



Law Council
OF AUSTRALIA

Office of the President

10 July 2020

Mr Andrew Hastie MP
Chair, Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

By email: picis@aph.gov.au

Dear Chair

Australian Security Intelligence Organisation Amendment Bill 2020

Thank you again for the opportunity to appear before the Committee today. The Law Council of Australia took one matter on notice. This matter arose from your questions about the criteria governing the making of oral requests and oral issuing decisions on questioning warrants in proposed subsections 34B(5)-(6) and 34BF(3) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).

Question taken on notice

You observed that the Law Council's submission, at page 50, commented that the above provisions did not adequately define circumstances of emergency in which questioning warrants may be sought and issued orally. You invited the Law Council to suggest how the term might be defined.

Law Council response

The Law Council remains of the views expressed at pages 49-51 of its submission, including recommendation 20. In particular, the above provisions do not currently apply any form of 'emergency' threshold for the oral requesting and issuing of questioning warrants. That is, there is no reference whatsoever to an 'emergency' in these provisions.

Rather, the provisions only require the Director-General of Security and the Attorney-General to reasonably believe that the delay caused by making a written request may be prejudicial to security. This would cover **any degree** of prejudice to security, without any quantification of the risk of prejudice or its likelihood of occurrence.

The Law Council has recommended that the provisions are amended to apply a specific threshold of emergency, and to define clearly the types of circumstances in which an emergency would exist in this specific context.

The Law Council considers that recommendation 20 at page 51 of its submission would provide adequate guidance on this matter. Recommendation 20 is reproduced on page two for convenience of reference.

Recommendation 20 – issuing threshold for emergency oral questioning warrants

- **Proposed subsections 34B(5)-(6) and 34BF(1)(b) of the ASIO Act should be amended to prescribe a different threshold for the requesting and issuing of oral questioning warrants, namely:**
 - **the Attorney-General is satisfied, on reasonable grounds, that:**
 - **there is an emergency situation, involving an imminent risk of serious prejudice to security or a serious risk to a person’s life or safety; and**
 - **issuing the warrant orally is necessary to avoid or minimise the impact of the risk materialising; and**
- **The warrant request includes an immediate attendance requirement, and the threshold in subsection 34BE(1) is met.**

The Law Council considers that an emergency threshold would be appropriately particularised by the concepts in recommendation 20 of an ‘imminent risk’ of ‘serious prejudice to security’ or ‘serious risk to a person’s life of safety’. A further degree of specificity in the substance of an ‘emergency’ in this context would be found in the additional requirement for oral questioning warrants to only be available where the warrant is requested and issued with an immediate appearance requirement.

The Law Council’s recommendation would also include a test of necessity in relation to the making of the oral request or issuing decision. That is, the oral request and issuing decision are necessary to prevent the identified risk of prejudice to security or to life or safety from materialising, or to minimise its impact.

The Law Council also draws the Committee’s attention to the observations at page 50, paragraph 190 of its submission. The Law Council noted that the *Intelligence Services Act 2001* (Cth) applies the concept of ‘serious prejudice to security’ and ‘serious risk to a person’s safety’ to prescribe the emergency authorisation threshold in section 9B, which applies to the Australia Secret Intelligence Service, the Australian Signals Directorate and the Australian Geospatial-Intelligence Organisation. The Law Council’s recommendation would bring ASIO’s oral questioning warrants into line within this existing approach.

Corrections to the Law Council’s submission

I would also like to confirm the two oral corrections the Law Council made to our submission. First, as I noted in my oral evidence, at page 106, paragraph [454], the word ‘effective’ should read ‘ineffective’.

Secondly, as Dr Neal noted in his oral evidence, at page 18, paragraph 43, the reference to ‘foreign interference’ being undefined in the ASIO Act should read that ‘acts of foreign interference’ is a defined term in section 4 of the ASIO Act, and that its scope appears to be broader than equivalent concepts in the *Criminal Code Act 1995* (Cth). I confirm that this correction in no way alters the Law Council’s position, expressed at page 19, paragraph [44] of our submission and re-iterated in oral evidence, that this will significantly expand the availability of ASIO’s compulsory questioning powers. This includes threats to Australia’s economic and political interests, and the ability to question adults who merely have some knowledge of such threats and are not personally engaged in prejudicial activities.

Further supplementary submission

Finally, the Law Council intends to lodge a further supplementary submission with the Committee dealing with a further issue relevant to the warrantless tracking device measures in Schedule 2 to the Bill. This concerns proposed the effects of proposed subsection 33(4) of the ASIO Act (item 16 of Schedule 2) which may operate to remove the need for ASIO to obtain even an internal authorisation under the proposed statutory framework in some jurisdictions, such as Victoria.

I trust that this assists the Committee. Thank you again for the opportunity to participate in the inquiry. Should you have any further questions, please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or natasha.molt@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President