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NSWCCL SUBMISSION

THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

REVIEW DIVISION 3 OF PART III OF THE *AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979* (CTH)

1 February 2024

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1. EXECUTIVE SUMMARY

The New South Wales Council for Civil Liberties (**NSWCCL**) considers that the powers contained in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) (herein referred to as **Division 3**) disproportionately infringe on fundamental civil liberties, create a serious threat to the rule of law in Australia, and moreover, no longer have the utility which precipitated their creation. The NSWCCL submits that Division 3 should be repealed in full.

The Division 3 powers, when introduced, were cast as a transient response to an exceptional set of events, as a response to the perceived terrorism threat following the 9/11 attacks. However, more than two decades on, and what were once powers of unprecedented and exceptional reach, are now a permanent feature of Australia's legal landscape. Given the reduction in the threat of terrorism, coupled with the fact that Division 3 powers have rarely been utilised, the powers given to Australian Security Intelligence Organisation (**ASIO**) under Division 3 are now well beyond the scope of what is reasonably necessary. They overstep intelligence collection and veer into investigatory powers that are properly the purvey of law enforcement agencies.

In addition to the lack of utility we maintain there are also specific concerns with Division 3, such as the abrogation of the common law right not to self-incriminate and breaches of Australia's international obligations under the International Covenant on Civil and Political Rights (**ICCPR**) and the Convention on the Rights of the Child (**CRC**). In particular, the questioning warrants which may be granted under the ASIO Act allow a person to be questioned in eight-hour blocks for up to a maximum of 24 hours or be detained for up to a week for questioning. These questioning warrants may be issued against non-suspects, including family members, journalists, children between the ages of 16 and 18 and innocent bystanders. The NSWCCL submits these powers should not be permitted in respect of non-suspects, journalists, innocent bystanders and especially, in relation to children. Further, the right to hold persons for questioning should be limited. A fundamental right under criminal law is that persons should not be held for questioning without charge except for a limited period, usually some hours without a court order.

The NSWCCL holds a strong view that in no circumstances should children be subject to any apprehension powers. In particular, the apprehension powers for minors aged 14 years or over as part of the issuing of questioning warrants under Division 3 should be completely repealed. The NSWCCL submits that the apprehension of minors, who are subject to the same powers and conditions as adults with only minor modifications, is a serious violation of human rights and a disproportionate measure that is not justified by any evidence of necessity or effectiveness.

In the absence of a national human rights charter, it is important that the Government provide a robust justification for any encroachment on civil liberties. Previous justifications for these powers have been superficial and tokenistic, and having rarely gone further than the rhetorical assertion that the limitations on civil liberties are necessary, reasonable, and proportionate. The NSWCCL submits that this attempt at justification is inadequate and that no persuasive evidence for retaining the Division 3 powers has been provided. The purported utility of the Division 3 powers when they were first conceived has not come to bear. In circumstances where there is deficient justification and negligible utility to Division 3, the disproportionate encroachment upon civil liberties and fundamental rights are unwarranted.

A complete repeal would allow for the adoption of measures that strike a more appropriate balance between national security and the preservation of individual rights and liberties. The failure to repeal Division 3, risks undermining the foundations of Australia's democratic society and its commitment to upholding international human rights standards. It would also leave Australia as the only country in the Five Eyes alliance to permit compulsory questioning powers. This is despite having experienced fewer terrorist attacks than some of the other countries in the Five Eyes alliance, particularly the US, Canada, and the UK. There are no justifiable reasons to retain Division 3, the NSWCCL therefore advocates for a complete repeal.

2. INTRODUCTION

The NSWCCL thanks the Attorney General's Department for the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security in response to the review of Division 3.

Division 3 is striking in its volume and scope containing an array of unfettered powers granted to ASIO. Supporters of the Division 3 powers have attempted to justify its value and utility by arguing that it is only through the protection of national security that civil liberties can be enjoyed by many.

While these justifications have been made, many concerns have been left unaddressed. Of particular concern is that it has not been shown that the counter-terrorism measures have actually increased security nor had any practical use in preventing terrorism. In the 2021-2022 financial year only one person has been subject to a questioning warrant, so it is questionable whether these powers are even being used. The NSWCCL submits that the purported utility of the Division 3 powers when they were first conceived has not come to bear. If this utility has not come to bear, it is hard to justify the powers under Division 3.

Not only is the utility of Division 3 questionable, but there are also specific concerns with its operation. It violates many of the fundamental civil liberties associated with a liberal democracy, including the right not to be arbitrarily detained, the right of freedom of association and the right to be legally represented. Particularly abhorrent is empowering ASIO to question minors as young as fourteen.

In circumstances where there is deficient justification and negligible utility to Division 3, the disproportionate encroachment upon civil liberties and fundamental rights are unwarranted. In light of absence of justification, minimal use of the powers and their effect on civil liberties and fundamental rights, the NSWCCL take a strong view that Division 3 should be repealed in full. The remainder of this submission is comprised of two parts.

Part 3 focuses on high level criticisms of Division 3, by focusing on:

(a) Unjustified encroachment on fundamental rights (section 3.1)

(b) Human rights perspective (section 3.2)

(c) International comparative approach: Australia is an international outlier (section 3.3)

(d) Division 3 powers are incompatible with ASIO's mission (section 3.4)

Part 4 provides specific criticisms of Division 3, by focusing on:

(a) Apprehension powers(section 4.1)

(b) Inadequate threshold for the request and issuing of questioning warrants (section 4.2)

(c) Absence of judicial check on the power to issue questioning warrants (section 4.3)

(d) Effective Power of Detention (section 4.4)

(e) The questioning warrant procedure (section 4.5)

(f) Involvement of lawyers and non-legal representatives (section 4.6)

(g) Questioning of minors (section 4.7)

(h) Secrecy provisions (section 4.8)

3. HIGH LEVEL CRITICISMS

3.1 Unjustified encroachment on fundamental rights

The powers contained in Division 3 disproportionately infringe on fundamental civil liberties. These powers are overly broad and intrusive with an unprecedented reach going far outside the bounds of what is necessitated to protect national security in a peacetime liberal democracy. Cast as a transient response to an exceptional set of events, these powers were originally introduced as a response to the perceived terrorism threat following the 9/11 attacks.[1] More than two decades on and what were once powers of unprecedented and exceptional reach are now a permanent feature of Australia's legal landscape.[2]

Division 3 is striking in its volume and scope. In particular, it affords ASIO the power to apprehend and compulsorily interrogate children as young as 14 under threat of criminal sanction if they do not comply.[3] Such powers breach several of Australia's obligations under the International Covenant on Civil and Political Rights (**ICCPR**) and the Convention on the Rights of the Child (**CRC**). They violate many of the fundamental civil liberties associated with a liberal democracy, including the right not to be arbitrarily detained, the right of freedom of association and the right to be legally represented.[4] Supporters of such powers have attempted to justify such violations by arguing that it is only through the protection of national security that civil liberties can be enjoyed by many.[5] The NSWCCL submits that such arguments are misleading as civil liberties are not dependent on the government establishing a 'secure environment' nor does the State 'create' human rights in its pursuit of security and societal freedom.[6] Such reasoning contradicts the core principles of modern liberal democracy including the recognition of the inviolability of absolute rights,[7] prohibitions on the arbitrary exercise of executive power and a separation of powers.[8] A legislative regime that does not respect human rights in the first place cannot legitimately claim to protect these rights against transnational security threats in times of emergency.[9] The powers contained in Division 3 are inherently antithetical to a free society.

These extraordinary powers are especially dangerous because Australia does not have a bill of rights that is enforced on a federal level. Australia is unique among Western nations in that it is now the only democratic nation in the world without a national human rights act.[10] This has resulted in a body of anti-terror laws that in many respects undermine democratic freedoms to a greater extent than the laws of other comparable nations, including nations facing more severe terrorist threats.[11] Without a bill of rights, the violations of human rights through the exercise of Division 3 powers may have no constitutional remedy.[12] The NSWCCL submits that the powers contained in Division 3 present a disturbing and unjustified encroachment of civil liberties and despite Australia not having a bill of rights they are antithetical to our liberal democracy and have no place in the Australian legal system.

In the absence of a national human rights charter, it is important that the Government provide a robust justification for any encroachment on civil liberties. The NSWCCL submits that former justifications have been inadequate and no persuasive evidence for the utility of the Division 3

[1] Explanatory Memorandum, *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating To Terrorism Offences) Bill 2019* (Cth) 3.
[2] Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36(2) *Melbourne University Law Review* 415, 420.
[3] Australian Human Rights Commission, Submission No. 29 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Security Intelligence Organisation Amendment Bill* (1 July 2020) 11, 33 ('AHRC Commission').
[4] Sandra Fonseca, 'ASIO'S 'Terrorism Powers' and the Implications for Democracy' (24 November 2005) Magazine of The UTS Journalism Program and the Australian Centre for Independent Journalism.
[5] Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) UNSW Law Journal 29(2) 1, 5.
[6] Ibid.
[7] Richard Ekins, 'Human Rights and the Separation of Powers' (2015) 34(2) University of Queensland Law Journal 217.
[8] Vasileios Adamidis, 'Democracy, populism, and the rule of law: A reconsideration of their interconnectedness' (2021) Politics 1, 8.
[9] Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) UNSW Law Journal 1, 6.
[10] George Williams, 'The Role of Parliament Under an Australian Charter of Human Rights' (Australia – New Zealand Scrutiny of Legislation Conference, 8 July 2009).
[11] Keiran Hardy and George Williams, 'Two Decades of Australian Counterterrorism Laws' (2022) 46(1) *Melbourne University Law Review* 34, 36.
[12] Ibid.

powers has been presented. Previous justifications of these powers have been superficial and tokenistic having rarely gone further than the rhetorical assertion that the limitations on civil liberties are necessary, reasonable, and proportionate.[13] Further it has not been shown that the counter-terrorism measures have actually increased security nor had any practical use in preventing terrorism.[14] In the 2021-2022 financial year only one person has been subject to a questioning warrant.[15] It is clear that the purported utility of the Division 3 powers when they were first conceived has not come to bear. In circumstances where there is deficient justification and negligible utility to Division 3, the disproportionate encroachment upon civil liberties and fundamental rights are unwarranted.

3.2 Human rights perspective

In this section, we take a closer look at how Division 3 restricts fundamental human rights. These restrictions, in addition to the encroachment upon civil liberties discussed above, add further weight behind the NSWCCL's submission that Division 3 should be completely repealed.

Division 3 abrogates the common law right not to self-incriminate and breaches Australia's international obligations under the ICCPR and CRC. In particular, Division 3 does away with the right against self-incrimination, and the right to liberty and security of a person.[16] The ASIO Act's Amended Explanatory Memorandum refers to the ICCPR's allowance for limitations on these rights where it is achieving a legitimate objective and is reasonable and proportionate.[17] However, these justifications are duplicitous and fail to acknowledge that the legislation, in practice, remains incompatible with these fundamental rights.

The privilege against self-incrimination is an essential cornerstone of Australia's common law. It is a 'basic and substantive common law right, and not just a rule of evidence',[18] and reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.[19] This right is further affirmed under Article 14(3)(g) of the ICCPR and Article 40(2)(iv) of the CRC.[20]

Section 34G of the ASIO Act requires a person to provide any information, record or thing requested in accordance with a warrant issued under Division 3.[21] The ability to compel answers, including instances where charges are imminent, constitutes an unacceptable erosion of the right against self-incrimination and the rights of an accused person to a fair trial. The NSWCCL submits that any abrogation of the right against self-incrimination can only be justified where the public benefit derived from negating the privilege decisively and unquestionably outweighs the harm to civil rights. This is not the case under the current Division 3 provisions, as it cannot be assumed that limiting this privilege will necessarily result in better investigations nor crime prevention.

Before the enactment of Division 3, ASIO already had the power to 'bug phones, install listening devices in offices and homes, intercept telecommunications, open people's mail, monitor online discussion, break into computer files and databases and use personal tracking devices'.[22] This extensive array of intelligence-gathering methods makes it more likely that the mandatory questioning warrants under Division 3 are unnecessary, beyond scope, and therefore, arbitrary. Moreover, current protections afforded under Division 3 are notably weak and lack the necessary restrictions on the use, and derivative use, of information or material seized under coercive

[13] Civil Liberties Councils, Submission No. 20 to Parliamentary Joint Committee on Intelligence and Security, Inquiry Into The National Security Legislation Amendment Bill (No 1) 2014 (2014).
[14] Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) UNSW Law Journal 1, 18.
[15] Australian Security Intelligence Organisation, Australian Security Intelligence Organisation Annual Report 2021-22 (Report, 2021-22) 135.
[16] International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9,14, Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37,40.
[17] Revised Explanatory Memorandum, *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth) 7.
[18] *Reid v Howard* (1995) 184 CLR 1, 8.
[19] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 1 (French CJ).
[20] International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14; Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2)(iv).
[21] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34(G) ('ASIO Act').
[22] Castan Centre for Human Rights Law, Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers cf Head, Michael "Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights" (2002) 26 Melbourne University Law Review 666, 671.

powers. The restrictions on disclosure under sections 34EA(1) and 34EC(1) only apply when charges are imminent or have already been filed, and a court order can override them.[23] The inherent fragility in these minimal protection mechanisms offers the opportunity for misuse and undermines the credibility of the safeguards in place. Without the necessary protections that would ensure compelled answers cannot be used in prosecution, and are restricted to the purview of intelligence, this abrogation necessitates an immediate repeal of the Division 3 powers.

The NSWCCL submits that Division 3 breaches the rights for liberty and security of a person as per Article 9 of the ICCPR and Article 27 of the CRC.[24] Article 9(1) states that 'no one shall be subjected to arbitrary arrest or detention'. The attempt by the Department of Home Affairs, as detailed in the Explanatory Memorandum, to distinguish between apprehending and detaining a person 'as it only lasts for such time as is necessary to bring the person before the prescribed authority for questioning', is a reliance on a technicality.[25] The Memorandum further states that 'Detention is not considered arbitrary where it is … necessary to achieve a legitimate objective of protecting Australia's national security interests.'[26] However, a warrant can be issued in relation to any 'protection …from espionage, politically motivated violence and acts of foreign interference', which allows individuals to be detained for a vast array of reasons as the definition is quite broad.[27] Whilst it is accepted that detention may be necessary to investigate the commission of a major terrorist act, it is submitted that detention would be arbitrary for the investigation of the potential crimes that could be caught by the definition, and thus a breach of Article 19 of the ICCPR.

The NSWCCL urges a thorough reconsideration of the power behind these provisions and their potential ill-effect and misuse. For the reasons explained above, the NSWCCL submits that Division 3 should be completely repealed. A complete repeal would allow for the adoption of measures that strike a more appropriate balance between national security and the preservation of individual rights and liberties. The failure to repeal Division 3, and keep these powers in place, risks undermining the foundations of Australia's democratic society and its commitment to upholding international human rights standards.

3.3 International comparative approach: Australia is an international outlier

Australia is the only country in the Five Eyes alliance – comprising Australia, New Zealand, Canada, the United Kingdom, and the United States of America – to confer a compulsory questioning power on one of its intelligence agencies, which, unquestionably, leaves it out of step with the international community.[28] This section highlights what is required to bring Australia back in line, it demonstrates these requirements through a comparative analysis of the questioning powers of other comparable nations.

- The Canadian Security Intelligence Service has no power to conduct compulsory questioning, to arrest, or to detain.[29] While in the past two decades Canadian law enforcement has possessed investigative hearing powers - first under the *Anti-Terrorism Act 2001* and subsequently (following the same Act's expiry in 2007), under the *Combating Terrorism Act 2013* - these powers were repealed in 2019 due to their lack of use and inappropriateness. The investigative hearing power, which permitted law enforcement to

[23] ASIO Act ss 34EA(1), 34EC(1).
[24] International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9; Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37.
[25] Revised Explanatory Memorandum, *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth) 25.
[26] Ibid 23.
[27] ASIO Act s 34A.
[28] Law Council of Australia, Submission No. 31 to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) 14 ('LCA Submission').
[29] Attorney-General's Department, Attorney-General's Department response to the Parliamentary Joint Committee on Intelligence and Security's post-hearing questions, Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (July 2017) 1.

compel testimony from a witness during the fact-finding stage of an investigation,[30] was faced with heavy criticism and was never used.[31]

- The United States' Federal Bureau of Investigations, which is charged with a dual security intelligence and law enforcement function, and has no power to conduct compulsory questioning despite being the jurisdiction of the 9/11 attacks, to which Australia's own legislation is responding.[32]

- The New Zealand Security Intelligence Service and Government Communications Security Bureau have no power to conduct compulsory questioning for intelligence gathering purposes. Although the *Intelligence and Security Act 2017* provides for single authorisation intelligence warrants, which permit the carrying out of otherwise unlawful activities,[33] the regime does not make warrantable any questioning or detention powers or activities.[34]

- The United Kingdom's Security Service does not have the power to conduct compulsory questioning for the purposes of gathering intelligence.35 Section 89 of the Terrorism Act 2000 (UK) empowers law enforcement agencies, including an on-duty member of Her Majesty's forces, or a constable, to stop a person for so long as necessary for questioning to ascertain a person's identity and movements, or what he or she knows about a recent explosion or another recent incident endangering life. However, this power is limited to application in Northern Ireland.36 The need for such a power was in response to a region historically and recently affected by dissident republican terrorist groups.37 This should be contrasted to the Australian context, which has no comparative threat.

As this comparative exercise illustrates, Australia remains the only country in the Five Eyes alliance to permit compulsory questioning powers, despite having experienced fewer terrorist attacks than some of the other countries in the Five Eyes alliance, particularly the US, Canada, and the UK.[37] The NSWCCL submits that this illustrates that the power to conduct compulsory questioning is not proportionate to the threat, and Australia should repeal these powers in line with the comparable international community.

As Division 3 is in breach of provisions of international treaties, such as the ICCPR and the CRC, as discussed above, Australia's failure to evolve in reforming and adjusting these laws to the present reality are a reputational risk for the nation as one that fails to recognise and uphold human rights, thereby contradicting its stated acceptance of human rights principles. As noted by the Hon. John von Doussa, former judge of the Federal Court of Australia, the common observation of formal statements from organisations such as the United Nations, International Commission of Jurists, the Advisory Council of Jurists, and human rights lawyers worldwide has been that "anti-terrorism laws that deny suspects fundamental human rights and the benefit of the rule of law undermine the very system of democracy that the laws are intended to protect".[38] Division 3 is such a law that undermines Australian democracy.

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[30] Ibid.

[31] Questions and Answers: Strengthening Security And Protecting Rights', Government of Canada (Web Page) <https://www.canada.ca/en/services/defence/nationalsecurity/our-security-our-rights/questions-answers-strengthening-security-protecting-rights.html>.

[32] Attorney-General's Department, Attorney-General's Department response to the Parliamentary Joint Committee on Intelligence and Security's post-hearing questions, Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (July 2017) 2.

[33] Intelligence and Security Act 2017 (NZ) Part 4 Subpart 1, ss 67.

[34] Ibid s 67; see Department of the Prime Minister and Cabinet, Activities allowed under intelligence warrants, The Intelligence and Security Act 2017 Fact Sheet No. 7 (September 2017) 1–2.

[35] Attorney-General's Department, Attorney-General's Department response to the Parliamentary Joint Committee on Intelligence and Security's post-hearing questions, Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (July 2017) 1.

[36] See *Terrorism Act 2000* (UK) Part VII.

[37] Bastian Herre (OurWorldInData.org), "The Global Terrorism Database: how do researchers measure terrorism?" (2023), < https://ourworldindata.org/the-global-terrorism-database-how-do-researchers-measure-terrorism>.

[38] The Hon. John von Doussa, "Human Rights – Refugees and Terrorists – What Rights?" (11 March 2005), John Bray Law Chapter Public Lecture, published at < https://humanrights.gov.au/about/news/speeches/human-rights-refugees-and-terrorists-what-rights >.

3.4 Division 3 powers are incompatible with ASIO's mission

As Australia's national security service, the main mission of ASIO is to collect, analyse and disseminate intelligence information that will enable it to notify the Government about activities or situations that may endanger Australia's national security.[39] However, the NSWCCL submits that the powers given to ASIO under Division 3 are beyond the scope of what is necessary for ASIO in this capacity, as these powers overstep intelligence collection and veer into investigatory powers that are properly the purvey of law enforcement agencies.

The Law Council of Australia (**LCA**) expressed concerned that allowing ASIO to continue with these powers erodes the "essential distinction" between the intelligence service and law enforcement.[40] This requirement for separation is consistent with the views of the Hope Royal Commission on ASIO, which emphasised the importance of ASIO's functions being demonstrably separate to those of law enforcement agencies.[41] The two agencies should be kept separate to perform their unique roles under clear, transparent schemes that are consistent with human rights and the rule of law. When either of these organisations are given powers beyond the necessary scope of their mission, they risk having greater influence and power than required, leading to potential encroachment upon the rights of individuals.

As noted above, the powers under Division 3 were introduced as an extraordinary power on the basis of the perceived emergency following the 9/11 attacks. However, these powers are no longer appropriate given that the threat of emergency has lifted. Australia has been criticised for its approach of 'hyper legislation' and having been 'caught up in the 9/11 effect.'[42] As the NSWCCL has previously submitted, in situations such as this, often a 'mission creep' can occur when security agencies that were conferred powers to deal with a threat discover new threats to justify holding onto those powers.[43]

There are no convincing reasons why these extraordinary powers are still necessary, or why ASIO cannot manage present threats under traditional security powers. As an alternative, the ASIO Act could implement an approach similar to the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**). For example, whereas the ASIO Act allows a prescribed authority to prohibit a questioning warrant subject being represented by their lawyer of choice, the ACC Act provides no such limitation. Instead, the ACC Act manages these risks through the enactment of disclosure offences applicable to all individuals, including an examinee's lawyer (alongside the usual professional conduct rules and duties applicable to legal professionals).[44] There remains no meaningful or reasonable explanation as to why it would not be possible for the ASIO Act to adopt an equivalent approach to that in the ACC Act.[45]

Further, the questioning warrants which may be granted under the ASIO Act allow a person to be questioned in eight-hour blocks for up to a maximum of 24 hours or be detained for up to a week for questioning. These questioning warrants may be issued against non-suspects, including family members, journalists, children between the ages of 16 and 18 and innocent bystanders. The NSWCCL submits these powers should not be permitted in respect of non-suspects, journalists, innocent bystanders and especially, in relation to children. The NSWCCL submits that these powers excessive and should be repealed.

The dichotomy that exists in anti-terror legislation, is ensuring the security of the nation whilst respecting the liberty of its people.[46] This is particularly important in Australia as there is no national bill of rights or human rights act. Therefore, the checking and balancing of anti-terror laws

[39] Australian Security Intelligence Organisation, 'About' (Web Page) <https://www.asio.gov.au/about>.
[40] LCA Submission, p 15.
[41] The Hon Justice Robert Hope, Royal Commission into Intelligence and Security, Fourth Report: Australian Security Intelligence Organisation, 1976, 210-21.
[42] Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism (Cambridge University Press, 2012) 309–310 cited in George Williams, "Sacrificing Civil Liberties to Counter-Terrorism – Where Will it End?" (John Marsden Lecture, 22 November 2018) 4.
[43] Civil Liberties Australia Inc, Submission No 14 to Parliamentary Joint Committee on Intelligence and Security (22 June 2020), 2.
[44] LCA Submission, p 74.
[45] Ibid.
[46] George Williams, "Sacrificing Civil Liberties to Counter-Terrorism – Where Will it End?" (John Marsden Lecture, 22 November 2018) 8.

has been dependent on the extent to which political leaders are willing to exercise good judgement and self-restraint in the enactment of new laws – an approach that has not proven effective.[47]

Ultimately, the provisions within Division 3 overstep the divide between the purpose of a national security agency and law enforcement. The powers are no longer appropriate given Australia's National Terrorism Threat maintains a level 2 (of 5 levels) assessment of 'possible'.[48] The NSWCCL submits that these powers should be scaled back to appropriately advance the protection of Australia's security in a way that does not, at the same time, sacrifice the freedoms and rights of those whom the Government is meant to protect.

4. SPECIFIC CRITICISMS

Section 4 is comprised of 8 subsections each addressing specific concerns with Division 3.

4.1 Apprehension powers

Division 3 contains an apprehension power,[49] which enables a police officer to apprehend a person who is subject to a questioning warrant to ensure their attendance at questioning, and to prevent them from tipping off others or destroying evidence.[50] The apprehension ends when the person appears before a prescribed authority for questioning under the warrant. However, this implies that if questioning is not ready to begin when the person appears, the person remains apprehended until questioning commences.

The NSWCCL submits that this apprehension power is problematic and unjustified, as it can potentially amount to detention in both substance and effect, without adequate judicial oversight or safeguards,[51] and therefore poses many of the same limitations on human rights as the detention regime it replaced.[52] The NSWCCL further strongly contends that this apprehension regime is especially harmful and disproportionate to minors, who should not be subject to apprehension or compulsory questioning (as explained below in section 4.7) in any circumstances whatsoever.

The NSWCCL outline the following criticisms of the apprehension regime, in support of the complete repeal of Division 3.

Arbitrary detention

As mentioned, subsection 34C(1) of the ASIO Act allows the police to apprehend a person who is subject to a questioning warrant 'until the subject appears before a prescribed authority for questioning under the warrant'. This limitation is not clear from the wording of the subsection and creates a risk of arbitrary detention, as the person could remain apprehended while waiting to appear before the prescribed authority if questioning is delayed for any reason.[53] The NSWCCL submits that the power of apprehension should be instead limited to cases where there is a reasonable belief that questioning will start immediately upon arrival at the place of questioning, and that the person should be released as soon as possible if questioning does not begin or finish within a reasonable time.

Absence of judicial oversight

The NSWCCL shares the same concerns as the LCA and others regarding the lack of judicial involvement in the authorisation of the immediate apprehension of a person under Division 3.[54]

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[47] Ibid.
[48] Australian National Security, '*Current National Terrorism Threat Level'*, 28 November 2022 (Webpage) <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>.
[49] *Australian Security Intelligence Act 1979* (Cth) s 34C ('ASIO Act').
[50] ASIO Act ss 34BE, 34C.
[51] LCA Submission, p 14.
[52] AHRC Submission, p 4.
[53] LCA Submission, pp 63-64.
[54] Ibid; AHRC Submission.

The NSWCCL submits that the exclusive power of the Attorney-General to issue a warrant for the apprehension of a person, based on a speculative assessment of their future conduct, is a grave infringement of the right to liberty and the presumption of innocence. The NSWCCL contends that such a power should only be exercised by a judicial officer appointed persona designata, as is the case under section 31 of the ACC Act, who can independently scrutinise the grounds and necessity for the apprehension.[55]

Apprehension of minors

The NSWCCL holds a strong view that in no circumstances should children be subject to any apprehension powers. In particular, the apprehension powers for minors aged 14 years or over as part of the issuing of questioning warrants under Division 3 should be completely repealed. The NSWCCL submits that the apprehension of minors, who are subject to the same powers and conditions as adults with only minor modifications, is a serious violation of human rights and a disproportionate measure that is not justified by any evidence of necessity or effectiveness.[56]

The apprehension of minors is an extraordinary and intrusive measure that is incompatible with the rule of law and the protection of civil liberties in a democratic society. Neither the issuing criteria nor criteria for authorising the apprehension of a child require the Attorney-General to be satisfied that compulsory questioning or apprehension are measures or last resort.[57] Further, there is no obligation on the apprehending officer to clearly inform the child of their legal status as to whether they are or are not free to leave at a particular point in time.[58] As such, and given that apprehension under Division 3 can be a form of detention, the apprehension of minors engages and infringes several rights protected by the ICCPR and the CRC, including the following:[59]

- **Article 9 of the ICCPR:** 'No one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law'.
- **Article 3 of the CRC:** 'In all actions concerning children … the best interests of the child must be a primary consideration'.
- **Article 37(b) of the CRC:** 'No child shall be deprived of their liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'.
- **Article 37(d) of the CRC:** 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance'.

In light of the above, the NSWCCL submits that the apprehension regime lacks sufficient safeguards, transparency, and accountability, and that it has not been shown to be necessary or effective in preventing or responding to terrorism or other threats to national security. The NSWCCL therefore calls for the repeal of the apprehension regime altogether.

4.2 Inadequate threshold for the request and issuing of questioning warrants

Issuing questioning warrants generally

Compulsory questioning poses a high level of constitutional risk and the exercise of compulsory questioning powers significantly infringes on the questioning subject's freedom and rights.[60] Further, the right to compulsorily question is not in line with international expectations.[61] On this

[55] Ibid p 45; AHRC Submission.
[56] LCA Submission.
[57] Ibid p 30.
[58] Ibid p 31.
[59] AHRC Submission, p 10.
[60] See section 4.1.
[61] See section 3.2.

basis, the power is extraordinary, however, the threshold for issuing questioning warrants is too low.

In 2020, the ASIO Act was amended so that Division 3 provides the power for the Attorney-General, on request of the Director-General, to issue a warrant in relation to two classes of persons:

(a) persons who are at least 18 years of age;[62] and

(b) persons who are at least 14 years of age.[63]

The ASIO Act provides different prerequisite requirements for issuing questioning warrants in relation to both classes of persons. Both require that the Attorney-General be satisfied that:

(1) there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a minor questioning matter;[64] and

(2) having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all circumstances for the warrant to be issued.[65]

The issuing criteria for questioning warrants relating to subjects at least 14 years of age includes an additional requirement that the Attorney-General be satisfied that there are reasonable grounds for believing that the person has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of, and the people of, the Commonwealth and the several States and Territories from politically motivated violence.[66] While the requirements are intended to be 'appropriate safeguards',[67] they do not reflect the extraordinary nature of the questioning power and continue to provide a broad discretion for the Attorney-General to issue the warrants. The NSWCCL considers that these requirements are not sufficient to safeguard against misuse of the power.

The current threshold for issuing adult questioning warrants was introduced for questioning warrants in relation to terrorism offences. Despite the scope of questioning being significantly broadened to include matters in relation to espionage, politically motivated violence and acts of foreign interference, which would favour a higher standard,[68] the threshold has not been amended to restrict the issuing of questioning warrants to circumstances of last resort.

The NSWCCL considers that the requirements of necessity and proportionality are essential safeguards against the misuse of the Attorney-General's power to issue questioning warrants. Indeed, the LCA in their 2020 submission to the Parliamentary Joint Committee on Intelligence and Security,[69] identified that the current warrant issuing process (which was then a proposed amendment to the ASIO Act) was lacking in these requirements. To remedy this defect, the LCA recommended a restriction of the issuing of questioning warrants to circumstances where a warrant was 'the only practicable way' to obtain the relevant intelligence before a security threat materialises.[70] The recommendation failed to be implemented. The NSWCCL considers that the failure to include essential safeguards means there are adequate measures to protect against the misuse of these powers. In turn this necessitates a complete repeal of Division 3.

[62] ASIO Act s 34BA.
[63] Ibid s 34BB.
[64] Ibid ss 34BA(1)(b), 34BB(1)(c).
[65] Ibid ss 34BA(1)(c), 34BB(1)(d)
[66] Ibid s 34BB(1)(b).
[67] Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Act 2020, [153].

[68] LCA Submission, 46.
[69] Ibid 45-47.
[70] LCA Submission, 46.

Orally requesting and issuing emergency questioning warrants

The legislation permits the Director-General to request an emergency warrant orally, or the Attorney-General to issue questioning warrants orally, where they are satisfied that there are reasonable grounds on which to believe that the delay caused by issuing a written warrant may be prejudicial to security.[71] Written requests and written warrants ensure transparency of the warrant issuing process and ensures accountability where an improper request or issuance is made. Accordingly, the requirement for a written request or issuance should only be bypassed where absolutely essential.

Without any guidance on what amounts to prejudicial to security, any degree of possible of prejudice to a head of security, however remote, could allow warrants to be requested or issued orally.[72] The legislature has disregarded the LCA's recommendation that the oral requests or issuance be permitted only where:

(1) there is an emergency situation, involving imminent risk of serious prejudice to security or a serious risk to a person's life or safety;

(2) it is reasonable and necessary in the circumstances; and

(3) issuing a warrant orally includes an immediate attendance requirement.[73]

These recommendations are not onerous and should be considered a bare minimum in protecting the civil liberties of Australians. Without these basic protections, the current legislation fails to promote transparency and accountability of Government which are core pillars to the rule of law upon which Australia's law systems is reliant. The failure to include basic minimum protections further supports a complete repeal of Division 3.

4.3 Absence of judicial check on the power to issue questioning warrants

The current legislation inappropriately streamlines the issuing of questioning warrants by removing the role of an independent issuing authority in allowing the Attorney-General to issue questioning warrants directly. That is, the legislation does not include an oversight body, which leaves the final decision with the Attorney-General without placing suitable checks on use of this power.

A suitable check on the Attorney-General's power is essential, especially in circumstances where broad discretion exists, and, as noted above, where the legislation does not promote transparency. In this regard, Judicial involvement is absolutely necessary to uphold the substantive and perceived independence and impartiality of the issuing body. The NSWCCL support the recommendation of the LCA that there must be mandatory review performed by a judicial officer who, on the same principles as would be applied by the court in statutory judicial review, must confirm the issuing decision prior to the warrant taking effect.[74]

Without these minimum protections Part 3 affords the Attorney-General an unchecked power to issue questioning warrants and is not equipped to protect the subjects of questioning warrants from the impingement of freedom associated with questioning warrants. These deficiencies add further weight to why Division 3 should be repealed.

4.4 Effective Power of Detention

The legislation no longer allows ASIO to detain a person for the purpose of compulsory questioning, recognising that the power of detention was not necessary or proportionate to the

[71] In relation to issuing orally, see ASIO Act s 34BF(1); In relation to requesting orally, see ASIO Act s 34B(2)(b).
[72] LCA Submission, 49 [186].
[73] Ibid 51.
[74] Ibid 42.

risk of terrorism.[75] Despite the intent to remove these powers, the legislation indirectly retains a power of detention. Section 34GD makes it a criminal offence where a person fails to attend questioning on receipt of a questioning warrant, attempts to leave a place of questioning or if a person refuses to answer questions. Further, section 34CD provides that police officers may use force in their apprehension of questioning subjects for the purposes of the subject being brought in for questioning. The effect of these provisions is that the questioning subject's freedom of movement and personal liberty is abrogated, which is 'functionally tantamount to detention'.[76]

Accordingly, these provisions of Division 3 are not in line with the aims of removing the power of detention.

Retaining the power to issue questioning warrants without the appropriate safeguards is out of line with community standards and against advice from community and legal bodies. These powers provide the Attorney-General with an unchecked power to impinge on the rights of adults, and more even more detestable, the rights of children. Considering the above, Division 3 is not equipped to appropriately protect against a misuse of the power and accordingly, if no amendments are likely to be made to protect against this misuse, Division 3 should be repealed.

4.5 The questioning warrant procedure

Inaccessibility of interpreters

The inaccessibility of interpreters is another concern. As the LCA has submitted, the threshold for appointing an interpreter, as outlined in sections 34DN and 34DO, creates an excessively high bar.[77] This is especially concerning given the bar exists while subjects who require the interpreter are in stressful and likely foreign environments where the need for such assistance is paramount to navigate the circumstance they are facing. Section 34DN requires an interpreter to be appointed if the prescribed authority believes, on reasonable grounds, that the subject is unable to communicate in English with reasonable fluency. Section 34DO notes that the prescribed authority may refuse a request for an interpreter if the authority believes on reasonable grounds that there is adequate knowledge of the English language to communicate with reasonable fluency or they are physically able to communicate. As the LCA suggests, these two sections should be amended so that the subject must be given access to an interpreter if English is not their first language, unless the prescribed authority is satisfied on reasonable grounds that the subject is competent in understanding and speaking English and has informed the authority that an interpreter is not needed or is highly competent in speaking and understanding English and an interpreter would not assist them to understand or answer questions. Increasing accessibility to interpreters by allowing the prescribed authority to appoint an interpreter is an important safeguard and accountability method for the warrant subjects.

4.6 Involvement of lawyers and non-legal representatives

Removal of 'unduly disrupting' questioning

The constraints placed on lawyers by section 34FF, which pertains to the involvement of lawyers in the questioning process, are incompatible with the proper discharge of their professional (and moral) obligations. As such, there is an inherent tension between those obligations and compliance by lawyers with the restrictions imposed on them by the ASIO Act. Of particular concern are ss 34FF(3) and 34FF(6).

Section 34FF(3) prohibits the lawyers of the subjects of questioning warrants from making objections and cautioning clients during questioning. Lawyers are able to intervene in the questioning process only for two limited purposes: (i) to request clarification of an ambiguous question or (ii) to request a break in questioning to provide advice to the subject. These limited

[75] Ibid 14 [23].
[76] Ibid 14; IGIS, Supplementary submission to the PJCIS Review of ASIO's questioning and detention powers, (October 2017) 6.
[77] LCA Submission, p 63.

grounds for intervention constitutes a grave circumscription of the essential function of lawyers. Not only do they effectively prevent lawyers from having the opportunity to meaningfully participate in the process to ensure that questions are both lawful and fair, but it also severely limits the degree of legal representation offered to the subjects of questioning warrants. This is particularly concerning where those subjects are minors, those with limited English proficiency, or those who are otherwise vulnerable.

Section 34FF(6) provides that, where the prescribed authority considers the lawyer's conduct as 'unduly disrupting', the prescribed authority may direct the removal of the lawyer from the place where the questioning is occurring. This rule is particularly problematic because there is no guidance on what constitutes 'undue disruption'. Additionally, there are no requirements for the prescribed authority to first warn a subject's lawyer before exercising the removal power, or to make such directions only where absolutely necessary. It follows that the 'removal power' granted to the prescribed authority is unassumingly and unduly broad.

Such breadth is made further concerning by the fact that the role of lawyers within the questioning framework is already prescriptively and explicitly circumscribed by section 34FF(3). Section 34FF(3) notes that to the extent that lawyers are only entitled to request clarification of ambiguous questions and/or request a break in the subject's questioning. Consequently, it might be the case that anything other than such perfunctory and pro forma interjections will be deemed as a 'disruption' of questioning and, therefore, an 'undue' disruption that warrants removal.

This means that lawyers are, in effect, being forced to choose between either upholding their professional obligations and consequently being removed for 'unruly disruption' or complying with the imposed limitations by participating less fully in the questioning process, but in so doing being unable to discharge truly and fully their professional obligations.

The vast majority of these concerns were raised by the LCA in its 2020 Submission. [78] The failure to make the requisite amendments so that the involvement of lawyers is appropriate continues the trend of Division 3 not having the necessary safeguards in place to warrant the use of these powers. In turn, with no demonstrated appetite to amend the ASIO Act as it currently operates, the only suitable solution is a complete repeal of Division 3.

Restrictions on choice of representation

Section 34F(4) provides a mechanism enabling the prescribed authority to prevent the subject from contacting a specific lawyer. In effect, this means that the authority can prohibit a subject from being represented by their lawyer of choice. This prohibition further narrows the degree of legal representation (and freedom as to legal representation) offered to subjects of questioning warrants. Indeed, where a person is compelled to answer questions in accordance with a warrant, they must be allowed access, without limitation and at all stages of the questioning process, to their lawyer of choice. Such access is critical to the warrant subject's ability to effectively, meaningfully and proportionately exercise their right to challenge the questioning warrant.

Historically, the reticence to removing the prohibition in section 34F(4) has been partly based on the increased risks, in ASIO's view, of tip-off, tampering, the alerting of those who possibly pose a danger to security, and the destruction of records/evidence. However, as the LCA noted in its 2020 Submission, these risks can be reasonably managed by standard disclosure offences and contempt provisions, as well as the usual application of lawyers' overarching professional obligations and duties as officers of the court.[79] Indeed, this is precisely how such risks are managed in the framework of ACIC examinations under the ACC Act. Despite these concerns being pointed out by the LCA in 2020, no amendments to the ASIO Act to address these concerns were made. And even at the time of the 2020 Bill, no meaningful or adequate explanation was provided as to why a comparably extreme provision like section 34F(4) was necessary in this context.

[78] LCA Submission, [280]-[289].
[79] LCA Submission, [302].

The consistent failure to reasonably justify (or, indeed, even attempt to justify) prohibitions that have been roundly criticised as unnecessary (given comparable regimes) and extreme, points to a deep-rooted unwillingness to implement constructive change. It follows that the regime, as it stands, is unsafe and encroaches on basic rights fundamental to a civil society. Given the lack of aspiration to justify or amend these sections, Division 3 should be repealed.

Restrictions on lawyers accessing of information relevant to their client's warrant

Under section 34FE, a lawyer acting for the subject of a questioning warrant may request, and if they do so, must be given, a copy of the warrant and any variations to the warrant. If the warrant was issued orally, the lawyer is required to be given a copy of the written record of the warrant made in accordance with section 34BF(3). The right to receive the warrant (or a record of it) is subject to the Director-General of Security's entitlement to make such deletions from the document as the Director-General considers necessary (with respect to an enumerated number of matters for example, to avoid prejudice to the defence of the Commonwealth).

The right of the Director-General to make such deletions as they consider necessary is, in effect, a limitation on the ability of a warrant subject's lawyer to view the entirety of the questioning warrant and any underlying documentation. And as it stands, under the existing framework, it is quite possible that a subject's lawyer will have insufficient information to mount a viable legal defence and act in their client's best interests.

In respect of this limitation, as the LCA has noted, these extensive discretionary powers might inadvertently (or, indeed, deliberately) limit the ability of a lawyer to properly ascertain the scope of the warrant's authority.[80] This might, in turn, restrict the lawyer's capacity to advise the subject about whether a question asked or other action done, ostensibly under the warrant, is lawfully authorised. As the LCA stressed, in 2020, that notwithstanding the importance of, for instance, national security concerns, any restrictions on the ability of a warrant subject's lawyer to access information must be subject to an overriding obligation that the lawyer be given access to sufficient information so as that they are able to discharge fully their professional duty to act in their client's best interests.

The failure to introduce a simple and necessary amendment that would create an overarching obligation on ASIO's use of powers and make the prohibition on accessing information far more palatable and reasonable, demonstrates an unwillingness to implement constructive, appropriate and sorely needed change. Such change is needed to ensure Australia abides by its commitments to fairness, due process and, most importantly, the rule of law.

Restrictions on the right of non-lawyer representatives to raise concerns about the welfare of the child and removal for 'unduly disrupting'

Much like how the role of lawyers is statutorily circumscribed, the extent to which the non-lawyer representatives of children can participate in the questioning process is severely limited. Most crucially, non-lawyer representatives (e.g., parents or guardians) do not have a clear statutory right to raise concerns about a child's welfare during questioning or to make complaints on behalf of a child in relation to the child's treatment during the questioning process.

Further, and like lawyers, non-lawyer representatives may be removed for 'unduly disrupting' questioning at the discretion of the prescribed authority. This, especially in view of the fact that what is meant by 'undue disruption' is not entirely clear, compounds the negative effects of the absence of the right of non-lawyer representatives to raise concerns about a child's welfare. It means, in effect, that any action taken by a non-lawyer representative (beyond sitting quietly) may be viewed by the prescribed authority as 'unduly disrupting' the questioning process and, as such, grounds for removal from the proceedings.

[80] LCA Submission, [307].

It follows then that non-lawyer representatives are likely unable to speak up during proceedings and, if they do speak up, they are at high risk of being found in contravention of the bar against undue disruption. This, we submit, is a deeply problematic outcome. Given the importance of the presence of a non-lawyer representative to the best interests of the child in question, it is necessary that non-lawyer representatives be able to freely (and without being at risk of removal) raise concerns about a child's welfare. This is particularly critical because a child's parent or guardian is likely to have detailed knowledge of the child, including being better able than a lawyer (or, indeed, the prescribed authority and its staff) to identify signs of distress, anxiety or illness.

Again, these concerns were raised by the LCA in its 2020 Submission, where it recommended that the then proposed section 34FG of the ASIO Act be amended, including to provide that non-lawyer representatives have the right to raise matters with the Inspector-General of Intelligence and Security (in relation to ASIO), the Ombudsman (in relation to the AFP) and the Independent Child Advocate (a position that the LCA itself recommended should be created) at any time.[81]

The failure to integrate these well-reasoned, suitable and necessary changes is demonstrative of a lack of willingness to develop legal rules and processes required in a civil society that prides itself on providing civil liberties associated with a liberal democracy. These changes are required for the existing legal rules and processes of the ASIO Act to be considered satisfactory. In particular, change is necessary for Australia to uphold the requirements of its commitment to the CRC, which recognises the necessity of ensuring that children's rights are protected during the criminal process and emphasises the importance of legal advice, information and support to enable their participation in that process.[82]

No assistance to minors in selecting a lawyer

The ASIO Act has no provision for minors to be assisted in the process of selecting a lawyer. The lack of assistance is threefold. First, minors are not assisted in making decisions about whether to seek contact with a lawyer and second, minors do not receive any practical support in making contact with a lawyer (where/if required). This is highly concerning. It can be reasonably inferred that a child, indeed even a young adult, is unlikely to be able to undertake these tasks on their own. Furthermore, even if a minor attends with a non-lawyer representative (e.g., a parent or a guardian), it is conceivable that such non-lawyer representative may not have sufficient knowledge or English language proficiency to be of assistance.

In its 2020 Submission, the LCA suggested the creation of an Independent Child Advocate.[83] Broadly, the role and function of this individual would be to support and assist the child in various ways, including supporting the child in deciding whether to contact a lawyer of choice and, if so, providing any guidance the child may require in selecting and contacting the lawyer. In the LCA's view, the presence of an Independent Child Advocate would not only deal with the existing dearth of support for minors vis-à-vis opting for and selecting a lawyer but also guarantee something that it considered to be necessary: independent support and legal representation.[84]

The failure to integrate these well-reasoned and suitable changes continues a trend of unwillingness to develop appropriate legal rules and processes. As has been outlined throughout this submission, significant change is required for the existing legal rules and processes of the ASIO Act to be considered satisfactory. In particular, and worth reiterating, change is necessary for Australia to uphold the requirements of its commitment to the United Nations Convention on the Rights of the Child, which recognises the necessity of ensuring that children's rights are protected during the criminal process and emphasises the importance of legal advice, information and support to enable their participation in that process.[85]

[81] LCA Submission, [135].
[82] Forde, L., & Kilkelly, U. (2023). Children and police questioning: A rights-based approach. Criminology & Criminal Justice, 0(0). https://doi.org/10.1177/17488958231161423.
[83] LCA Submission, p 37.
[84] Ibid [115]-[121].
[85] Forde, L., & Kilkelly, U. (2023). Children and police questioning: A rights-based approach. Criminology & Criminal Justice, 0(0). https://doi.org/10.1177/17488958231161423.

4.7 Questioning of minors

The NSWCCL submits that ASIO should not have authority to question minors under any circumstances for the following reasons: (1) it is in breach of Australia's international obligations under the CRC; (2) it is contradictory to the Australian Government's National Framework for Protecting Australia's Children 2021–2031 (PAC Framework); and (3) it is unconstitutional as it fails to comply with the proportionality test.

Obligations under CRC

In equipping ASIO with the ability to question minors as young as fourteen, the ASIO Act is in direct breach of Australia's international obligations under the CRC.[86] The CRC defines a 'child' as 'every human being below the age of eighteen years'.[87] The Preamble states:

> '*[t]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'*.[88] Article 3(1) obliges, *'[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*'.[89]

The NSWCCL submits that subjecting vulnerable children as young as fourteen to mandatory questioning by ASIO is inappropriate and does not have 'the best interests of the child' as a 'primary consideration'. This is in direct violation of Article 3(1). Although the ASIO Act provides for the presence of any 'representative'[90] and guarantees provision of 'breaks',[91] this does not ameliorate the power imbalance that exists between the child and the questioner that arises from a child's emotional and cognitive vulnerabilities.

The ASIO Act also violates Article 40(1) which states:

> '*States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society*'.[92]

The ASIO Act enables the Attorney-General, on the request of ASIO's Director-General, to issue questioning warrants for children for simply "believing that the [child] has likely engaged in…or is likely to engage in activities prejudicial to the protection of…the Commonwealth…".[93] This is a very low threshold. The subjective elements of 'belief' and 'likely' – without the need for providing any concrete and factual evidence of an actual national security concern – generates a high degree of ambiguity and breadth which can easily be misused and exploited. It presents a high risk of violating a child's sense of 'dignity and worth' and may erode their sense of self, damaging their ability to reintegrate into society. If Australia fails to comply with the provisions under the CRC, it will violate its obligations under international law and significantly damage its reputation and trust within the international community.

[86] United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[87] Ibid art 1.
[88] Ibid preamble.
[89] Ibid art 3(1).
[90] *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) sch 1 pt 1 div 3 sub-div B s 34BD(2)(a).
[91] Ibid sch 1 pt 1 div 3 sub-div B s 34BD(2)(b).
[92] United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(1).
[93] *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) sch 1 pt 1 div 3 sub-div B s 34BB(1)(b).

Contradiction with the PAC Framework

ASIO's ability to question children is in direct contradiction of the PAC Framework,[94] which launched in December 2021.[95] The PAC Framework's principal focus is to uphold Australia's obligations under the CRC.[96] The key vision is to ensure that 'children and young people in Australia reach their full potential by growing up safe and supported, free from harm and neglect'.[97] The subjection of children to mandatory interrogation by ASIO is in direct violation of the PAC Framework. The Australian government has a duty to ensure that children grow up in a safe and supportive environment where they are not subjected to coercion and hostile interrogations by government authorities. This is not an unreasonable requirement or expectation.

Unconstitutional according to the proportionality test

The NSWCCL submits that the powers conveyed by Division 3 are unconstitutional as they do not comply with the proportionality test as established by the High Court. In *McCloy v NSW*, the High Court described the proportionality test as a collective of criteria that aid in determining 'whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done'.[98] The Federal Parliamentary Joint Committee on Human Rights utilises the proportionality test to determine the extent to which a law can be considered legitimate: 'A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups'.[99] Further, the Attorney-General's Department in a public sector guidance sheet illustrates a list of questions to ask when assessing whether a measure limiting a right is "reasonable, necessary and proportionate", which includes:

> '*Will the limitation* ***in fact lead to a reduction of that problem****?*
>
> *Does a* ***less restrictive alternative exist, and has it been tried****?*
>
> *Is it a blanket limitation or is there* ***sufficient flexibility to treat different cases differently****?*
>
> *Has sufficient regard been paid to the* ***rights and interests of those affected****? Do safeguards exist against error or abuse?*
>
> *Does the limitation* ***destroy the very essence of the right*** *in issue?*'[100]

As has been argued throughout this submission, the unfettered powers granted to ASIO to question children are outrightly inappropriate, unreasonable and unnecessary. Even if ASIO intends to utilise these questioning powers for national security purposes, it cannot justify the 'severity of impact' mandatory questioning has on the emotional wellbeing of children, particularly given there is no evidence – either provided by ASIO or available in the public and academic domain – that demonstrates it will factually 'lead to a reduction' of threats to national security. Furthermore, as has been argued above, also particularly so given the issues associated with a child's right to legal representation. ASIO has not attempted to utilise any 'less restrictive

[94] Department of Social Services, Australian Government, Safe and Supported: The National Framework for Protecting Australia's Children 2021 – 2031 (Web Page) <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/protecting-australias-children>.
[95] Australian Institute of Health and Welfare, Australian Government, National Framework for Protecting Australia's Children Indicators (Web Page, 15 June 2022) <https://www.aihw.gov.au/reports/child-protection/nfpac/contents/policy-framework>.
[96] Department of Social Services, Australian Government, Safe and Supported: The National Framework for Protecting Australia's Children 2021 – 2031 (Web Page) 14 <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/protecting-australias-children>.
[97] Ibid 8.
[98] *McCloy v NSW* (2015) 257 CLR 178 [3] (*McCloy v NSW*) (French CJ, Kiefel, Bell and Keane JJ).
[99] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Guide to Human Rights (June 2015) 8 <https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/resources/Guide_to_Human_Rights.pdf?la=en&hash=BAC693389A29CE92A196FEC77252236D78E9ABAC>.
[100] Attorney-General's Department, Australian Government, Permissible Limitations: Public Sector Guidance Sheet (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/permissible-limitations>.

alternatives' and as has been argued above, the ASIO Act does not incorporate 'sufficient flexibility' to treat 'different cases differently'; for example, no provisions of safeguard/exemptions exist for children with mental and/or physical disabilities.

Australia's national security should not be achieved at the cost of the wellbeing of its children. Draconian interrogation and detention powers in relation to children should have no place in a free, democratic and developed society like Australia. The NSWCCL repeats its call for a complete removal of the ASIO's ability under the ASIO Act to question any child under the age of eighteen.

4.8 Secrecy provisions

The NSWCCL has long advocated for the repeal of Commonwealth secrecy provisions, which it considers to be an unjustified and disproportionate restriction on the right to information and freedom of expression in Australia. While it is acknowledged that secrecy is at times a necessary and proper part of democracy to protect public interests such as individual privacy and national security,[101] too often, secrecy provisions go too far. They degrade the freedom of information regime and undermine open justice. The secrecy provisions of section 34GF are no exception to this.

By prohibiting a person from disclosing certain information connected with a questioning warrant, Section 34GF effectively shields public coercive power from public scrutiny, oversight and challenge. It also harms the rights of subjects of questioning warrants, who face a penalty of 5 years' imprisonment for seeking support (that is not legal advice) in relation to the warrant. Under section 34GF, an individual with a disability may be prevented from contacting a disability advocate or support person to raise concerns about the warrant, either before or after questioning.

Additionally, section 34GF is drafted in a confusing manner that does not clearly identify the class of persons who are the 'discloser' and thus potentially liable for an offence. The NSWCCL shares the same concerns as Associate Professor Greg Carnes where he argued in his submission to the inquiry into the *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth), that:

> "*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.*"[102]

Section 34GF also lacks an express serious harm requirement. That is, it does not explicitly require an outcome which has caused, or has the potential to cause, serious harm to public interests. For example, under section 34GF, anyone who communicates information indicating that a 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 a warrant, is liable for an offence – even where there has been no actual or potential harm as a result of such actions. This makes section 34GF too broad and overly punitive in effect, and therefore an unjustified and disproportionate encroachment on civil liberties fundamental to a liberal democracy. This provision should be completely repealed.

[101] HRLC, Transparency International Australia and the Centre for Governance and Public Policy Griffith University, Submission to Secrecy Provisions Review, p 1 <https://consultations.ag.gov.au/crime/review-secrecy-provisions/consultation/download_public_attachment?sqId=question-2022-01-06-6908678210-publishablefilesubquestion-1&uuId=638488631>.

[102] Greg Carne, Submission to PJCIS Inquiry into the Australian Security Intelligence Organisation Amendment Bill 2020 (Cth), p 15 <https://www.aph.gov.au/DocumentStore.ashx?id=bf37e3ad-cbcd-4992-b769-a3b50d380e70&subId=685078>.

We trust this submission will be useful to the committee.

Yours sincerely,

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