



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

12 November 2020

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: legcon.sen@aph.gov.au

cc: The Hon Peter Dutton MP, Minister for Home Affairs,
dlo@homeaffairs.gov.au

The Hon David Coleman, Minister for Immigration, Citizenship,
Migration Services and Multicultural Affairs,
dlo.immi@homeaffairs.gov.au


Dear Chair,

Matters of interest to the Senate

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instruments appear to contain significant policy matters, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw them to the attention of your committee:

| Instrument | Purpose | Last day to lodge disallowance notice |
|---|---|---------------------------------------|
| Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134] | To provide that Division 3 of Part III of the <i>Australian Security Intelligence Organisation Act 1979</i> (ASIO Act), which establishes the framework for ASIO to question and detain persons under a warrant in relation to terrorism offences, will continue to operate until 7 March 2021 despite the ASIO Act providing that the provisions sunset on 7 September 2020. | First sitting day of 2021 |
| Migration Amendment (Hong Kong Passport Holders) Regulations 2020 [F2020L01047] | To amend the Migration Regulations 1994 to implement policy changes relating to visas for Hong Kong passport holders, including extending temporary skilled and temporary graduate visas and providing that temporary skill shortage visas will be for a period of five years. | 01/12/2020 |

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine either of the above instruments, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

Should you have any questions, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



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12 November 2020

The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Via email: Peter.Dutton.MP@aph.gov.au

CC: dlo@homeaffairs.gov.au


Dear Minister,

Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Modification of primary legislation

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to examine each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment (matters that should be included in primary rather than delegated legislation). In addition, standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes where an instrument may limit parliamentary oversight.

The instrument is made under subitem 1(2) of Schedule 16 to the *Coronavirus Economic Response Package Omnibus Act 2020*, which provides that the relevant minister may, by legislative instrument, determine a new sunsetting date that is no later than six months from the original sunsetting date for Acts or legislative instruments that are due to sunset on or before 15 October 2020.

Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) establishes the framework for the Australian Security Intelligence Organisation (ASIO) to question and detain persons under a warrant in relation to terrorism offences. The provisions set out significant coercive powers, including ASIO's powers with respect to

compulsory questioning warrants (without detention), and compulsory questioning warrants which authorise detention for up to seven days. Under section 34ZZ of the ASIO Act, the provisions were due to sunset on 7 September 2020. However, the instrument provides that the provisions will now continue to operate until 7 March 2021. In this regard, the measures in the instrument constitute a significant extension to ASIO's compulsory questioning and detention warrants regime.

The committee has significant scrutiny concerns about enabling delegated legislation to override the operation of legislation which has been passed by the Parliament. Such provisions may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. In this regard, the committee generally considers that such measures should ordinarily be included in primary legislation, unless a sound justification for the use of delegated legislation is provided.

In this instance, the explanatory statement to the instrument notes that parliamentary consideration of the Australian Security Intelligence Organisation Amendment Bill 2020 (the ASIO bill), which proposes to repeal ASIO's current detention powers as set out in Division 3 of Part III of the ASIO Act and introduce a new questioning warrant framework, was delayed due to changes to the parliamentary schedule resulting from the COVID-19 pandemic. Accordingly, the explanatory statement explains that the instrument is necessary to 'ensure that ASIO will continue to have operational powers to respond to the ongoing threat of terrorist activities in Australia' until the provisions in the ASIO bill are operative.

While noting this explanation, the committee remains concerned that using delegated legislation to extend the operation of ASIO's compulsory questioning and detention warrants regime limits parliamentary consideration of the regime. In this regard, the committee notes that previous extensions to the regime were appropriately enacted by primary legislation. Most recently the regime was extended by the *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019*, a standalone bill containing a single amendment to extend the sunset date by one year

The committee acknowledges that the extraordinary circumstances relating to the COVID-19 pandemic may have necessitated the use of delegated legislation to defer the sunsetting of primary legislation when Parliament was not sitting. However, it is unclear why it continues to be necessary or appropriate to continue to make significant extensions to the operation of primary legislation via delegated legislation noting that regular parliamentary sittings have recommenced. In this regard, the committee notes that a standalone bill to extend the sunset date in section 34ZZ of the ASIO Act could have been introduced into the Parliament to provide the Parliament with the opportunity to consider the appropriateness of extending the operation of the compulsory questioning and detention warrants regime as an interim step while the Parliament considered the more complex changes proposed in the ASIO bill. It is also unclear why it was considered necessary and appropriate to defer sunsetting for a full six months, particularly noting that the ASIO bill is currently before the Parliament.

The committee therefore requests your advice as to:

- why it was considered necessary and appropriate to extend the operation of ASIO's compulsory questioning and detention warrants regime by delegated legislation, rather than primary legislation, particularly noting that parliamentary sittings have recommenced and a standalone bill to extend the regime could have been introduced into, and considered by, the Parliament; and
- why it was considered necessary and appropriate to extend the operation of the regime for the full six months permitted under the *Coronavirus Economic Response Package Omnibus Act 2020*, as opposed to a shorter period.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 November 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



**THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS**

Ref No: MS20-002875

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Connie,

Dear Senator Fierravanti-Wells

I refer to your letter dated 12 November 2020 seeking further information about the Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 (the **determination**).

This letter responds to your request for my advice as to:

- why it is considered necessary and appropriate to extend the operation of ASIO's compulsory questioning and detention warrant regime by delegated legislation, rather than primary legislation, particularly noting that parliamentary sittings have recommenced and a standalone bill to extend the regime could have been introduced into, and considered by, the Parliament; and
- why it was considered necessary and appropriate to extend the operation of the regime for the full six months permitted under the *Coronavirus Economic Response Package Omnibus Act 2020*, as opposed to a shorter period.

The determination extends the sunset date for the Australian Security Intelligence Organisation's (**ASIO**) existing questioning, and questioning and detention powers in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**) from 7 September 2020 to 7 March 2021, or until the provisions in the Australian Security Intelligence Organisation Amendment Bill 2020 (the **Bill**) come into force.

The Bill was introduced into Parliament on 13 May 2020, and referred to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) for review. The Bill repeals ASIO's existing questioning, and questioning and detention, warrant framework in Division 3 of Part III of the ASIO Act and introduces a reformed compulsory questioning and apprehension framework.

The Bill implements the Government's response to the PJCIS's 2018 review of Division 3 of Part III of the ASIO Act, in which it recommended that ASIO retain a compulsory questioning power, and that ASIO's current detention powers be repealed. Consistent with this recommendation, the Government does not intend to retain ASIO's questioning and detention powers any longer than is necessary. The Government intends to pass the Bill as soon as possible after carefully considering any recommendations from the PJCIS's current review of the Bill.

Extension through delegated legislation rather than primary legislation

Schedule 16 of the *Coronavirus Economic Response Package Omnibus Act 2020* (the **Economic Response Act**) introduced a mechanism to extend the operation of provisions in primary legislation and legislative instruments due to sunset on or before 15 October 2020. This mechanism is intended to ensure that there are no gaps in Australia's legislation while Parliament's attention is focussed on high priority and urgent measures arising from the COVID-19 pandemic.

The Bill is the primary legislation through which the Government intended to address the 7 September 2020 sunset date. However, this was not possible due to disruptions to Parliamentary sittings resulting from the COVID-19 pandemic. As a result, the sunset date was extended by the deferral determination to provide Parliament with sufficient time to consider passage of the Bill.

In this light, extending the operation of ASIO's questioning and detention warrant powers through the determination, as opposed to further primary legislation, was an appropriate and proportionate exercise of the authority provided by the Economic Response Act to ensure ASIO continues to have the powers it needs to gather information relevant to the investigation of a terrorism offence, while enabling Parliament to focus on responding to the unprecedented circumstances presented by the COVID-19 pandemic.

It would not have been appropriate to introduce an additional bill into the Parliament to defer the sunset date when the Bill was already before Parliament for this very purpose. In addition to this, given the uncertainty surrounding the Parliamentary sittings during this time, it was not clear whether a further bill to defer the sunset date would have been delayed in the Parliament due to disruptions resulting from the COVID-19 pandemic. If this were to occur, ASIO may have lost a vital intelligence collection power which may assist in the prevention of a terrorist attack. This would have presented an unacceptable risk to the Australian community.

Importantly, the determination will cease to operate when the provisions in the Bill come into force. While the Bill remains under consideration by the PJCIS, the Government's intention is to pass the Bill as soon as possible. The determination will only remain in force while the PJCIS and the Parliament consider the reforms to ASIO's compulsory questioning powers brought forward in the Bill.

Extension for six months as opposed to a shorter period

Extending ASIO's existing powers for six months, as opposed to a shorter period, ensured that the powers did not sunset while the PJCIS and the Parliament consider the reforms in the Bill. The extension was a temporary mechanism to provide certainty that ASIO's existing powers will not sunset in circumstances of uncertainty regarding the duration of the COVID-19 pandemic and any further disruptions to the Parliament.

The Government's priority remains to pass legislation to repeal ASIO's existing questioning, and questioning and detention warrant powers and introduce a reformed questioning framework for ASIO. The Government is working to ensure that the new questioning framework contained in the Bill is in force as soon as possible.

Thank you for bringing your concerns to my attention.

Yours sincerely

PETER DUTTON

03/12/20



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10 December 2020

The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Via email: Peter.Dutton.MP@aph.gov.au

CC: dlo@homeaffairs.gov.au

Dear Minister,

Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134]

Thank you for your response of 3 December 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on Wednesday, 9 December 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

Whilst acknowledging the particular circumstances in which the instrument was made, the committee reiterates its longstanding technical scrutiny view that delegated legislation should not be used to extend the operation of primary legislation. This is particularly important where the relevant Act has the capacity to trespass on personal rights and liberties and Parliament has limited its duration in recognition of this issue.

The committee also notes that the instrument was made in response to the COVID-19 pandemic. The committee's views in relation to COVID-19 related delegated legislation are set out in detail in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight. The interim report highlights the importance of ensuring parliamentary oversight during times of emergency and notes that COVID-19 serves to shine a light on the deeper, systemic issues which inhibit Parliament from effectively overseeing delegated legislation at all times, not just during emergencies.

The committee will continue to closely monitor COVID-19 related delegated legislation in the future to ensure that it complies with the recommendations set out in the interim report.


A copy of the committee's interim report is available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,


Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation