligation to appear before the Prescribed Authority – with Clause 34 DE Directions while subject is before prescribed authority for questioning – **does NOT become a de facto form of a questioning and detention warrant, so that the *subject is not obliged to continuously attend before the presence of the Prescribed authority* beyond a clearly prescribed limit of hours.**

. Accordingly, under the stated requirements for a written statement of procedures, the capacity of the Prescribed Authority under clause 34 DE (1) (d) to give a direction to *defer questioning* under the warrant, and clause 34 DE (1) (e) to give a direction for the subject's *further appearance* before the prescribed authority for questioning under the warrant, or for the subject to be *excused or released from further attendance* at questioning – *should be specifically referenced, at each eight hour interval, in the extension of questioning time provisions in Clause 34 DJ.*

. In particular, under Clause 34 DE, a 'remain in readiness for attendance for questioning before the Prescribed Authority' obligation should be developed/included to *reconcile the humane treatment obligations with the existing capacity of a Prescribed Authority to extend questioning in two successive blocks up to eight hours, to a total of 24 hours.*

. In particular, under Clause 34 DE, a clearer Prescribed Authority obligation should be included to notify the subject that questioning is concluded, that the subject is free to go, and that the subject is no longer obliged to be in readiness for attendance for questioning before the Prescribed Authority, nor to attend for further questioning before the Prescribed Authority.

VII. Clause 34 DL Time that is not questioning time – further reform needed for an outer limit of time in which the 24 hours of questioning is actually situated – the present warrant limit of 28 days is not adequately designed to respond to the interaction between Clause 34 DL and the ability to obtain eight hour extensions of questioning time, up to 24 hours, under Clause 34 DJ

The conjunction of circumstances discussed immediately above - potentially producing a De Facto questioning and detention warrant - is further reinforced by the multiple circumstances under clause 34 DL (a) to (d) of the Bill that are disregarded for 'the purposes of working out the time that the subject of a questioning warrant has been questioned under the warrant'

The Bill should be further reformed to impose an outer hours limit to 'Time that is not questioning time' to ensure that the subject is not obliged to continuously attend before the presence of the prescribed authority beyond a certain hours limit.

This will avoid **potential risk for the 'dead time' provisions to extend out so far the questioning time as to produce similar circumstances** as occurred under *Crimes Act* (Cth) questioning of Mohammed Haneef – which subsequently required amendment of the *Crimes Act* (Cth) investigatory procedures **to set an outer** limit for detention for the purposes of investigation of criminal offences.

VIII. Police power of apprehension – inferred or imputed behaviour re appearing for questioning warrant (when subject of warrant makes representation) – the breadth of what constitutes a representation; no record by arresting officer of what the representation; the absence of a reasonableness test; and the contradictory statement between two principles in the relevant clause about what constitutes a representation

As presently drafted, Clause 34 C of the Bill is an exceptional provision, potentially creating a de facto detention as preliminary to the activation of questioning. There are insufficient checks and balances regarding the assessment of inferred or imputed language and behaviour

Whilst the note to Clause 34 C states:

> A police officer's power to apprehend the subject of a questioning warrant under this subsection ends when the subject appears before a prescribed authority for questioning under the warrant

and whilst the apprehension power is restrained by circumstances where a questioning warrant includes an immediate appearance requirement (Clause 34 C (2) (a)), (and where the alternative would have been to seek authorisation of apprehension to immediately bring the subject before the prescribed authority for questioning under the warrant), Clause 34 BE (2) on three alternate grounds – Clause BE (2) (b) (i), (ii) and (iii)),

Clause 34 C (2) is able to be activated by the **subject making a representation that the subject intends to**

> (iii) alert a person involved in an activity prejudicial to security that the activity is being investigated; (ii) not appear before the prescribed authority; or (iii) destroy, damage or alter, or cause another person to destroy, damage or alter, a record or thing the subject has been or may be requested in accordance with the warrant to produce

The reforms needed are:

. The **inclusion of a reasonableness test as to the inference or imputation made about the anticipated consequences in (i) to (iii),** above

. A requirement that the arresting officer contemporaneously make a record of what the representation was, as well as the inference or imputation drawn from it – however the representation was made – orally, in writing or by conduct.

. Similarly, the definitional meaning in Clause 34 C (4) (d) of *representation* is ridiculously contradictory – it includes a representation that for *any reason is not communicated* – whereas Clause 34 C (2) (c) states that 'at the time the subject is given notice of the requirement in accordance with section 34 BH, the subject *makes a representation* that the subject intends to….. . Logically, C**lause 34 C (4) (d) therefore should be deleted.**

IX. A clear statement should be included in the Bill of the right to make representations to prescribed authority when proposed to extend the questioning period (see s.105.18 of Criminal Code)

. Under Clause 34 DJ (6) of the Bill, a person exercising authority under a questioning warrant may request the prescribed authority to extend the permitted questioning period (involves extensions of 8 hours at the 8 hour and 16 hour point). The request may be made in the absence of

(a) the subject of the warrant; and
(b) a lawyer for the subject; and

(c) if the warrant is a minor questioning warrant – a minor's representative for the subject; and
(d) any person the subject is permitted to contact

. In Clause 34 DJ (7), the Prescribed Authority is granted the power to extend the permitted questioning period if satisfied of certain conditions. In Clause 34 DJ (8) the prescribed authority may revoke the extension of the permitted questioning period.

. Under Clause 34FF, if a lawyer for the subject is present during the questioning

(3) The lawyer must not intervene in the questioning of the subject or address the prescribed authority before whom the subject is being questioned, except

(a) to request 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

. It is only during a break in the questioning of the subject, that the lawyer may request the prescribed authority for an opportunity to address the prescribed authority on a matter: Clause 34 FF (4)

.The practical interaction and operation of the above cited clauses will make it likely that no opportunity is afforded to the subject or the lawyer of the subject to address the Prescribed Authority at the time of, or immediately after, the request of a person exercising authority under the warrant seeking to extend the permitted questioning time, in order to put contrary arguments and facts as to why the questioning period should not be extended.

.This is in significant contrast to provisions regarding preventative detention orders in Division 105 of the *Criminal Code* (Cth).

. Under section 105.17 (7) of the *Criminal Code* (Cth), a person being detained under a preventative detention order may make representations to the senior AFP member nominated under subsection 105.19 (5) in relation to the order with a view to having the order revoked

. **A similar clause should be included in the Bill allowing the subject or the lawyer of the subject to address the Prescribed Authority at the time a person exercising authority under the warrant then makes a request to the prescribed authority seeking to extend the permitted questioning time.**

. The Prescribed Authority should be further obliged to make a record of the substance of that address by the subject or the subject's lawyer about issues raised in relation to the proposed extension of questioning time.

X. Improvements are needed in the Bill regarding the evidential basis, and the relevant legal tests to exclude lawyers and to prevent contact with lawyers – a higher standard of evidence should be required in both instances

The Bill creates a range of exceptional limits around

. Contacting lawyers (Clause 34 F (2) and (3))

. Limits choice of lawyers (Clause 34 F (4) and (5)

. Questioning in the absence of a lawyer (Clause 34 FA (1) (2) (3)

In each of these circumstances, the prohibitive and preventative language of the clauses needs to be clarified and tempered by amendments to the Bill.

. Contacting lawyers (Clause 34 F (2) and (3)) of the Bill – amendments)

. The prescribed authority must direct that a person exercising authority under the warrant give the subject *all reasonable assistance and facilities* for contacting a lawyer of choice (modification of backgrounding clause 34 FB (2) (b) and clause 34 FC (2) (b) – these two clauses inform the operation of preventive aspects of contacting lawyers in Clause 34 F (2)

. Similarly, Clause 34 F (2) (d) should be modified to read 'the lawyer for the subject is an appointed lawyer and the prescribed authority is satisfied that the subject has been afforded all reasonable assistance and facilities for contacting a lawyer of choice.'

. Limits on the choice of lawyers (Clause 34 F (4) of the Bill – amendments)

Clause 34 F (4) states that a prescribed authority may direct that the subject of a questioning warrant be prevented from contacting a particular lawyer *if the prescribed authority is satisfied, on the basis of circumstances relating to that lawyer,* that, if the subject is permitted to contact the lawyer:

(a) a person involved in an activity prejudicial to security may be alerted that the activity is being investigated; or
(b) a record or other thing that the subject has been or may be requested, in accordance with the warrant, to produce may be destroyed, damaged or altered

The italicised words create an extraordinarily low threshold for excluding contact by the subject with a particular lawyers. The circumstances relating to that lawyer are likely be from intelligence (supplied by the same Organisation that has a person exercising questioning authority under the warrant) not evidence, and may comprise rumour, gossip and hearsay, potentially providing a mechanism to exclude effective legal representative.

The clause should be amended (at a minimum, to impose a higher threshold) to preface the exclusionary discretion that the prescribed authority must be reasonably satisfied, on the basis of information and professional reputation relating to that lawyer, that if the subject is permitted to contact the lawyer, it is likely that …

. Questioning in the absence of a lawyer for subject (Clause 34 FB (3) (b) and Clause 34 FF (6) of the Bill – amendments)

Questioning under an adult questioning warrant may be conducted in the absence of a lawyer where the prescribed authority gives a direction that the prescribed authority is satisfied that such time as is reasonable to enable a lawyer for the subject to be present during the questioning has passed; and (ii) a lawyer for the subject is not present during the questioning (Clause 34 FB (3) (b).

A similar circumstance exists under Clause 34 FF (6) where the prescribed authority has directed the removal of a lawyer for disrupting questioning, questioning has been deferred, the subject has chosen to contact another lawyer – and the time referred to as 'such time as the prescribed authority considers reasonable to enable a lawyer for the subject to be present' (Clause 34FF (7)) has passed and a lawyer for the subject is not present.

In both situations, there is an enhanced risk of an abuse of process, in the absence of the subject's lawyer. **This is best remedied by**:

(a) defining a series of *indicative criteria* in the relevant clauses above – or in the statement of procedures – as to what will constitute a reasonable time and

(b) amending the clauses to require that an IGIS official be separately notified of the non-attendance of the lawyer and for the IGIS official to attend as expeditiously as possible.

. A further solution in the situation of absence of a lawyer for subject would be to have in attendance an already appointed, independent **Public Interest Monitor** who would be on call to *virtually attend* the questioning session in the **very limited circumstances identified above**, involving questioning in absence of a lawyer for the subject.

. Further, in each of these three outlined circumstances – Contacting lawyers, Limits on the choice of lawyers and Questioning in the absence of a lawyer for subject - **the Prescribed Authority exercises significant decision making and directive powers.**

. This underlines the importance of ensuring that the status, authority, adjudicative experience and independence of the Prescribed Authority is above reproach – please see the comments above on the need to eliminate Clause 34 AD (1) (c) from the bill, and more generally, broadening the ineligibility criteria for appointment as a Prescribed Authority.

XI. Legislative clarity and precision is needed around obligation to video and audio record all hours of questioning under a questioning warrant – and to provide copy to IGIS; and that video and audio recording should be continuous

. Clause 34 DP of the Bill is ***strangely ambivalent and largely incomplete*** as far as ensuring audio-video recording of the whole warrant questioning process is concerned.

. Experience in custodial situations has shown that video recording of proceedings is a useful safeguard of the rights of the subject.

. Clause 34 DP imposes an obligation to video record only:

(a) the appearance of the subject of a questioning warrant before a prescribed authority for questioning under the warrant;
(b) any other matter or thing in relation to the warrant that the prescribed authority directs to be video recorded

. Appearance before the prescribed authority of a subject for questioning under the warrant appears confined to circumstances set out in Clauses 34 DC and 34 DE.

. Similarly, video recordings of any complaint made by the subject of a questioning warrant 'when the subject is not appearing before a prescribed authority for questioning under the warrant' are only ensured "if practicable': Clause 34 DP (2).

. The Bill should **be amended to make unambiguous and clear that audio-video recording is required of all circumstances, directions, and events under the questioning warrant from the inception of the subject first appearing before the prescribed authority (see Clause 34 DC) to all questioning and questioning procedures under the warrant, including various directions of the prescribed authority, to the point where the subject is informed by the prescribed authority that questioning is concluded and that the subject is free to go.**

. For each questioning warrant, a copy of the above entire audio-visual recording should be required to be provided within 48 hours to the IGIS.

. The present obligation of providing information to the IGIS under Clause 34 HB (g) 'a copy of any video recording made under section 34 DP' needs to be re-drafted to obligate provision to IGIS of all video recording occurring in the bolded terms above.

XII. Further prohibition on disclosure of operational information – needs greater clarity about what operational information is, and how the concept of operational information applies at two levels, namely in relation to before the warrant ceases to be in force, and in two years after the warrant ceases to be in force (secrecy relating to warrants and secrecy in relation to questioning)

. Clause 34 GF of the Bill in dealing with secrecy relating to warrants and questioning includes disclosures of information relating to questioning warrants – *before warrant ceases to be in force* (Clause 34 GF (1) (a) to (f)) and in *two years after warrant ceases to be in force* (Clause 34 GF (2)(a) to (f).

. Clause 34 GF (1) is ***confusingly drafted*** as (1)(c) (i) *becomes redundant* in the stepped elements of the offence of disclosure of operational information at the point of element (1)(d) – the intent appears to be to constitute the offence of disclosure of operational information (which might include (c) (i) elements that the information indicates the fact that the warrant has been issued, or a fact relating to the content of the warrant or to the questioning or apprehension of a person in connection with the warrant – but only if such information is operational information (as separately defined in Clause 34 GF (5)) – and the discloser has the information as a direct or indirect result of:

(i)the issue of the warrant

(ii)the doing of anything authorised by the warrant, by a direction given by a prescribed authority in connection with the warrant or by another provision of this Division in connection with the warrant; a

.The clause should be drafted to express <u>in clear form the class of persons who are the discloser</u> – if it is the intention to *exclude the subject of the warrant* from being a discloser (and the disclosure offence) in circumstances where the information is operational information, but such information is OUTSIDE of the categories mentioned under (1) (c) (i) – that should be clearly and simply stated

. The re-drafting of Clause 34 GF (1) and Clause 34 GF (2) is important because the penalty is imprisonment for 5 years. Comprehension of Clause 34 GF would be aided by moving the Definitions (Under (5)) to the commencement of Clause 34 GF.

XIII. Penalties should also apply to serious breaches of written statement of procedures (not only just permit form of complaint to various bodies)

Clause 34 GE of the Bill creates offences for contravening various safeguards in the Bill. Each carries a maximum of two years imprisonment.

The list of offences in Clause 34 GE (5) should be added to by offences::

(a) if the person engages in conduct; and
(b) the conduct contravenes:
paragraph 34 DC (1) (i) being:

the subject's right to make a complaint orally or in writing to:

(i)in relation to the Organisation- the Inspector-General of Intelligence and Security under the Inspector General of Intelligence and Security Act 1986; or

(ii) in relation to the Australian Federal Police – the Ombudsman under the Ombudsman Act 1976; or

(iii)in relation to the police force or police service of a State or Territory- the complaints agency of the State or Territory concerned.

(c) the person knows of the contravention

Penalty: imprisonment for 2 years

The list of offences in Clause 34 GE (5) should be added to by an offence for

(a) if the person engages in conduct; and
(b) the conduct contravenes the right of the subject to seek from a federal court a remedy relating to the warrant or the treatment of the subject in connection with the warrant
(c) the person knows of the contravention

Penalty: imprisonment for 2 years

The Bill should also be amended to create a second tier regulatory offence for breach of the written statement of procedures (Clause 34 AF). This should be provided as an alternative avenue to the existing Clause 34 H (1)(a)to (d) – Complaints and information about contravention of procedural statement

XIV. Use immunity only of information obtained under a questioning warrant – availability of derivative use immunity

Many of the same information use and application issues that arose with the inception of the ASIO questioning warrants and questioning and detention warrants in 2002-2003 legislative changes appear to arise again in relation to the present Bill. Available time considerations preclude an analysis here of these recurrent issues.

The Committee is advised to consider the original reports of its predecessor Committee on this issue as to the existing balance struck relating to use immunity and derivative use immunity, and how, if at all, proposed arrangements in the Bill are an improvement and/or create a more integrated and balanced approach to second use application of questioning information outside of the immediate intelligence objective.

XV. No sunset clause – a five year sunset clause should be included in the Bill for Division 3 of Part III of the *ASIO Act 1979* (Cth)

There is no sunset clause in the Bill's provisions. Sunset clauses provide a useful check and balance on the operation of exceptional powers, and have done so since the inception of the ASIO questioning and questioning and detention powers since 2002.

As this is an untested and substantially expanded scheme – taking in a very significantly expanded scope of questioning regimes under adult questioning matters for espionage, politically motivated violence and acts of foreign interference, whether directed from, or committed within, Australia or not (previously restricted to questioning and questioning and detention that is important in relation to a terrorism offence – one of only five definitional examples in the s.4 ASIO Act definition of politically motivated violence); as well as questioning warrants being extended to 14 year olds for politically motivated violence – the uncertainty of operation of these changes (which are likely to involve

substantially more questioning warrants) and the relaxation of other safeguards (such as discussed above in relation to issuing authorities and the prescribed authority), make it prudent to retain a five year sunset clause provision.

The bill should be amended so that Division 3 of Part III of the ASIO Act 1979 expires five years after coming into operation.

XVI. No provision in the Bill for review of new Division 3 of Part III of *ASIO Act 1979* (Cth)

Linked to the absence of a sunset clause is the lack of instated review in the Bill.

.The Bill should be amended to include two reviews in the fourth year of operation of the Bill, leading up to the five year sunset clause limit for the Bill.

The first review should be a review by the Independent National Security Legislation Monitor.

The second review, informed by the INSLM review, should be by the Parliamentary Joint Committee on Intelligence and Security.

Both reviews should consider the terms, operation and effect of the new Division 3 of Part III of the ASIO Act 1979 (Cth) involving all aspects of the ASIO questioning warrants.

XVII. Resourcing of IGIS to ensure the IGIS it has an effective and substantive right to attend questioning warrant sessions – percentage of budget of intelligence agencies – potential substantial increase in ASIO questioning warrants as against a lack of capacity to resource IGIS attendance

Clause 34 JB of the Bill states 'To avoid doubt, for the purposes of exercising a power or performing a function or duty as an IGIS official, an IGIS official may be present at the questioning or apprehension of a person under this Division'.

To practically exercise this power and function, the IGIS must be properly resourced. This is because the Bill proposes a very substantial expansion of the availability of ASIO questioning warrants, namely:

. Adult questioning matters: for a matter that relates to the protection of, and of the people of, the Commonwealth and the several States and Territories from any of (a) espionage, (b) politically motivated violence and (c) acts of foreign interference, whether directed from, or committed within, Australia or not (the questioning warrants previously restricted to questioning that is *important in relation to a terrorism offence* – one of only five definitional examples in the s.4 ASIO Act definition of politically motivated violence)

. Minor questioning matters: 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 – extending to 14 year olds

The IGIS must be properly resourced to carry out its important function of ensuring compliance of ASIO with the various procedural checks and balances in the new Division 3 of Part III of the ASIO Act and in the written statement of procedures

The IGIS should be consulted on the likely resourcing impacts of the new ASIO questioning regime to allow effective operation of presence of IGIS officials at questioning warrant sessions (in

particular) and for the more general supervision of the massively expanded scope for ASIO questioning warrants (in general).

The scope of these enhanced activities means that it is now highly desirable to amend the *Inspector General of Intelligence Act 1986* (Cth) to fix the annual appropriation for the IGIS budget **as a proportion of the budget of those national security agencies which fall within the supervisory and investigative responsibility of the IGIS.**

PART TWO:

Schedule 2 of *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth) – Amendments relating to tracking devices

SUBDIVISION DA – Use of tracking devices under internal authorisation

The existing ASIO legislation definition of surveillance device (s.4 *ASIO Act 1979* (Cth)) is:

(a) a listening device, an optical surveillance device or a tracking device; or
(b) a device that is a combination of any 2 or more of the devices referred to in paragraph (a) or (c); or
(c) a device of a kind prescribed by regulation for the purposes of this paragraph

. As a tracking device is a surveillance device in the present legislation, the use of a tracking device requires the issue by the Attorney General of a surveillance device warrant (s.26 ASIO Act). The only present non warrant exception for the installation, use or maintenance of a tracking device is based around consent provided by the person so affected (S.26 E ASIO Act)

I. The reasons why tracking devices are included as surveillance devices, and presently permissible only under Attorney General warrant authority are twofold.

. First, tracking devices are as intrusive on the autonomy and privacy of the individual as any other of the special powers warrants, such as computer access warrants, inspection of postal articles and delivery service warrants, or listening devices and optical surveillance devices (a variant of surveillance device warrants) or telecommunications interception warrants. The present Commonwealth promotion of warrantless authorisation in the bill for tracking devices makes a ridiculous claim of unobtrusiveness simply because the tracking device can easily be slipped into a bag, attached to clothing or positioned on a motor vehicle.

. Second, the claim that Commonwealth, State and Territory police forces may use tracking devices without warrant is beside the point – it may also be prudent that such use by these law enforcement and investigatory bodies should also be subject to procedural checks and balances.

. Further, such police forces are public institutions, operating openly in a public space and with public accountability mechanisms, such as complaints agencies involving Ombudsman and other bodies. In contrast, ASIO is a secretive organisation that conducts most of its activities covertly. Put simply, police forces are completely different organisations, with different operating mechanisms around respectively criminal investigation and intelligence gathering, that renders the conflation of powers between police agencies and ASIO illogical and inappropriate.

Because of these characteristics, the bill should be amended to *retain the existing Attorney General warrant authority for tracking devices under surveillance device warrants*.

The existing ASIO Act s.4 definition of a tracking device requires the installation of the device 'in or on an object'.

In contrast the proposed amended definition in Clause 5, Schedule 2 to the Bill, a tracking device 'means ***any device*** capable of being used (whether alone or in conjunction with any other device) to track a person or an object'.

This reinforces the need to retain an Attorney General warrant authority mechanism, as the range of tracking devices is vastly expanded, and the deployment of such devices is no longer restricted to a physical association with an object 'in or on an object' – but instead includes the broader and more flexible concepts of installation, ***use and maintenance*** of tracking devices.

For example Clause 26 J (1) If an internal authorisation is given in relation to a particular person, the authorisation may authorise the Organisation to do, without warrant, one or more of the following:

(a) install***, use*** or maintain one or more tracking devices to track the person

(c) install, use or maintain enhancement equipment in relation to the device or devices referred to in paragraph (a) or (b)

'Enhancement equipment' in s.22 definitions of Division 2 Special powers states 'In relation to a surveillance device, means equipment capable of enhancing a signal, image or other information obtained by the use of the surveillance device'.

The above amendments with internal authorisation procedures only clearly contemplate tracking technologies such as drones, smart phone apps, laser beams, infra-red and heat imaging, satellites etc.

II. A test template for future liberalised access to special powers? - To free other Division 2 Special powers intrusive surveillance powers from the process of an Attorney General warrant?

The bill may be advancing warrantless, internally authorised tracking devices as a first test measure to later press further reforms to remove the Attorney-General warrant authorisation system for Part III Division 2 Special powers and also for ASIO telecommunications interception powers.

The possibility of the advancement of the internal authorisation process for tracking devices forming a trial reform or precedent, to then advance to a removal of the check and balance that the Attorney General warrant authorisation provides, is reason alone to reject this present proposal in the bill.

III. If real emergency – other warrant process by verbal application exists, or for senior ASIO figure (DG emergency warrant provision elsewhere)

If greater flexibility is required (because of a claim of emergent circumstances or an emergency) in the use of tracking devices, two alternate, more accountable models exist.

Presently, the Director General of Intelligence and Security can issue an emergency warrant in prescribed circumstances (ASIO Act s.29), including in relation to s.26 surveillance device warrants, incorporating tracking devices.

Further, the model is developed in the bill (clause 34 B, in relation to questioning warrants) that would be adaptable to an emergency need for a tracking device warrant – namely (b) The request may be made (b) if the Director-General reasonably believes that the delay caused by making a written

request may be prejudicial to security – orally in person, or by telephone or other means of communication.

I would be pleased to provide further assistance to the Committee in its deliberations, or to attend through video conference in support of this present submission.

Yours faithfully,

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