



Law Council
OF AUSTRALIA

Office of the President

19 November 2020

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2603

By email: pjicis@aph.gov.au

Dear Chair

Australian Security Intelligence Organisation Amendment Bill 2020

1. Thank you for your invitation of 11 November 2020 to provide a further supplementary submission to the Committee's inquiry into the above Bill.
2. You asked the Law Council to respond to two issues arising from evidence of the Director-General of Security at a public hearing on 30 October 2020. These issues concern issuing authorities for the re-designed coercive questioning powers of the Australian Security Intelligence Organisation (**ASIO**).

Questions placed on notice to the Law Council

3. The Law Council understands that ASIO is advocating for a model of internal or ministerial authorisation, which would regress from the current model of independent issuing by a judicial officer in their personal capacity.
4. The Law Council is requested to respond to the following reasons advanced by ASIO in support of its position:
 - (1) several Commonwealth law enforcement agencies have compulsory questioning powers that operate under an internal authorisation model. There was an apparent suggestion that the proposal in the Bill to remove the existing requirement for the independent issuing of ASIO's questioning warrants by a judicial officer (acting in their personal capacity) is justifiable because it would be consistent with the framing of authorisation requirements for these other Commonwealth agencies; and
 - (2) ASIO's special powers warrants under Division 2 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) are issued by the Attorney-General. There was an apparent suggestion that this model provides a sound foundation for the ministerial authorisation of ASIO's questioning warrants, without the involvement of an independent issuing authority (namely, a judicial officer).

Overview of Law Council position

5. For the reasons explained below, the Law Council remains of the strong view that neither of these lines of reasoning is persuasive, and there must be independent, judicial involvement in the authorisation of ASIO's compulsory questioning powers.
6. This independent, judicial issuing model should either:
 - retain the current model, which appoints judicial officers, in their personal capacity, as issuing authorities; or
 - establish a 'double lock' mechanism (as is the case for surveillance-based intelligence warrants in the UK) in which a ministerial decision to approve a questioning warrant must be reviewed and approved by a judicial officer before it takes effect (with provision for *ex post facto* review in emergencies).¹
7. It is particularly important that there is independent, judicial authorisation for powers of apprehension to bring a person into questioning, which is able to be authorised under a questioning warrant.²

Suggested precedent in the powers of other Commonwealth agencies

8. In evidence at the public hearing on 30 October, the Director-General of Security identified that several Commonwealth agencies have compulsory questioning or information-gathering powers, which are not subject to judicial authorisation. These agencies were stated to include the Australian Competition and Consumer Commission; Australian Criminal Intelligence Commission; Australian Sports Anti-Doping Authority; Australian Commission for Law Enforcement Integrity; Australian Securities and Investments Commission; and Australian Taxation Office.
9. The Law Council remains of the view that the catalogue of the information-gathering frameworks of other Commonwealth agencies (generally performing law enforcement functions), which operate under ministerial or agency-level authorisation models, does not provide a persuasive basis for emulating those design features in the statutory framework governing ASIO.

Unique functions of ASIO, as a security intelligence collection agency

10. The security intelligence collection functions of ASIO, and the covert manner in which those functions are performed, are significant distinguishing factors. No other five eyes intelligence agency has been invested with compulsory questioning powers as a means of collecting intelligence.
11. ASIO performs its functions almost entirely covertly, and its compulsory questioning powers are proposed to be subject to extensive secrecy offences to limit disclosure of the existence of questioning warrants, as well as things done under those warrants.

¹ See further: Law Council of Australia, *Submission 31*, (3 July 2020), 41-45 and recommendations 15 and 16; and Law Council of Australia, *Supplementary Submission 31.1* (9 July 2020).

² Law Council of Australia, *Submission 31*, (3 July 2020), 45 and recommendation 16.

12. These factors make it critical that there is independent, judicial involvement in the issuing of warrants.
13. In particular, it is reasonable to expect that there will be little-to-no meaningful opportunities to test, in court, the validity of an ASIO questioning warrant, or things purportedly done under the authority of a questioning warrant.
14. While it is the case that questioning warrants will be overt to the people who are subject to them (unlike ASIO's other intelligence collection powers) the practical reality is that such challenges are highly likely to be met with claims by the Commonwealth for public interest immunity, or at best, the suppression of evidence under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). This is likely to severely limit the ability of an aggrieved person to obtain the evidence necessary to commence legal proceedings.
15. These evidentiary difficulties are compounded even further by the severe limitations on the role of lawyers for questioning subjects during questioning, and the extensive limitations on their access to information after the execution of the warrant.
16. The likely practical effect of these limitations will be to make it very difficult, if not impossible, for lawyers to advise their clients on the legality of questioning warrants, the validity of acts purportedly done under those warrants (including advising on the relevance of questions to the security matter or matters in respect of which the warrant was issued), and the subsequent use to which ASIO and others may put questioning material and things which have been seized under a questioning warrant.
17. Not even the closest statutory analogy, being the examination powers of the Australian Criminal Intelligence Commission, imposes restrictions as severe as those proposed in the Bill on a person's rights to effective legal representation.
18. The absence of meaningful opportunity to challenge a questioning warrant, and things done under that warrant, makes it even more important that there is a rigorous issuing process, which involves the approval of a judicial officer.
19. Importantly, a judicial officer is a person of the highest standing in the community, who possesses deep legal and adjudicative expertise gained from a long career in the law. Judicial officers are deeply familiar with, and proficient in applying, the core characteristics of judicial power, including impartiality, procedural fairness, and evidence-based decision-making. Critically, judicial officers are independent from the executive government, both in substance and perception. These qualities are unmatched by any other type of decision-maker or authority.

Authorisation of apprehension (including powers of search and seizure)

20. Further, the Bill proposes to enable questioning warrants to also authorise the immediate apprehension of a person, not only their compulsory questioning. A questioning warrant also authorises the exercise of powers of search and seizure against the subject (with no limitation on the use of seized things in evidence against that person).
21. In sharp contrast, the equivalent power of apprehension under the *Australian Crime Commission Act 2002* (Cth) requires authorisation by a court, and examination summonses do not enliven exposure to search and seizure powers. Rather, if

powers of search and seizure are considered necessary in a particular criminal intelligence operation or investigation, search warrants must be sought and obtained separately to the internal authorisation to conduct an examination.

Breadth of ASIO's compulsory questioning powers

22. Weight should also be given to the proposed breadth of ASIO's compulsory questioning powers, particularly with respect to the collection of intelligence that is important in relation to foreign interference, and the ability to compulsorily question any person who holds relevant information, not just people suspected of committing an offence. The model of authorisation for ASIO's questioning warrants should further give weight to the fact that questioning about these extremely broad matters can be conducted for up to 40 hours, and extensive secondary use can be made of information given during questioning, including derivative use in the criminal investigation and prosecution of the person.
23. Most other law enforcement agencies' powers are constrained to inquiries and investigations into specific incidents (that is, offences, regulatory breaches or serious corruption). This is consistent with their focus in obtaining relevant, admissible evidence to support prosecutions or other enforcement actions. Even the examination powers of the Australian Criminal Intelligence Commission, which are exercised as part of a criminal intelligence investigation, must have a nexus with the commission of an offence or offences.
24. It is important that these significant differences are reflected in the authorisation arrangements for ASIO's compulsory questioning powers, and specifically through the requirement of judicial authorisation (at a minimum, as part of a 'double lock' mechanism).
25. Further, the model of internal authorisation of coercive questioning powers in other Commonwealth agencies is of concern, and should not necessarily be taken as an appropriate 'baseline' standard on which to model new proposals for compulsory questioning powers. As the third Independent National Security Legislation Monitor has pointed out, internal authorisation runs contrary to the trend in other Five Eyes countries to maintain judicial authorisation of extraordinary powers.

Paramount importance of independence in issuing questioning warrants

26. In short, the unique nature of ASIO's functions, and the manner in which those functions are performed, are distinguishable to any other Commonwealth agency, especially law enforcement agencies. The community understandably reacts with caution to proposals to expand the extraordinary powers of an agency whose highly intrusive powers are exercised on a largely covert basis, especially when those proposals are accompanied by an intended dilution of the existing authorisation process, by removing judicial involvement.
27. Public trust and confidence are critical to the legitimacy of ASIO's important work. Judicial authorisation is a crucial means of creating and maintaining that confidence and consequent legitimacy. Of all of the proposed enhancements to safeguards that the Law Council has recommended in relation to this Bill, the retention of judicial involvement in the issuing process for ASIO's questioning warrants is the most critical measure. The national legal profession implores the Committee to retain this important safeguard in any re-designed compulsory questioning regime.

Suggested precedent in ASIO's special powers warrants

28. In further evidence to the Committee, the Director-General of Security commented that all of ASIO's special powers warrants are authorised by the Attorney-General. The Law Council cautions against relying on arguments of alignment or standardisation to reduce the authorisation requirements for ASIO's questioning warrants, by removing judicial involvement. To do so would assume that ministerial authorisation is appropriate even for ASIO's special powers warrants, let alone for its extraordinary questioning powers. They are exceptions to the principle that the exercise of coercive powers requires judicial warrant,³ and thereby erode the traditional protections against abuse of power by government investigative agencies.
29. The authorisation requirements for ASIO's special powers warrants are also at odds with the more rigorous, judicial authorisation requirements adopted by other Five Eyes jurisdictions. Indeed, the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 presently before the Parliament recognises the lack of equivalence by creating bespoke arrangements for the authorisation of orders sought by ASIO, in an attempt to meet the minimum eligibility requirements for an international cross-border data sharing arrangement with the United States.
30. Australia is already an outlier among the Five Eyes in conferring compulsory questioning powers on a security intelligence agency. It is similarly an outlier in adopting ministerial-only authorisation requirements for intrusive surveillance powers. Reducing the authorisation requirements for questioning warrants, by removing judicial involvement, would further compound this disparity.
31. In making these comments, the Law Council in no way impugns the due diligence of any Attorney-General in performing their issuing functions under the ASIO Act.
32. Rather, the Law Council notes that judicial authorisation of extraordinary, intrusive powers provides a higher standard, and therefore more effectively engenders public trust and confidence in relation to the exercise of covert and highly intrusive intelligence collection powers. The adoption of that higher standard is critical to at least ASIO's compulsory questioning powers, which are its most intrusive and extraordinary powers.

Other comments—relevance of ex post facto oversight

33. The Law Council also notes that the availability of *ex post facto* review by the Inspector-General of Intelligence and Security (IGIS) was raised as a further factor supporting a ministerial authorisation model, to the exclusion of judicial involvement (via authorisation or performing a review function under a 'double lock' mechanism).

³ While the issuing of a warrant is generally not an exercise of judicial power, but rather an exercise of executive power, this power has historically conferred on judges acting *persona designata* (that is, in their personal capacities). It has long been recognised in common law jurisprudence that the conferral of powers to issue warrants on judicial officers in their personal capacity is a critical safeguard, because judges are bound to exercise that power in a manner that is compatible with the essential requirements of the judicial process—that is, in a just and fair manner, with judicial impartiality, rigour and independence. For a useful summary and discussion of Australian, US and Canadian authorities on this proposition, see: the Hon Robert French AC, former Chief Justice of the High Court of Australia, 'Executive Toys: Judges and Non-Judicial Functions' [2008] [Federal Judicial Scholarship](#) 8, especially at [57]-[64] and [77]-[79].

34. The Director-General stated at the public hearing of 30 October that 'the Attorney-General has been authorising special powers for many years now and the inspector-general has never once found the Attorney-General wanting in that process'.⁴
35. The Law Council notes that the reason the IGIS has never made an adverse finding about an issuing decision by the Attorney-General on one of ASIO's special powers warrants is that paragraph 9AA(b) of the *Inspector-General of Intelligence and Security Act 1986* (Cth) expressly excludes the actions of Ministers from the independent oversight of the IGIS. This exclusion has existed since the original enactment of the IGIS's governing legislation in 1986.⁵
36. In any case, the Law Council remains of the view that it has expressed to the Committee on several previous occasions that *ex post facto* oversight of ASIO's intrusive powers (covering both its actions in applying for, and executing, warrants) is valuable, but serves a separate purpose to independent authorisation. The existence of *ex post facto* oversight does not, in any way, reduce the need for the highest levels of independence and assurance in authorisation decisions. This is particularly important for powers of the most intrusive kind.
37. In this regard, the Law Council agrees with the assessment of the Director-General of Security that compulsory questioning powers (including the associated apprehension, search and seizure powers) are ASIO's most intrusive intelligence collection powers.⁶
38. Consequently, the case for the independent authorisation of these powers is even stronger than the already significant case for the independent authorisation of ASIO's special powers warrants, as is the case in other Five Eyes jurisdictions.

Further information

39. I hope that this supplementary submission is of assistance to the Committee in completing its inquiry into this important legislation. Please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or natasha.molt@lawcouncil.asn.au, should you wish to discuss this submission, or if you require any further information.

Yours sincerely



Pauline Wright
President

⁴ *Proof Committee Hansard*, Public hearing 30 October 2020, 18 (questioner: Mr T Wilson MP).

⁵ See paragraph 8(8)(b) of the original enactment, relocated in 2010 to current paragraph 9AA(b).

⁶ *Proof Committee Hansard*, Public hearing 30 October 2020, 11 (questioner: the Hon M Dreyfus QC MP).