

Review of Australian Security Intelligence Organisation Amendment Bill 2020

Submission to the Parliamentary Joint Committee on
Intelligence and Security

23 June 2020

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the review by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of the Australian Security Intelligence Organisation Amendment Bill 2020 ('the Bill').
2. This submission will focus on the ALA's concerns regarding the following sections of the Bill:
 - Lowering the age for detention and questioning from 16 to 14 (s34BB);
 - The ability to issue oral warrants (s34BF(1));
 - The limits on a person's ability to choose a particular lawyer to be present for questioning (s34F(4));
 - The prescription of when a lawyer may or may not intervene in questioning (s34FF);
 - The removal of a lawyer for disrupting questioning (s34FF(6)).

Questioning a person aged 14–18 – sections 34BB, 34BD(2)

3. The ALA is concerned that the legislation gives ASIO the power to seek a warrant to allow questioning of young people between the ages of 14 and 18 if that young person is a target of an ASIO investigation into politically motivated violence.
4. According to the Explanatory Memorandum for the Bill, the intent of s34BB is to enable the Attorney-General to issue warrants in relation to persons who are at least 14 years of age but under 18 years. The ability of the Attorney-General to issue a warrant under this section is limited to circumstances where the minor is the target of an investigation in relation to politically motivated violence and where the minor is at least 14 years of age. The effect of the amendment is to lower the minimum age from 16 to 14 years.
5. The ALA is concerned that this section invests considerable discretion in the Attorney-General in relation to issuing warrants for young people aged 14 and 15. Moreover, there are no security or accountability procedures in place to ensure that the Attorney-General will consider the best interest of the child when considering whether to issue a warrant, or that the safeguards provided for in s34BB have been satisfied.

6. The ALA is concerned that the power to issue a warrant under s34BB constitutes a violation of Australia's obligations under Article 37(b) of the *Convention on the Rights of the Child*. The ALA does not accept the distinction drawn in paragraph 25 of the Explanatory Memorandum's Statement of Compatibility with Human Rights that the power to apprehend is distinct from detention, as the process of taking a person who is subject to a questioning warrant to a location for questioning necessitates detaining the person for the purposes of questioning. The ALA submits that the distinction drawn in paragraph 25 is spurious.
7. In relation to the safeguards provided in s34BD, the ALA notes that s34F imposes limitations on the choice of lawyer to be present. The ALA will address concerns regarding this section below.

The ability to issue oral warrants – section 34BF

8. According to the Explanatory Memorandum for the Bill, s34BF(1) provides that a questioning warrant may be issued either by a written document signed by the Attorney-General, or orally. A questioning warrant may only be issued orally where the Attorney-General reasonably believes that the delay caused by issuing a written warrant may be prejudicial to security.
9. Section 34BF(3) states that where a questioning warrant is issued orally, a written record must be made as soon as practicable, but no later than 48 hours after the warrant is issued. This written record must contain the elements outlined in s34BF(2); namely, what the warrant authorises and any relevant conditions or restrictions.
10. The ALA is concerned that the issuing of an oral warrant lacks the necessary accountability, given that it may be up to 48 hours after the warrant is issued that a written record of the warrant and any relevant conditions or restrictions are made. The ALA is concerned that in that time the warrant may have been executed excessively or beyond the scope of what was originally intended, and that any subsequent written record could be 'retro-fitted' to the manner in which it was executed.
11. The ALA submits that a written record of the warrant must be made no later than 12 hours after the warrant is issued.

Limits on the choice of lawyer - section 34F(4)

12. According to the Explanatory Memorandum, new sub-s34F(4) limits the subject's right to a particular lawyer of their choosing in some circumstances. This subsection will have the effect that the subject may be prevented from contacting a particular lawyer. The subject would then be able to choose another lawyer (but contact with that lawyer may also be prevented).
13. The ALA submits that this undermines the right of a person to choose their own lawyer when they are subject to investigation by ASIO. Section 34F(4) allows for a prescribed authority – which is a judge, Administrative Appeals Tribunal member or legal practitioner (with at least ten years' experience) who has been selected by the government (s34AD(1)) – to stop a person who ASIO is seeking to question from contacting their lawyer if 'satisfied, based on circumstances relating to the lawyer, that, if the subject is permitted to contact the lawyer, a person involved in activity prejudicial to security may be alerted that the activity is being investigated, or that a record or other thing the subject may be requested to produce might be destroyed, damaged or altered'. This power is sweeping and it appears to allow for hearsay 'evidence' to be used in the process.
14. The ALA submits that the process to prevent a particular lawyer from being contacted by a person being interviewed by ASIO could be abused by ASIO. ASIO could assert to the prescribed authority that, based on their information, a particular lawyer would not be acceptable on the basis that a person involved in an activity prejudicial to security may be alerted that the activity is being investigated. This information may be unsubstantiated, uncorroborated and of spurious value. However, the broad ranging power given to ASIO to make this assertion may have the effect of depriving the person of their choice of lawyer.

The prescription of when a lawyer may intervene in questioning and removal of a lawyer for disrupting questioning – section 34FF

15. Section 34FF(6) sets out the circumstances in which a lawyer may intervene in questioning. It states that a lawyer must not intervene or address the prescribed authority except to request clarification of an ambiguous question, or to request a break to provide advice to the subject. The section also sets out the circumstances in which a lawyer may be removed from questioning. According to the Explanatory Memorandum, a lawyer be removed if the conduct is unduly disrupting questioning. The Explanatory Memorandum gives the example of the case where a lawyer repeatedly interrupts questioning (other than to make reasonable

requests for clarification or a break to provide advice), in a way that prevents or hinders questions being asked or answered.

16. For a lawyer to fulfil their professional duties on behalf of a client who is the subject of interrogation by security or police officers, it may be necessary for that lawyer to intervene when they consider that the questioning is untoward, inappropriate, excessive or conducted in an intimidating manner. In addition, it is appropriate for a lawyer to intervene and interrupt questioning where the client has departed from the instructions and advice that had been agreed to between them and the lawyer.
17. The ALA is concerned that s34FF(6) narrows the scope of when a lawyer may intervene in questioning, such that a lawyer may not be able to fulfil their professional duties to the client in circumstances that require an assertive intervention due to the possibility that the lawyer will be removed. Ultimately, it is the discretion of the interviewing officer that may determine whether a lawyer who is fulfilling their professional obligations in an assertive manner on behalf of a client is considered disruptive and therefore should be removed from the interview.

Conclusion

18. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security. For the reasons outlined in this submission, the ALA submits that the Bill should not be passed in its current form.

Andrew Christopoulos


President
Australian Lawyers Alliance