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[REDACTED]
[REDACTED] Inquiry into *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth)

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

19 November 2020

Dear Committee Members,

Re: Request of 11 November 2020 for supplementary submission to PJCIS Inquiry – *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth)

Thank you for the invitation in the e-mail of 11 November 2020 to make a supplementary submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the *Australian Security Intelligence Organisation Amendment Bill 2020* (the Bill), focused upon having an issuing authority independent of the Attorney General, continue to approve the issue of ASIO questioning warrants under the Bill.

This supplementary submission is made in a personal capacity.

My existing submission to this inquiry is Submission 7 dated 12 June 2020 and is at :
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions

The Hansard transcript of the hearings of the PJCIS on the Bill on Friday 30 October 2020 at pages 1-14 has various contestable claims about the supposed ordinariness of an ASIO questioning warrant on the significantly expanded matters relevant to security included in the Bill – espionage, acts of foreign interference and politically motivated violence.

It subsequently associates those claims with two points:

1. A range of other Commonwealth authorities enabled to require persons to attend for questioning based on an internal authorisation only (with the exception of the Australian Building and Construction Commission) (and thereby implicitly elevating the executive office of the Attorney General as the issuing authority for a questioning warrant as a higher level of authority than internal authorisation, particularly as ASIO is now located within the Home Affairs ministry)
2. Purported equivalence of ASIO questioning warrants with the range and variety of ASIO Special powers warrants available on the Attorney General's authorisation under Part III, Division Two (Subdivisions A to J) of the *ASIO Act 1979* (Cth).

It is submitted that both of the above claims are illusory.

I will set out as **simply as possible the arguments for the retention of an independent issuing authority (not being the Commonwealth Attorney General) for issue of ASIO questioning warrants under the Bill.**

Each of these arguments makes wise the retention of an independent issuing authority for ASIO questioning warrants, as a modest, lawful, reasonable, necessary and proportionate check and balance upon substantial intelligence gathering powers.

Such retention would be a conservative and prudential measure, favouring rule of law values and institutional integrity.

It will bolster community and individual confidence in the integrity of security measures, and of the Commonwealth Government more broadly, that such questioning warrants (politically motivated violence, espionage and foreign influence) will only then be sought in demonstrably serious and compelling circumstances.

The recommendation of this supplementary submission is that the existing arrangements of an independent judicial or like authority (appointed as a class determined by regulation), acting in a *persona designata* capacity, be retained as the issuing authority for questioning only warrants under the *ASIO Act 1979* (Cth).

. ASIO is necessarily a secrecy based organisation, so the usual rules of public accountability or the usual levels of Ministerial responsibility to the Parliament cannot definitively apply

This means by definition **specially developed accountability mechanisms or additional accountability mechanisms are needed for intelligence agencies**, as the usual principles of Ministerial responsibility to the Parliament (under Australia's selected and preferred Parliamentary based model of human rights protection) cannot ordinarily apply. Typically Executive devices of 'neither to confirm nor deny', matters of national security, or not to comment on national security 'operational matters' hinder scrutiny of ministerial decisions and proprieties to a degree inapplicable in other policy areas.

One example of a specially developed accountability mechanism is the IGIS, with Royal Commission like investigative powers.¹ One further such accountability mechanism is the independent warrant issuing authority for ASIO questioning warrants., a judge of a court created by the Commonwealth Parliament, or a person declared by regulation in a specified class (members of both categories having consented and the consent in force) exercising such authority in a *persona designata* capacity. This provides a level of independent legal scrutiny unavailable from the modern official, but political office of the Attorney general as the first law officer of the Commonwealth.

. The ASIO questioning power is an exceptional power, being a compulsory questioning power held by an intelligence agency

The issue of an intelligence agency from comparable democratic nations to Australia having a compulsory questioning power has been raised in deliberations surrounding *ASIO Act 1979 (Cth)* reforms since 2001.

For formative issues *relating to the exceptionality of these powers*, please refer to two research articles published after the passage of the original legislation in 2003:

G Carne, 'Gathered Intelligence Or Antipodean Exceptionalism?: Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27 *Adelaide Law Review* 1 at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AdelLawRw/2006/1.html>

G Carne 'Detaining Questions Or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)* (2004) 27 *University of New South Wales Law Journal* 524 at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UNSWLawJl/2004/32.html>

It was established on response to questions on notice to the Attorney-General's department from the PJCIS in 2017 that 'to the best of the department's knowledge there are no other comparable international domestic intelligence agencies which have the power to conduct questioning for the purposes of gathering intelligence in relation to terrorism and espionage/foreign interference'.² This position was confirmed by the IGIS in 2020 in her statement 'To the best of my knowledge, no other Five Eyes country has comparable legislation'³

There are a variety of other, non-intelligence agency arrangements for compulsory questioning on national security topics in other jurisdictions.⁴ This information truly establishes *the exceptionality of*

¹ See s.8 (1) (a) – (d) of the Inspector General of Intelligence and Security Act 1986 (Cth) for the IGIS functions in relation to ASIO.

² See Australian Government Attorney-General's Department Review of the operation, effectiveness and implications of Division 3 of Part III of Australian Security Intelligence Organisation Act 1979 – Attorney-General's Department response to the Parliamentary Joint Committee on Intelligence and Security's post hearing questions, 1-2.

³ See Inspector General of Intelligence and Security Australian Security Intelligence Organisation Amendment Bill 2020 Submission to the Parliamentary Joint Committee on Intelligence and Security 3 July 2020 (Submission 32) and IGIS evidence to PJCIS Inquiry into ASIO Amendment Bill 2020 Committee Hansard 10 July 2020, 24.

⁴ See Australian Government Attorney-General's Department Review of the operation, effectiveness and implications of Division 3 of Part III of Australian Security Intelligence Organisation Act 1979 – Attorney-General's Department response to the Parliamentary Joint Committee on Intelligence and Security's post hearing questions, 1-2.

the Australian arrangements, the compulsory questioning power assigned under warrant to a domestic intelligence agency.

This is why which is why in 2003 significant, multiple safeguards were incorporated in the legislation, such as the independent issuing authority, which the present Bill seeks to weaken and diminish. That should not occur.

. The ASIO questioning power is an *exceptional* power – as a member of the Executive (the Attorney General) is the warrant issuing authority

The fact that a member of the Executive – the Commonwealth Attorney General – is the issuing authority for a compulsory intelligence agency questioning power is also exceptional.

As is pointed out in the submission of the IGIS⁵ and in the evidence of the IGIS,⁶ in both the United Kingdom and New Zealand, intrusive powers require approval by a responsible minister and an independent judicial commissioner – respectively under the Investigatory Powers Act (UK) and the Intelligence and Security Act 2017 (NZ), commenting also that

The removal of the role of the issuing authority also departs from the trend towards increased requirements for external authorisation in other Five Eyes jurisdictions.⁷

. The ASIO questioning power is an *exceptional* power – as it does not require reasonable suspicion of the commission of a criminal offence (relating to espionage, foreign interference or politically motivated violence).

There is no need that the person subject to the ASIO questioning warrant has any criminal involvement, even at a secondary or remote level.

The warrant is simply to collect intelligence relevant to the three broadly identified areas of security, including the collection of such intelligence from innocent persons, under a compulsory attendance and questioning regime.

This needs to be constantly kept in mind, and provides a strong reason for retaining the existing safeguard of an independent, judicial issuing authority acting in a *persona designata* capacity, to ensure that the issuing of a compulsory questioning warrant directed to an entirely innocent person must be in serious and substantiated circumstances – in other words, it is reasonable in all the circumstances for the warrant to be issued.

The questioning warrant requirements are merely that

⁵ IGIS Australian Security Intelligence Organisation Amendment Bill 2020 Submission to the Parliamentary Joint Committee on Intelligence and Security 3 July 2020 7-8

⁶ IGIS evidence Parliamentary Joint Committee on Intelligence and Security Committee Hansard Australian Security Intelligence Organisation Amendment Bill 2020, 10 July 2020, 22.

⁷ IGIS Australian Security Intelligence Organisation Amendment Bill 2020 Submission to the Parliamentary Joint Committee on Intelligence and Security 3 July 2020, 8.

. For adults:

(b) there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to an adult questioning matter; and

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

. For persons 14-17:

(b) 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 of the people of, the Commonwealth and the several States and Territories from politically motivated violence, whether directed from, or committed within, Australia or not; and

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

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

. The ASIO questioning power is an *exceptional* power, being a power that potentially requires ongoing compulsory attendance before a Prescribed Authority for an extended time, with a compulsory obligation to answer questions.

This places the power at the high end of intrusiveness of a range of human rights, and is *significantly more intrusive* than Attorney General issued ASIO special powers warrants: Search warrants, computer access warrants, surveillance device warrants, inspection of postal articles and delivery service articles warrants, foreign intelligence warrants, identified person warrants and assistance to access to data warrants.

This high level of intrusiveness was similarly recognised by the IGIS in her submission to this present inquiry,⁸ adding that the additional relevant to security subject matter coverage may also create disproportionality:

Compulsory questioning and detention is the most intrusive power available to ASIO, and it is currently only available for the collection of intelligence in relation to a terrorism offence. Broadening the availability of compulsory questioning powers to ASIO's investigations of espionage, acts of foreign interference and politically motivated violence (albeit without the detention elements) will necessarily alter what will be a proportional use of the powers.

Efforts to downplay the seriousness of the intrusion on a range of human rights needs careful consideration. The synonymous comparison made of a questioning warrant with other special powers warrants, in the Hansard transcript of 30 October 2020, is therefore inaccurate and logically unsustainable. The recognised high level of intrusiveness requires a higher level of initial scrutiny of the questioning warrant claim, provided for in the existing judicially based issuing authority arrangements.

⁸ See IGIS Australian Security Intelligence Organisation Amendment Bill 2020 Submission to the Parliamentary Joint Committee on Intelligence and Security 3 July 2020,

. The requirement of an independent issuing authority for ASIO questioning warrants was forensically and exhaustively deliberated in 2001- 2003 by two Parliamentary Committees – the Joint Parliamentary Committee on Intelligence Services⁹ and the Senate Legal and Constitutional References Committee,¹⁰ during the term of the Howard Coalition government.

This process resulted in an independent issuing authority for ASIO warrants, under s.34 AB of the ASIO Act 1979 (Cth), namely a *persona designata* appointment of a Judge of a Court created by the Parliament, or persons of a specified class that are declared by regulations as issuing authorities.

This arrangement was one of a series of checks and balances installed to ensure passage of the *ASIO (Terrorism) Act 2003* (Cth), as amending the *ASIO Act 1979* (Cth). There is no credible reason offered to depart from the check and balance upon executive power provided by the warrant issuing authority for questioning warrants being a judicial or other independent appointee acting in a *persona designata* capacity.

. The present Bill provides for a very substantial expansion of ASIO questioning warrant subject matters.

This expansion is from *an aspect* of politically motivated violence, namely (ba) acts that are terrorism offences, to all forms of politically motivated violence, as defined in s.4 of the ASIO Act 1979 (Cth).

It also includes, within the meaning of an adult questioning matter (a) espionage and (c) acts of foreign interference, whether directed from, or committed within, Australia or not.

Acts of foreign interference are defined particularly broadly in in s.4 of the ASIO Act 1979 (Cth), providing very ample circumstances where a questioning warrant might be sought:

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

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

These amendments in the Bill therefore represent a very significant expansion of the relevance to security footprint as providing access to ASIO questioning warrants.

⁹ Joint Parliamentary Committee on Intelligence Services *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Canberra, Parliament of Australia, May 2002.

¹⁰ Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).

The consequences for human rights observance and for organisational priorities in liberalising the availability of questioning warrants, over a whole new range of activities relevant to security, is untested and unpredictable.

It is therefore prudent that an independent, non-political office holder judicial issuing authority be retained to assess whether, as measured against the statutory criteria, a questioning warrant is justified, *in addition to* the suite of special intelligence gathering powers available by an Attorney General's special powers warrant, including an identified person warrant, as issued by the Attorney General. This is a safeguard against potentially serious unintended consequences of so wide an expansion of the categories relevant to security now to be available for a questioning warrant.

. The newly issued 2020 Minister's Guidelines in relation to the performance by ASIO of its functions and the exercise of its powers relevant to security potentially expand the meaning of politically motivated violence in an operational sense, and possibly allow for greater collection of intelligence as relevant to security.

The 2020 Minister's Guidelines appear to have an expansive effect upon the obtaining, correlating and evaluating of intelligence relevant to security. The history of ASIO's interactions with political protest and dissent¹¹ partly led to the reforms instituted after the Hope Royal Commissions in 1977 and 1984, and should be of continued instruction in any proposed amendments to the *ASIO Act 1979* (Cth) which might inadvertently weaken its accountability framework.

To argue that the use of the Questioning Warrant powers in the Bill will not be potentially abused in the example of political protest and demonstration, may provide a significantly over simplified assessment of the operation of s.17 A of the *ASIO Act 1979* (Cth), which discounts its interpretive and interactive relationship with the 2020 Minister's Guidelines.¹²

The 2020 Guidelines' active extension of the practical reach of the meaning of *security* is illustrated by the example of politically motivated violence, one of the elements of security in s.4 of the *ASIO Act 1979* (Cth).¹³

Importantly, politically motivated violence itself comprises five distinctive and extensive elements, traversing a range of violent and potentially violent activity, upon which the Guidelines operate.

These elements include acts or threats of violence or unlawful harm intended or likely to achieve a political objective;¹⁴ acts that involve violence or are intended or likely to involve or lead to violence, by a range of persons, that are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory;¹⁵ acts that are terrorism offences;¹⁶ certain acts that are offences under various

¹¹ See John Blaxland *The Protest Years The Official History of ASIO 1963-1975* (Sydney: Allen and Unwin 2015)

¹² S.17 A of the *ASIO Act 1979* (Cth) states that 'This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly'.

¹³ See s.4 *ASIO Act 1979* (Cth) 'security', paragraph (a) (iii).

¹⁴ S.4 *ASIO Act 1979* (Cth), 'politically motivated violence', paragraph (a) the political objective refers to an objective anywhere in the world, with the acts or threats including those carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere.

¹⁵ s.4 *ASIO Act 1979* (Cth), 'politically motivated violence', paragraph (b)(i) and (ii)

¹⁶ s.4 *ASIO Act 1979* (Cth) 'politically motivated violence', paragraph (ba). Terrorism offences are further defined as (a) an offence against Subdivision A of Division 72 of the Criminal Code; or 9b) an offence against

Commonwealth criminal laws;¹⁷ and acts that are (i) offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*¹⁸ or (ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director General.¹⁹

The 2020 Guidelines noticeably reduce and remove the preparatory, descriptive and discursive content of the 2007 Guidelines.²⁰ That earlier content provided useful guidance in applying criteria for the obtaining, correlating and evaluating of intelligence relevant to politically motivated violence, as an aspect of security. Features of this 2007 content usefully included some restraining, triaging and prioritising characteristics. Prominent examples (removed from the comparable section of the 2020 Guidelines) are:

ASIO is not required to inquire into every instance, actual or potential, of PMV. The Director General must always make a judgment as to the potential seriousness of any matter or information, the Organisation's priorities and available resources.²¹

In deciding whether to conduct an investigation and the investigatory methods to be employed, the Director General shall consider all of the circumstances, including:

- (a) the magnitude of the threatened or perceived violence or harm
- (b) the likelihood it will occur
- (c) the immediacy of the threat
- (d) the privacy implications of any proposed investigation²² and

The gravity of risk to security will be a factor in determining the investigative techniques that are appropriate where an investigation is decided upon. Where, for example, there is little information to indicate that serious acts of PMV are in prospect, the degree of intrusion into individual privacy should, so far as is practicable consistent with resolution of the investigation, be limited.²³

In another instance, the relevant preparatory, descriptive and discursive content of the 2007 Guidelines has been absorbed into the 2020 Guidelines, with changes made in the latter providing for increased ASIO investigative activities. For example, paragraph 3.12 (a) in the 2007 Guidelines stated that 'ASIO is not to make inquiries into demonstrations or other protest activity unless (a) there is a risk of *serious* premeditated violence for the purpose of influencing government acts or policy'. This 2007 paragraph is significantly liberalised in the 2020 Guidelines, which now states 'there is a risk of pre-meditated use of *violence* against persons or property for the purposes of achieving a *political*

Part 5.3 of the Criminal Code (a person can commit a terrorism offence against Part 5.3 of the Criminal Code even if no terrorist act (as defined in that Part) occurs.

¹⁷ S.4 ASIO Act 1979 (Cth) 'politically motivated violence', paragraph (c), being offences punishable under Division 119 of the Criminal Code, the Crimes (Hostages) Act 1989 or Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*

¹⁸ S.4 ASIO Act 1979 (Cth) paragraph (d) (i)

¹⁹ S.4 ASIO Act 1979 (Cth) paragraph (d) (ii)

²⁰ This content prefaced the individual sub paragraph descriptions in the 2007 Guidelines, comprising one and two thirds pages of content in small typeface.

²¹ 2007 Guidelines, paragraph 3.5.

²² 2007 Guidelines, paragraph 3.6

²³ 2007 Guidelines, paragraph 3.9

objective, or pre-meditated use of tactics that can be reasonably assessed as likely to result in violence'.²⁴

The same approach emerges when contrasting the 2007 Guidelines and the 2020 Guidelines, in relation to subparagraph (a) definition of politically motivated violence. Both versions include prioritisation of ASIO activities 'to persons or groups likely to be involved in acts or threats of serious violence or unlawful harm designed to provoke violent reaction.' However, the 2020 Guidelines go further, including in the alternative, 'the use of tactics that can reasonably be assessed as likely to result in violence'.²⁵

Changed circumstances and experiential evidence from the 13 years of operation of the 2007 guidelines may well justify as sound this more relaxed, liberalised interpretation, but the reasons substantiating this change are neither accessible nor publicly justified.

In the absence of such explanation, it might be that changes to these aspects of the Guidelines are precursors and enablers for the proposed inclusion of ASIO questioning warrants for politically motivated violence, along with the proposed relaxation of warrant processes and the appointment of prescribed authorities,²⁶ which will significantly increase questioning warrant availability.

A further feature of the politically motivated violence aspect of Guidelines arises at the intersection with political protest and political communication. The foundational principle of s.17 A of the *ASIO Act 1979* (Cth) is afforded an operational meaning, by the Guidelines:²⁷

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

S.17A is cited in the Guidelines as forming the outer boundary of ASIO activities:

ASIO is not to undertake investigations where the *only* basis for the investigation is the exercise of a person's right of lawful advocacy, protest or dissent (section 17 A of the ASIO Act)²⁸

The wording of s.17 A and its prefacing role in the Guidelines points to *other* situations. These situations could conceivably arise where there are parallel, differentiated circumstances to those of lawful advocacy, protest and dissent; where there is ambivalence around the nature of activity as constituting lawful advocacy, protest and dissent; and further, the intersection of political protest and communication with politically motivated violence, in such a parallel circumstance, drawing in preliminary and exploratory investigative activity (which may be legitimately necessary to ascertain relevance to security).

Some further distinctive features are apparent in the 2020 Guidelines, confirming the extended practical operational interpretive influence over politically motivated violence as relevant to security. This may open the gateway to investigation, beyond what is apparent from a conventional textual reading of the relevant sections of the *ASIO Act 1979* (Cth). As seen, Paragraphs 3.11 and 3.12 from

²⁴ 2020 Guidelines, paragraph 5.18 (a).

²⁵ 2020 Guidelines paragraph 5.4 (b)

²⁶ See *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth)

²⁷ A further administrative constraint on how ASIO functions relevant to security are performed is provided by s.20 of the *ASIO Act 1979* (Cth) (a) 'The Director General shall take all treasonable steps to ensure that (a) the work of the Organisation is limited to what is necessary for the purposes of the discharge of its functions; and (b) the Organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions'.

²⁸ 2020 ASIO Guidelines paragraph 5.17 Emphasis added

the 2007 Guidelines are copied over to become paragraphs 5.20, 5.18 and 5.21 of the 2020 Guidelines, with the content of paragraph 3.12 in its new guise significantly changed..

A second set of examples arises from the 2020 Guidelines in relation to paragraph (b) of the definition of politically motivated violence.²⁹ Three paragraphs were transitioned from the 2007 Guidelines.³⁰ Another paragraph had the first sentence deleted, then was carried over, without further changes, from the 2007 Guidelines.³¹ Paragraph 3.20 of the 2007 Guidelines appears replaced by paragraph 5.8 in the Guidelines. Paragraph 5.8 sharpens up the language, so an intention to initiate violence is no longer needed, removing a hypothetical proposition, with direct reference to a person or group as actors as not requiring such intention to meet the classification of politically motivated violence. Instead, an objective test is applicable for activities potentially leading to violence, merely requiring a 'reasonable likelihood that the activity will produce violence from others.'³²

The liberality of other content in the 2020 Guidelines likewise provides considerable expansive interpretive scope of the politically motivated violence aspect of *security*. Probability of success or imminence of the violence are not determinative factors for the category of politically motivated violence, instead merely factors relevant in setting investigative priorities.³³ Though paragraph (b) of the definition of politically motivated violence is both prefaced and conditioned upon the performance of 'acts'³⁴ the Minister's Guidelines capaciously treat both lawful and non-public *advocacy* of violence *as an act*, asserting that 'preparations directed at the overthrow of government are likely to be clandestine and their early manifestations are deceptive.' The understanding of politically motivated violence as an element of *security* becomes predictive and pre-emptive by the inclusion of classes of non-violent activities, *minimally contemplating* violence, as potentially warranting ASIO investigation for ascertaining a risk or danger of politically motivated violence.³⁵

Again, this very elastic and accommodative interpretation in the 2020 Guidelines aiding collation, correlation and evaluation of an aspect of security, namely politically motivated violence, is potentially adaptable. How the Guidelines might elasticise the boundaries of what constitutes politically motivated violence, then being of relevance to security (including questioning warrants) may not be fully appreciated.

This interactive and interpretive role of the 2020 Minister's Guidelines, possibly expanding the potential intelligence gathering reach in relation to politically motivated violence (to potentially include ASIO questioning warrants) again makes it prudent to retain an independent judicial or other form of independent issuing authority for these warrants.

²⁹ S.4 ASIO Act 1979 (Cth) 'politically motivated violence' paragraph (b)

³⁰ Paragraphs 3.18, 3.21 and 3.22 of the 2007 Guidelines respectively become paragraphs 5.6, 5.9 and 5.10 of the 2020 Guidelines.

³¹ Paragraph 3.19 of the 2007 Guidelines, so described, became paragraph 5.7 of the 2020 Guidelines.

³² Paragraph 5.8 of 2020 Guidelines.

³³ Paragraph 5.7 of 2020 Guidelines

³⁴ S.4 ASIO Act 1979 (Cth) 'politically motivated violence', paragraph (b).

³⁵ Paragraph 5.10 of 2020 Guidelines 'If apparently non-violent activities directed at destabilising or undermining constitutional government are associated with what purports to be no more than contemplation of the prospect of the violent overthrow of government, ASIO may investigate those activities to the extent necessary to establish (with some confidence) whether the activities involve a real risk or danger that violence will flow from those activities'.

Thank you for this opportunity to provide a supplementary submission.

I would be pleased to provide further assistance to the Committee in its deliberations.

Yours faithfully,

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Appendix: E-mail from PJCIS 11 November 2020 inviting the making of a supplementary submission to the PJCIS Inquiry – *Australian Security Intelligence Organisation Amendment Bill 2020 (Cth)*

OFFICIAL

Dear Submitter

I am writing to you on behalf of the PJCIS invite you to make a supplementary submission, by **12pm Friday 20 November 2020**, following an additional hearing the Committee held with ASIO on the issue of the Attorney-General holding the responsibility to issue questioning warrants and the alternate proposal of a 'double lock' authorisation mechanism for the issuing of questioning warrants

The transcript is attached and I would like to draw to your attention to the discussion between the Chair and the Director-General of ASIO on pages 2 and 3 of the transcript.

It was stated that, in keeping with the heightened thresholds in relation to the used of ASIO's powers and, by using the Attorney-General rather than an internal authorisation, a questioning warrant has a higher threshold for issuance than other existing powers in the Australian Government. It was stated that all of the following agencies have powers to require people attend for questioning based on an internal authorisation only:

- Australian Competition and Consumer Commission;
- Australian Criminal Intelligence Commission;

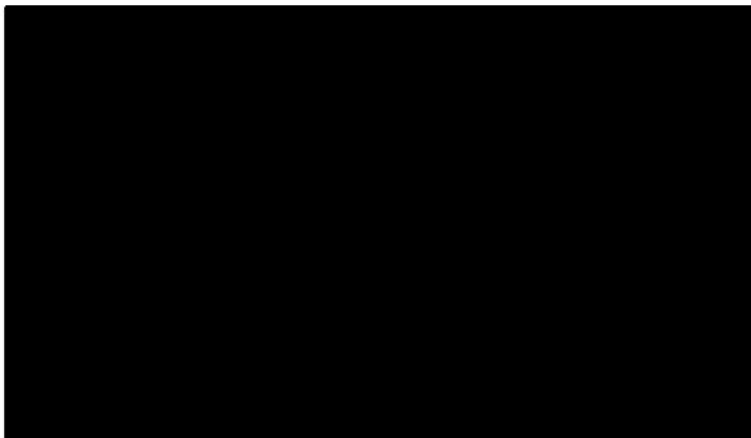
- Australian Sports Anti-doping Authority;
- Australian Commission for Law Enforcement Integrity;
- The Australian Securities and Investments Commission; and,
- The Australian Taxation Office.

Further it was stated that all Commonwealth agencies have internal authorisations, except for ASIO in relation to the current questioning powers, and the Australian Building and Construction Commissioner is required to go to a presidential member of the AAT.

In addition looking to current ASIO powers, it was pointed out that a search warrant; a computer access warrant; a surveillance device warrant; an inspection of postal articles warrant; an inspection of delivery services articles warrant; a foreign intelligence warrant; an identified person warrant; assistance to access to data warrants; questioning and detention warrants are all warrants issued by the Attorney-General alone. The implication being that, the position of the ASIO Amendment Bill 2020 is in keeping with ASIO's current powers.

The Committee looks forward to receiving a supplementary submission from you.

Regards



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