

The Committee Secretary,
Parliamentary Joint Committee on Intelligence & Security
PO Box 6021
Parliament House
Canberra ACT 2600

26 June 2020

Dear Committee Secretary,

RE: Australian Security Intelligence Organisation Amendment Bill 2020

The Australian National University Law Reform and Social Justice Research Hub (ANU LRSJ Research Hub) welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence & Security (PJCIS) concerning the Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill).¹

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law. The ANU LRSJ has partnered with Melissa Camp, Alexandra Touw and Sophie Hewitt to author this submission.

Our submission reflects our views as researchers, and is not the institutional view of our respective universities or employers.

Summary of Recommendations:

1. A proportionality framework should be used in assessing proposed national security measures as this framework can best balance the objectives of security, privacy and liberty.
2. The Bill should be amended to insert an express proportionality assessment into the *Australian Security Intelligence Organisation Act 1979* (Cth) (the Act). This assessment would better allow Australian Security Intelligence Organisation (ASIO) and the Inspector-General of Intelligence and Security (IGIS) to assess when and how powers granted in the Act may be used.
3. Alternatively to (2), existing ministerial guidelines should be updated to include express guidance on how the assessment of proportionality should be undertaken.
4. The Bill should be amended to raise the minimum age contained in s 34BB to 16 years given the present lack of justification for the lowering of the age that an individual may be subject to a compulsory questioning warrant.
5. The Bill should be amended to incorporate additional safeguards to better protect minors subject to compulsory questioning. Safeguards should include mandating a minimum

¹ Australian Security Intelligence Organisation Amendment Bill 2020 (Cth) ('ASIO Bill').

- frequency and length of questioning breaks, and clarifying/setting a maximum time for which a minor can be held (incorporating the time allowed for breaks).
6. The Bill should be amended to require a prescribed authority to have regard to additional considerations, including the interests of the child, in deciding whether to grant a request to extend questioning time.
 7. The Bill should be amended so that a compulsory questioning warrant may only be sought in relation to espionage or politically motivated violence (in relation to adults) and politically motivated violence (in relation to minors), pending the ongoing inquiries investigating foreign interference.
 8. The definition of foreign interference in the Act should be amended to clearly define the threat that ASIO is aiming to prevent and is using as justification for seeking an increase in its powers.
 9. The power granted under s 34B to the Attorney-General, regarding questioning warrants, should be amended to, at a minimum, be limited to time-critical circumstances.
 10. The Bill should be amended to increase the transparency and accountability measures contained within the Act. These should allow the IGIS to undertake a more comprehensive review of actions taken under the Act, especially the new warrant issue process and expanded compulsory questioning framework.
 11. The proposed section 34F should be amended to mimic the current s 34ZO to apply a stricter standard to a decision to restrict access to a particular lawyer.
 12. The Bill should be amended to provide greater freedom for lawyers to make submissions to the prescribed authority, and to allow individuals to request access to a lawyer at any stage during questioning.
 13. The Bill should be amended so that the requirement currently contained in the Act for ASIO to seek a warrant from a judicial officer to track individuals is retained.
 14. If the warrantless tracking scheme remains in the Bill, additional independent oversight measures should be implemented, beyond the general reporting requirements presently included in the Bill.
 15. The Independent National Security Legislation Monitor (INSLM) should conduct a further review of the Bill to assess whether the proposed powers are proportionate and whether appropriate and transparent safeguards are retained.

If further information is required, please contact us [REDACTED]

On behalf of the ANU LRSJ Research Hub,

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Introduction

This submission focuses on whether the proposed powers granted to ASIO appropriately balance the competing objectives of security, oversight and transparency, privacy and individual liberty. The submission is focused on specific additional powers that have been granted to ASIO and does not comment on the Bill in its entirety. The submission supports the repeal of ASIO's detention powers, however, it highlights specific concerns relating to the expansion of the compulsory questioning warrant framework, changes to ASIO's tracking powers, and potential transparency and accountability issues arising from the Bill.

1. Balancing Agency Powers and Individual Liberty

As accepted by ASIO in their submission to this Inquiry,² ensuring that security measures are proportionate to the threat they aim to prevent is key in ensuring that powers are appropriate and do not unduly impinge individual liberty and privacy.³ It is important to note that proportionality is critical both in assessing powers granted to agencies and in assessing individual actions and measures taken by security agencies. In a national security context, the amount of transparency regarding individual actions taken and powers used is obviously limited, given the sensitive nature of those actions. This means that greater scrutiny needs to be applied to bills that expand the powers of security agencies. How proportionality should be assessed remains a vexed question,⁴ and is one that we address in greater detail below.

It is important that privacy and security are not seen as oppositional, such that to strengthen one requires a weakening of the other. This is a false dichotomy. Instead, it is possible to achieve security objectives while maintaining strong privacy protections.⁵ This helps to improve public confidence regarding laws, and also ensures that Australia does not lose the benefits afforded by both privacy and security. Similarly, emphasis should be placed on ensuring that individuals are not unnecessarily deprived of their liberty. This is of critical importance in the case of vulnerable individuals (such as children), who require appropriate protection when being questioned by security agencies. Proposed measures must appropriately balance and accommodate all of these objectives. In making this submission we acknowledge that we are limited to publicly available information, which may not fully reflect the true situation “on the ground”. This means that some latitude should be given to security agencies in determining the powers they need to protect

² Australian Security Intelligence Organisation, Submission No 3 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review into the effectiveness of the Australian Security Intelligence Organisation Amendment Bill 2020* (29 May 2020) ('ASIO Submission').

³ Ibid 2; ANU Law Reform and Social Justice Research Hub, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review into the effectiveness of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (30 April 2020) ('Telecommunications Submission').

⁴ Telecommunications Submission (n 3) 3.

⁵ Ibid 3.

Australia. Despite this, we submit that the proponents of the Bill exaggerate the security threat facing Australia, and the utility of the proposed measures. We are also of the opinion that greater protections should be afforded to individuals. In short, less intrusive and narrower powers could achieve the security purpose, such that certain aspects of the Bill are not proportionate to the security threat facing Australia.

Recommendation 1: A proportionality framework should be used in assessing proposed national security measures as this framework can best balance the objectives of security, privacy and liberty.

1.1 Applying a Proportionality Framework

In order to assess the desirability of proposed security powers, a structured proportionality assessment should be used. This has the benefit of being supported by the academic and intelligence community, and allows provisions to be clearly tied to the threat they seek to prevent. This, in turn, helps to justify the proposed measures and increases the transparency and accountability of those exercising the powers. In conducting this assessment it is necessary to:

1. Determine the security benefit afforded by each provision/power;
2. Determine the impact of the proposed measure on the privacy/liberty of Australian citizens; and
3. Balance these competing objectives to determine whether the measures are proportionate to the threat they seek to prevent.

Ideally, this assessment should be conducted in conjunction with government agencies such as the Office of the Australian Information Commissioner, which can best comment on the potential privacy impacts of a proposed measure.

We note that given the inherent secrecy afforded to national security threats and issues, the comments that we can provide may not fully reflect the national security situation. Referring to ASIO's submission, however, it seems likely that certain measures contained in the Bill cannot be tied directly to a clear national security justification.

The onus in demonstrating the need for additional intelligence gathering and security powers should fall on those seeking them. ASIO, in their submission, outlined the threat level posed by terrorism in Australia, assessing the threat as 'Probable'.⁶ While the threat remains at this level, it is important to recognise that Australia's security agencies have had success in disrupting terrorism threats within Australia to date. As will be discussed further below, ASIO did so without the additional powers contained in the Bill. This raises questions regarding the necessity of the provisions, and whether less restrictive and intrusive measures (such as the current compulsory questioning warrant and tracking schemes) are capable of combatting the present security threat.

⁶ ASIO Submission (n 2) 3 [1.1]–[1.2].

While some media reports have suggested that a spike in extremism is occurring due to the COVID-19 pandemic,⁷ security powers, not due to sunset until September 2030, should not be implemented in response to a short-term crisis. It is also important to note that the increased activity has related to right-wing groups,⁸ which, according to the ASIO Submission, are not the primary terrorist threat facing Australia. Additionally, while the ASIO Submission refers to the increased number of terrorism offenders to be released from imprisonment over the next five years,⁹ ASIO's submission does not discuss the use of interim control orders which can be sought by members of the AFP to help combat this precise threat.¹⁰ The federal interim control order scheme, and similar legislation enacted in NSW,¹¹ should be viewed as mitigating the threat posed by released offenders. There are also concerns regarding how ASIO classifies terrorism offenders in their submission, as the submission fails to define the 85 sentenced offenders by year of sentence and offence type. The majority of recent terrorism convictions have been for preparatory offences, largely due to the success of Australian security agencies utilising their existing powers to disrupt terrorism plots.¹² The blanket reference to the number of convicted offenders may therefore overstate the threat posed.

It is similarly important for a proportionality assessment to be conducted in regard to individual operational decisions regarding when and how to use powers conferred under the Act. Currently there is no statutory requirement compelling ASIO to undertake a proportionality assessment in obtaining intelligence under the new powers proposed by the Bill. The ministerial guidelines issued by the Attorney-General in relation to the performance of ASIO's intelligence gathering functions provides that any means used for obtaining information must be proportionate to the gravity of the threat posed and probability of its occurrence.¹³ However, these guidelines do not provide clear guidance on how the proportionality assessment is to be undertaken, and were issued in 2007 prior to a significant expansion of ASIO's intelligence gathering and questioning/detention powers. We propose that the insertion of an express statutory proportionality requirement would provide further clarity around when and how the powers contained in the Act can be used. Introduction of a consistent standard would better ensure the

⁷ Andrew Greene, 'Spies kept busy by increase in suspicious internet activity during coronavirus lockdown', *ABC News* (online, 30 May 2020) <<https://www.abc.net.au/news/2020-05-30/asio-detects-spike-in-online-extremism-during-coronavirus/12295426>>.

⁸ Mario Christodoulou, 'ASIO briefing warns that the far-right is exploiting coronavirus to recruit new members', *ABC News* (online, 12 June 2020) <<https://www.abc.net.au/news/2020-06-12/asio-briefing-warns-far-right-is-exploiting-coronavirus/12344472>>.

⁹ ASIO Submission (n 2) 4 [12].

¹⁰ *Commonwealth Criminal Code* s 104.4. For example, an order was imposed in *Boothe v Thorne* [2020] FCA 445.

¹¹ See, eg, *Terrorism (High Risk Offenders) Act 2017 No 68* (NSW).

¹² Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Advisory Report on the Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019 (Parliamentary Paper, 14 October 2019) app C. See also Sophie Hewitt 'The Sentencing of Conspiracy Preparatory Terrorism Offences' (LLB Thesis, The Australian National University, 2019), 25-6.

¹³ Attorney General, 'Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)' (17 September 2007) <<https://www.asio.gov.au/sites/default/files/Attorney-General's%20Guidelines.pdf>>.

appropriate use of the expanded powers, and allow the IGIS to conduct more effective oversight of ASIO's decision making. Alternatively, we recommend that the existing ministerial guidelines should be updated to include guidance on how the assessment of proportionality should be undertaken to deal specifically with the extended powers proposed by the Bill.

Recommendation 2: The Bill should be amended to insert an express proportionality assessment into the ASIO Act. This assessment would better allow ASIO and the IGIS to assess when and how powers granted in the Act may be used.

Recommendation 3: Alternatively to (2), existing ministerial guidelines should be updated to include express guidance on how the assessment of proportionality should be undertaken.

Sentencing conspiracy preparatory terrorism offences

The combination of ss 101.6 and 11.5 of the *Commonwealth Criminal Code Act 1995* (Cth) Sch 1 makes it an offence to conspire to commit acts in preparation for a terrorist act ('conspiracy preparatory offence').

Criminalising conspiracy to commit preparations for a terrorist act further extends boundaries of criminal law, as criminal liability accrues at an earlier stage in conspiracy preparatory offences than preparatory offences.¹⁴ Further, conspiracy preparatory terrorism offences are sentenced in a manner which skews the sentencing framework, as it expands the number of aggravating factors¹⁵ which may be taken into account in sentencing, resulting in disproportionately harsher sentences. Conduct undertaken in conspiracy preparatory offences attracts a higher level of objective seriousness than preparatory offences, even when the conduct undertaken is the same.

¹⁴ Brown et al *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) [13.3.3.1]. For further critiques on conspiracy preparatory offences, see: Tamara Tulich, 'A View Inside the Preventive State' (2012) 21(1) *Griffith Law Review* 209; Anthony Pyne, 'The Mood and Temper of the Public: R v Lodhi and the Principles of Sentencing in the War on Terror' (2011) 23(2) *Current Issues in Criminal Justice* 163. See also Bernadette McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27(2) *University of New South Wales Law Journal* 354, 366. This is discussed further in Hewitt (n 12).

¹⁵ For example, the individual conduct of the offender, depth and extent of radicalisation of the offender, whether the offender indoctrinated others, and the nature and gravity of the intended act are relevant to the individual offender only in preparatory offences, but relevant to the entire group in conspiracy preparatory offences. See Hewitt (n 12) 34. For discussions on the limited utility of general deterrence in sentencing preparatory terrorism offences, see Justice Anthony Whealy, 'Terrorism and the Right to a Fair Trial: Can the Law Stop Terrorism? A Comparative Analysis' (Conference Paper, British Institute of International and Comparative Law, April 2010) 36; Nicola McGarrity, '"Let the Punishment Match the Offence": Determining Sentences for Australian Terrorists' (2013) 2(1) *Crime Justice Journal* 18, 29.

This may inadvertently increase the opportunities for radicalisation in prison, as warned in the ASIO Submission,¹⁶ as offenders will be subject to lengthier prison sentences.

The conspiracy preparatory offence was not a deliberate creation of the Legislature, as conspiracy liability was not considered by parliament when preparatory offences were enacted.¹⁷ Accordingly, the number of offenders sentenced for terrorism offences may not accurately convey the terror threat. Given the susceptibility of prisoner's to radicalisation whilst incarcerated, it may be wise to consider the overlap between conspiracy preparatory and preparatory terrorism offences, although this falls outside the scope of the parliamentary review.

2. Concerns Regarding Compulsory Questioning Powers

2.1 Reduction in age of warrants for minors to 14 years

The Bill alters the current compulsory questioning warrant scheme which defines the circumstances in which ASIO may obtain a warrant to question minors and relevant safeguards. Section 34BB of the Bill outlines the test for the grant of a 'minor questioning warrant'¹⁸ for individuals who are at least 14 years old; warrants would have no effect on subjects younger than 14.¹⁹ This significantly lowers the threshold from the current requirement that individuals subject to a compulsory questioning warrant be at least 16 years old.²⁰

Lowering the age of questioning subjects

Rationales offered to justify the expansion of ASIO's questioning powers include a purported increase in 'terrorism leads' investigated by ASIO,²¹ and incidents involving minors.²² We acknowledge that reasonable limitations to individual liberty may be necessary to address national security issues. It is not evident, however, that the magnitude of the threat posed by minors aged below 16 is as grave as submitted by ASIO to justify the significant extension of the agency's powers.²³ In ASIO's submission, it identified four incidents in the past five years involving minors, comprising one terrorist attack and three 'disruptions'.²⁴ Of these four incidents, only one involved a minor below the age of 16.²⁵ Beyond this, only the presence of propaganda was raised to justify

¹⁶ ASIO Submission (n 2) 4.

¹⁷ Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 (Cth).

¹⁸ Defined in s 34A of the ASIO Bill.

¹⁹ ASIO Bill (n 1) amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) ('ASIO Act') s 34BC.

²⁰ ASIO Act s 34ZE(1).

²¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2020, 3230 (Minister for Home Affairs Peter Dutton MP) ('ASIO Bill Second Reading Speech').

²² ASIO Submission (n 2) 5.

²³ Ibid 2 [3].

²⁴ Ibid 2 [3], 4 [15].

²⁵ Ibid 5.

the threat posed by minors.²⁶ This propaganda already existed throughout this five-year period and does not appear to present an enhanced threat justifying the extension of compulsory questioning powers to vulnerable individuals.

Further, as of March 2018, no warrants had been issued to question a minor.²⁷ The PJCIS has previously noted that if this compulsory questioning power were not granted to ASIO, the agency would nonetheless be able to obtain information from minors through a *voluntary* interview or using another power that it already possesses.²⁸ Thus, the Committee should seriously consider the necessity of lowering the age of persons subject to questioning warrants given that ASIO has access to viable alternative means of obtaining information.

Safeguards

If lowering the age of persons subjected to questioning warrants is assessed as a necessary and proportionate measure considering the current level of security threat, it is imperative that adequate safeguards are present to protect minors who may be questioned.²⁹ We acknowledge that some safeguards have been included in the Bill, including an obligation for the Attorney-General to account for the best interests of the child in determining whether to issue a questioning warrant.³⁰ Given the vulnerability of minors, however, there are several further issues and possible safeguards which the Bill does not sufficiently address or clarify. This is particularly important for minors aged under 16 years old who are, by virtue of their age, vulnerable.

Questioning time:

First, there is no definite limit on the maximum period during which a minor must be present for questioning. We acknowledge that the Bill makes some attempt to safeguard minors through limiting periods of continuous questioning to two hours (separated by breaks).³¹ Further, the requirement that the prescribed authority be, for instance, a previous judge or senior lawyer and the exclusion *inter alia* of ASIO employees may go some way to alleviating any infringements on the liberty of minors subject to questioning.³²

²⁶ Ibid 4–5 [16].

²⁷ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *ASIO's Questioning and Detention Powers* (Report, March 2020) 64 [3.79] ('2018 PJCIS Report').

²⁸ Ibid 80 [3.153].

²⁹ Ibid 80 [3.152].

³⁰ ASIO Bill (n 1) amendments to the *ASIO Act* s 34BD(2)–(3). The view of the Parliamentary Joint Committee on Human Rights should be noted on this point. The Committee stated that it is unclear whether the proposed measures meet the obligation to give primary consideration to the best interests of a child under Australia's international obligations: Parliament of Australia, *Report 7 of 2020* (Report No 7, 17 June 2020) 51 [2.65] ('2020 JCHR Report'). Issues regarding the ability of the Attorney-General to issue compulsory questioning warrants are addressed below.

³¹ ASIO Bill (n 1) amendments to the *ASIO Act* s 34BD(2).

³² Ibid s 34AD(1)–(2). Section 34AD(1) prescribes that the Attorney-General may appoint a previous judge, President or Deputy President of the Administrative Appeals Tribunal or lawyer of at least ten years' standing.

Nonetheless, the length and frequency of these breaks are not defined in the Bill.³³ Two concerns are raised by this absence. First, the prescribed authority appears to have wide discretion about the duration of breaks, and may allow for negligible breaks under the present section. Second and conversely, the provision for breaks means that there is no hard limit on the amount of time a minor may be required to be present for questioning.³⁴ Accounting for the maximum possible permitted questioning period,³⁵ this could extend to over 24 hours; this has the potential to significantly increase the total time period during which a minor could be held for questioning. In circumstances where the questioning period is extended for a minor questioning warrant, additional elements should be incorporated into the decision-making process. For example, as a minimum, the Bill should allow for the prescribed authority to consider the interests of the child in deciding whether to grant the request; this would mirror the obligations imposed on the Attorney-General in granting the initial warrant request.³⁶

Presence and role of support:

We acknowledge that the Bill seeks to provide a safeguard by requiring the presence of a ‘minor’s representative’ during questioning,³⁷ as well as that of a lawyer.³⁸ The definition of a ‘minor’s representative’, however, appears to be wide enough to include a lawyer.³⁹ This means that circumstances could arise where *only* the lawyer is present and yet the provisions of the Bill are complied with.⁴⁰ The need for a minor’s representative is heightened given the limitations surrounding the subject’s choice of lawyer and the ability for a lawyer to best represent the interests of the subject as discussed below. The Committee should consider the consequent risks that a child questioned in these circumstances may not understand what is happening, the options available to them, and the consequences of any statements they may or may not make.

³³ ASIO Bill (n 1) amendments to the *ASIO Act* ss 34BD(2)(b), 34DE(1)(e).

³⁴ 2020 JCHR Report, 51 [2.66]. The Parliamentary Joint Committee on Human Rights also noted the 40 hour maximum permitted questioning period where an interpreter is used.

³⁵ ASIO Bill (n 1) amendments to the *ASIO Act* s 34DJ.

³⁶ ASIO Bill (n 1) amendments to the *ASIO Act* s 34BD(2)–(3).

³⁷ *Ibid* s 34BD(2)(a).

³⁸ *Ibid* s 34FA(1).

³⁹ *Ibid* s 34AA(2),

⁴⁰ Department of Home Affairs, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review into the effectiveness of the Australian Security Intelligence Organisation Amendment Bill 2020* (25 May 2020) 24 [2.2.8]; 2020 JCHR Report, 51–52 [2.66].

Recommendation 4: The Bill should be amended to raise the minimum age contained in s 34BB to 16 years given the present lack of justification for the lowering of the age that an individual may be subject to a compulsory questioning warrant.

Recommendation 5: The Bill should be amended to incorporate additional safeguards to better protect minors subject to compulsory questioning. Safeguards should include mandating a minimum frequency and length of questioning breaks, and clarifying/setting a maximum time for which a minor can be held (incorporating the time allowed for breaks).

Recommendation 6: The Bill should be amended to require a prescribed authority to have regard to additional considerations, including the interests of the child, in deciding whether to grant a request to extend questioning time.

2.2 Expansion of grounds on which compulsory questioning warrants may be sought

The Bill expands the grounds under which a compulsory questioning warrant may be issued from a warrant that 'will substantially assist the collection of intelligence that is important in relation to a *terrorism offence*'⁴¹ to include (in the case of adults) intelligence that relates to espionage, politically motivated violence or acts of foreign interference. Critically, this extends to acts directed from, or committed within, Australia or not.⁴² In the case of minors, compulsory questioning warrants may only be issued where the intelligence relates to politically motivated violence.⁴³ We recommend that the allowed category of questioning for minors is not expanded to include the additional categories, in accordance with the need identified by ASIO in their submission.⁴⁴

In relation to adult warrants, this represents a significant expansion of the grounds of compulsory questioning warrants, particularly in relation to acts of foreign interference which are defined in s 4 of the Act. Notably the definition includes: 'activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power ... that ... are clandestine or deceptive and are otherwise detrimental to the

⁴¹ *ASIO Act* s 34E(1)(b).

⁴² *ASIO Bill* (n 1) amendments to the *ASIO Act* ss 34A, 34BA.

⁴³ *Ibid* amendments to the *ASIO Act* ss 34A, 34BB.

⁴⁴ In particular, while ASIO identified several terror threats involving minors in recent years, no threat was identified in their submission of an individual aged 14, and only one example was provided of a 15 year old offender (the 15-year-old male involved in the NSW police shooting): *ASIO Submission* (n 2) 5. As was apparent from sentencing decisions relating to the NSW police shooting, the individuals involved were already under extensive surveillance and it is unclear why further compulsory questioning powers are needed given that present powers were not used to question any of the adult offenders involved (no questioning powers have been used since 2010: *ASIO Submission* (n 2) 6).

interests of Australia; or involve a threat to any person'.⁴⁵ This definition is extremely broad, and in light of the general reduction in independence and oversight associated with the new warrant process (as discussed below), there remain concerns that many activities could fall within this definition. In particular, there is no need to demonstrate that a subject was aware that the activities were being subsidised by a foreign power, nor is there a clear standard to apply to determine what is or is not within the interests of Australia.

The threat of foreign interference is increasing globally, and has been subject to review by a number of Australian parliamentary inquiries.⁴⁶ The threat of foreign interference in Australia has been particularly evident in recent weeks, with significant state-led cyber attacks being conducted against Australia.⁴⁷ Foreign interference in the context of elections is particularly concerning, with recent technological developments, especially in the area of artificial intelligence and facial recognition, significantly increasing the potential impact of foreign interference on elections.⁴⁸

Critically, these reviews are ongoing with final reports due to be handed down later in the year. The expansion of ASIO powers may therefore be premature and fail to account for a whole of intelligence or a whole of law enforcement approach. We therefore recommend that s 34A be amended to remove reference to foreign interference, pending the final outcome from the current reviews into foreign interference which will more holistically assess how Australia can combat foreign interference. We would also note that in practice, the use of these questioning powers will be limited to individuals located within Australia, such that it is unclear whether they will be able to be used to prevent the instances of foreign interference that have impacted Australia recently.

Recommendation 7: The Bill should be amended so that a compulsory questioning warrant may only be sought in relation to espionage or politically motivated violence (in relation to adults) and politically motivated violence (in relation to minors), pending the ongoing inquiries investigating foreign interference.

Recommendation 8: The definition of foreign interference in the Act should be amended to clearly define the threat that ASIO is aiming to prevent and is using as justification for seeking an increase in its powers.

2.3 Transparency concerns regarding the Attorney-General's ability to issue warrants and ability to seek warrants orally

⁴⁵ ASIO Act (n 19) s 4.

⁴⁶ See, eg, Senate Select Committee on Foreign Interference through Social Media.

⁴⁷ Mahmoud Elkhodr, 'Australia is under sustained cyber-attack, warns the government. What's going on, and what should businesses do?', *The Conversation* (online, 19 June 2020) <<https://theconversation.com/australia-is-under-sustained-cyber-attack-warns-the-government-whats-going-on-and-what-should-businesses-do-141119>>.

⁴⁸ See, eg, XR Belgium, 'The truth about COVID-19 and the ecological crises – a speech for Sophie Wilmes' (online, April 2020) <<https://tube.rebellion.global/videos/watch/2ad12b6b-bb53-473c-ad74-14eef02874b5?title=0&warningTitle=0>>.

Under the current legislation, consent is required from the Attorney-General to request a warrant from a prescribed authority.⁴⁹ The proposed amendments would allow the Attorney-General to directly grant questioning warrants.⁵⁰ We note that the Committee outlined a 'range of safeguards' that apply to the exercise of this power,⁵¹ namely that the IGIS is supplied with a copy of the warrant, and that the person may contact a lawyer. These are not safeguards guaranteeing the appropriate use of this power. These are safeguards that only become relevant subsequent to the power being exercised.

We agree that this system of applying for warrants would be more efficient and streamlined. However, concerns around efficiency must be balanced against the need for accountability in relation to these expansive powers. Judges acting in their role as *persona designata* bring a level of independence to a decision that is otherwise made entirely internally within the executive branch of government. There are also significant concerns regarding these types of decisions made by a member of the executive who is seeking election. Terrorism is a fraught political issue, subject to spin and electoral leveraging. This may mean that the Attorney-General could be subject to accusations of bias or the appearance of bias in making these types of decisions. Such a situation would likely not accord with either the goals of government or of ASIO and could impact the perception of the validity of any warrants issued under this section.

We recognise that internal authorisation is in line with the way that other ASIO powers are authorised. This has been a key justification for removing the requirement of independent authorisation. We submit that, rather than ensuring that all powers are authorised in the same fashion, the focus should be on whether it is reasonable and necessary to remove independent authorisation for all warrants. Having all powers authorised in the same fashion is not a justification in itself.

We recognise that there may be instances where warrants are required with such urgency that seeking approval from an independent authority is not appropriate. However, not all warrants will be required within this urgent timeframe. Accordingly, we submit that the scope of the Attorney-General's power to grant warrants be, at a minimum, limited to circumstances where it is necessary to obtain a warrant because there is no reasonable alternate option to prevent the security threat.

This recommendation extends to the Attorney-General's power to grant warrants orally, via telephone or other means of communication. There are additional concerns regarding requesting and granting a warrant orally around the reviewability of that decision. In short, as limited records will be kept, it will be difficult for an applicant to determine if there were any deficiencies in the process of issuing a warrant. The term 'prejudicial to security' is vague, and undefined. The circumstances in which this option would be available should be more clearly defined. We echo the recommendation made by the IGIS that the IGIS should receive timely notification of when

⁴⁹ ASIO Act (n 19) s 34D.

⁵⁰ ASIO Bill (n 1) s 34B.

⁵¹ 2018 PJCIS Report (n 27) 4–5 [1.19]–[1.20].

the powers are being exercised, and that these powers should be used as a last resort.⁵² This would improve IGIS' ability to undertake a review of actions taken under the Act, however concerns would remain regarding the documentation surrounding the oral warrant process.

Recommendation 9: The power granted under s 34B to the Attorney-General in regards to questioning warrants should be amended to, at a minimum, be limited to time-critical circumstances.

Recommendation 10: The Bill should be amended to increase the transparency and accountability measures contained within the Act. These should allow the IGIS to undertake a more comprehensive review of actions taken under the Act, especially the new warrant issue process and expanded compulsory questioning framework.

3. Limitations Imposed on Legal Representatives

There are significant concerns regarding the potential limitations that can apply to the legal representative of individuals subject to a compulsory questioning warrant. While some of these concerns were raised in relation to provisions already contained in the ASIO Act, there are additional concerns regarding the changes made by the Bill. In particular, the Bill expands the grounds on which a prescribed authority can be used to deny the ability of an individual to contact a particular lawyer. The current s 34ZO reads:

34ZO Limit on contact of lawyer of choice

...

the subject may be prevented from contacting a particular lawyer of the subject's choice if the prescribed authority concerned so directs.

(2) The prescribed authority may so direct only if the 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 a terrorism offence may be alerted that the offence is being investigated; or

(b) a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.

⁵² Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 16 June 2017, 8 (Margaret Stone, Inspector-General of Intelligence and Security).

The Bill effectively shifts the old s 34ZO into s 34F and expands the ground in (a) from a 'person involved in a terrorism offence' to 'a person involved in an activity prejudicial to security'.⁵³ As noted below, prejudicial to security is an extremely broad definition, and could be used by a prescribed authority to limit the choice of lawyer of an individual.

We are also concerned regarding the ability of a prescribed authority to deny a request by an individual to contact a lawyer in the event that they have had a reasonable amount of time and chose at the time not to do so. The importance of access to legal advice is clear, and it is important to recognise that an individual may not initially feel they need a lawyer, and then change their mind over the course of up to 24 hours of questioning by intelligence officials. Similar concerns apply to provisions which limit the ability for a lawyer to advise their client, and to make submissions to the prescribed authority and ASIO during questioning⁵⁴ - noting that the Bill allows the prescribed authority to remove a lawyer if they deem their conduct to be unduly disruptive.⁵⁵ These provisions may impede the ability of lawyers to best represent the interests of those subject to questioning.

Recommendation 11: Section 34F should be amended to replicate the current s 34ZO to apply a stricter standard to a decision to restrict access to a particular lawyer.

Recommendation 12: The Bill should be amended to provide greater freedom for lawyers to make submissions to the prescribed authority and ASIO during questioning, and to allow individuals to request access to a lawyer at any stage during questioning.

4. Tracking Powers

Technological advances understandably justify a transformation in how surveillance is conducted in Australia. We acknowledge that updating the definition of 'tracking device'⁵⁶ in s 22 is a sensible step towards modernising ASIO's powers. However, we are concerned that warrantless tracking without independent judicial oversight does little to contribute to ASIO's modernisation, but rather, reduces the transparency and accountability that is integral in Australia's democracy.

⁵³ ASIO Bill (n 1) amendments to the *ASIO Act* 34F.

⁵⁴ ASIO Bill (n 1) amendments to the *ASIO Act* s 34FF(3).

⁵⁵ ASIO Bill (n 1) amendments to the *ASIO Act* s 34FF(6).

⁵⁶ ASIO Bill (n 1) amendments to the *ASIO Act* s 22.

In its submission, ASIO indicated that the internal authorisation of tracking devices will 'balance the need to maintain physical surveillance ... with the need to protect surveillance officers from physical threats'⁵⁷ in the current security environment.

We acknowledge that a warrantless system of tracking individuals would allow ASIO to gain coverage of a suspect that would otherwise be lost if obtaining a warrant was required prior.⁵⁸ However, removing the process of obtaining a warrant to be exclusively replaced with ASIO's internal authorisation also considerably undermines the role of judicial review which ensures the accountability of executive government.

Such an expansion of power is not a proportionate response to security threats currently facing ASIO on balance with the liberties that must be afforded to individuals. Alternatively, we submit that focus should be redirected towards streamlining the process of obtaining a warrant, as opposed to eliminating it. For example, we suggest that the scope of the internal authorisation be limited to circumstances proportionate to critical national security threats and only be used until such a time as a warrant can reasonably be obtained. In all other circumstances, ASIO can monitor suspected individuals and groups whilst respecting the role of independent authorisation. This suggestion aligns with our above recommendation that internal authorisation for questioning warrants be limited to circumstances of extreme time pressure, or other limited instances where it is inappropriate to seek independent approval.

Further, we submit that there has been insufficient focus on the loss of accountability and independence that would result from these amendments. We note the Minister for Home Affairs emphasised that safeguards such as 'oversight and reporting' would be in place,⁵⁹ however, internal oversight is insufficient. We note that the value of independent authorisation is not in merely having a second 'layer' of approval, but the accountability and independence that is brought to the decision-making.

We submit that bringing 'ASIO into line with law enforcement agencies' should not be considered a strong justification for these amendments.⁶⁰ There is no principle behind all law enforcement agencies being able to exercise the same powers, similar to the fact that now all law enforcement agencies are subject to the same degree of public oversight.

ASIO also has other alternatives to warrantless tracking which would more suitably fit within their scope of power. For example, the deployment of interdiction teams to follow suspects of ongoing terror threats whilst waiting to receive a warrant from a judge is a viable option to ensure that surveillance officers are protected in the time it takes for a warranted tracking surveillance.⁶¹

⁵⁷ ASIO Submission (n 2) 2 [2].

⁵⁸ Ibid 3 [9].

⁵⁹ ASIO Bill Second Reading Speech, 3230.

⁶⁰ Ibid.

⁶¹ ASIO Submission (n 2) 3 [9].

The removal of independent authorisation of tracking warrants also reduces the reasonable expectation of privacy and other liberties. Independent oversight is integral for safeguarding the right of an individual to privacy, where analysis may be directed towards individualised suspicion.

We recognise that authorising internal approval of tracking will expand ASIO's powers to track an unrestricted number of people. Accordingly, we submit that there is no critical need here for the role of judicial oversight to be eliminated if this outcome is desired. If ASIO wishes to increase the number of people it can monitor, the standard that an individual must be reasonably suspected of threatening national security and afforded independent oversight should be upheld.

Recommendation 13: The Bill should be amended so that the requirement currently contained in the Act for ASIO to seek a warrant from a judicial officer to track individuals is retained.

Recommendation 14: If the warrantless tracking scheme remains in the Bill, additional independent oversight measures should be implemented, beyond the general reporting requirements presently included in the Bill.

We recommend that the Independent National Security Legislation Monitor conduct a further review of the Bill with regard to the proportionality and need for the additional powers, and the independence and transparency provisions. This is necessary given the issues we have identified above, and the fact that many of the changes contained in the Bill were based on previous recommendations by the PJCIS, and the limited time period available for the present review.

Recommendation 15: The INSLM should conduct a further review of the Bill to assess whether the proposed powers are proportionate and whether appropriate and transparent safeguards are retained.

We would be happy to answer questions or provide further submissions if requested by the committee and may be contacted [REDACTED]

Yours sincerely,

Andrew Ray, Charlotte Michalowski, Mathilde Clark, Alexandra Touw, Sophie Hewitt and Melissa Camp