GETUP LIMITED: RE *AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION AMENDMENT BILL 2020*

JOINT MEMORANDUM OF ADVICE

A. INTRODUCTION

1. On 13 May 2020, the *Australian Security Intelligence Organisation Amendment Bill 2020* (**the Bill**) was introduced into the House of Representatives. The Bill proposes a number of amendments to the *Australian Security and Intelligence Organisation Act 1975* (**ASIO Act**) concerning the secret and compulsory questioning regime and the use of tracking devices. It has been considered by the Senate Standing Committee for the Scrutiny of Bills and the Joint Parliamentary Committee on Human Rights, and has been referred to the Parliamentary Joint Committee on Intelligence and Security for review.

2. We have been asked to provide a written advice as to:

    a. the constitutional validity or otherwise of the powers being afforded under the amendments proposed in the Bill;

    b. general impacts on freedoms, including media and the press;

    c. implications for civil society organisations;

    d. the quality of the drafting of the changes, and the flow-on implications for other legislation and powers, given their complexity and the speed with which they have been tabled.

3. For the reasons set out in this advice, we consider that:

    (a) there are doubts about the constitutional validity of the existing regime of questioning warrants, and questioning and detention warrants, and those doubts remain in respect of the proposed regime of questioning and apprehension warrants. The proposed amendments contains provisions amounting to executive detention that may not survive constitutional scrutiny on their face, or in their application to a particular case;

    (b) there are also doubts about the constitutional validity of provisions relating to the questioning of persons charged with offences and the use of information provided pursuant to such

questioning, in circumstances where the privilege against self-incrimination is expressly abrogated;

(c) the limitations on legal representation for the subject of a questioning warrant, and the extension of questioning warrants to children as young as 14 years old, do not on their face raise constitutional issues. However, they do impose significant incursions into rights recognised as being fundamental to a democratic society ruled by law. They also contravene Australia's obligation under the Convention on the Rights of the Child;

(d) journalists and media are not afforded any protection under a questioning warrant and may be required to reveal a confidential source, contrary to well-recognised ethical and professional obligations that promote freedom of expression and the accountability of executive action and decision-making. While these provisions do not give rise to a constitutional issue on their face, their application to a particular case may give rise to a constitutional issue and may amount to an interference with the implied constitutional guarantee of freedom of political communication;

(e) civil society organisations, and persons involved in or associated with them, may be issued with questioning warrants or subjected to an internally authorised tracking device, as a result of the expansion in scope of matters that are covered within these provisions, particularly by the inclusion of "acts of foreign interference", which may undermine the important role played by civil society organisations in holding government to account; and

(f) there are discrepancies and anomalies in the drafting of the Bill that may reflect lack of care in drafting.

4. We assume the reader has a degree of familiarity with the Bill.[1]

5. This advice is provided at a level of generality and is not a comprehensive review of all the issues with the Bill. We have provided our views as to what we consider to be the more significant issues that are raised by the Bill. This is also not an advice on the prospects of success of any challenges to the legislation if it was to be enacted.

B. OVERVIEW OF THE BILL

6. Presently, Division 3 of Part III of the ASIO Act allows ASIO, upon obtaining a warrant, to question a person under compulsion in order to obtain intelligence that is important in relation to a terrorism offence.

[1] References to the "sections" of the Bill are references to the new sections proposed to be inserted as set out in the Bill, Schedules 1 and 2.

7. These powers were introduced in the wake of the September 11, 2001 terrorist attacks. Initially proposed in March 2002, they were the subject of extensive debate and scrutiny and were not ultimately enacted until July 2003. The original sunset date for these provisions was 26 July 2006. This period was extended by 10 years to 26 July 2016 (*Australian Security Intelligence Organisation Legislation Amendment Act 2006*), and further extended to 7 September 2018 (*Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*) and again to 7 September 2019 (*Counter-Terrorism Legislation Amendment Act (No. 1) 2018*), then finally to 7 September 2020 (*Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019*).

8. The Bill proposes amendments to three key features of the ASIO Act:

(a) amendments to the compulsory questioning powers regime;

(b) amendments to the detention powers regime; and

(c) amendments to the use of tracking devices without a warrant.

Compulsory questioning powers

9. Division 3 of Part III of the ASIO Act allows ASIO, upon obtaining a warrant, to question a person under compulsion in order to obtain intelligence that is important in relation to a terrorism offence. For the purposes of these provisions, "terrorism offence" is defined as:

a. an offence against Subdivision A of Division 72 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), being offences relating to international terrorist activities using explosive or lethal devices; or

b. an offence against Part 5.3 of the Criminal Code, being an action or threat of action with the intention of advancing a political, religious or ideological cause and with the intention of coercing or intimidating a government or intimidating the public, and intended to cause harm or endanger a person or create a risk to the health and safety of the public.

10. Under the present regime, with the written consent of the Attorney-General, ASIO may request either a questioning warrant (**questioning warrant**) or a questioning and detention warrant (**detention warrant**) from an issuing authority (a judge of a federal court acting in a personal capacity). Both warrant types require the person to appear before a prescribed authority for questioning in relation to the relevant terrorism offence(s).[2] The primary difference between the

[2] A "prescribed authority" presides over and controls the questioning and detention authorised by the warrant.

At present, the prescribed authorities are retired superior court judges.

two warrant types is that under a detention warrant police officers take the person into custody and detain that person; under a questioning warrant the person is not initially apprehended or detained, instead appearing for questioning at a specified time. In this section we focus upon the issue of questioning warrants. The issue of detention warrants will be addressed in the next section.

11. The Attorney-General's consent to the making of a request for a questioning warrant may only be provided if the Attorney-General is satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that, having regard to other methods of collecting intelligence that are likely to be as effective, it is reasonable in the circumstances for the warrant to be issued.[3]

12. The questioning warrant may only be issued by a judge if the judge is satisfied there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[4]

13. The warrant requires a specified person to appear for questioning before a "prescribed authority" (a retired superior court judge)[5] either immediately after the person is notified of the issue of the warrant, or at a later time specified in the warrant.

14. The prescribed authority controls the questioning and detention process and may make a range of directions, including to detain the person or defer (or extend) questioning.[6] Questioning may occur for up to eight hours, but this can be extended on request up to a maximum of 24 hours (or 48 hours if using an interpreter).[7]

15. During questioning, the person must provide any information, records or things requested. There is no privilege against self-incrimination: the person must answer the questions or produce the requested things even though it may incriminate them.[8] However, any information provided or

[3] ASIO Act, s 34D.
[4] ASIO Act, ss 34AB, 34E(1).
[5] There is a power to appoint other persons as a prescribed authority if there is an insufficient number of retired judges available, although to date it has not been necessary to exercise that power. The second category of person who may be appointed as a prescribed is current serving judges of State or Territory Supreme or District Courts who have served for at least 5 years. If there are still insufficient numbers available, then a third category of persons, being those who have been appointed as President or Deputy President of the AAT and who have been enrolled as a legal practitioner for at least 5 years: ASIO Act, s 34B.

[6] ASIO Act, s 34K.
[7] The questioning can occur at any time during the life of the warrant and does not have to occur in one questioning session. Therefore, the allowed questioning could occur over multiple questioning sessions over the maximum 28-day life of the warrant.
[8] ASIO Act, s 34L(8).

document or thing produced cannot be used against the person in a criminal proceeding.[9] There is no prohibition on the derivative use of such information, document or thing in criminal proceedings.

16. The person may contact a lawyer. However, the person may be prevented from contacting a particular lawyer if the person is in detention and the prescribed authority is satisfied, on the basis of circumstances relating to that lawyer, that contacting that lawyer would mean:

    a. a person involved in a terrorism offence may be alerted that the offence is being investigated; or

    b. a record or thing that the person may be requested to produce in accordance with the warrant may be destroyed, damaged or altered.[10]

17. Under the current regime a person's contact with their lawyer can be monitored by ASIO. Reasonable opportunities must be provided for the lawyer to advise the person, and the lawyer may request permission to address the prescribed authority during breaks in questioning. The lawyer may not, however, intervene in the questioning or address the prescribed authority during questioning, except to clarify an ambiguous question. If the lawyer fails to comply with these restrictions, and is considered by the prescribed authority to be unduly disruptive of the questioning, the lawyer may be removed. If removed, the prescribed authority must permit the person to contact another lawyer.[11]

18. There is nothing in the current regime that expressly authorises the questioning of a person who has been, or is about to be, charged with the terrorism offence the subject of the warrant, or indeed any other offence.

19. The Bill proposes to retain the compulsory questioning regime for a further ten years to 7 September 2030[12] with some significant amendments:

    (a) the extension of ASIO's compulsory questioning powers to explicitly include the power to compulsorily question a person who has been charged with an offence, or where such charge is imminent, about the subject matter of those charges;[13]

    (b) the extension of ASIO's compulsory questioning powers to compulsorily question children at least 14 years old in matters that relate to the protection of the Commonwealth, the States

[9] ASIO Act, s 34L(9). The exception to this is in a criminal proceeding for an offence under s 34L of the ASIO Act, such as for providing false or misleading answers during questioning.
[10] ASIO Act, s 34ZO
[11] ASIO Act, s 34ZQ
[12] Bill, s 34JF.
[13] Bill, ss 34BA(1)(d), 34BB(1)(e), 34BD(4), 34DB(1).

and Territories, from politically motivated violence,[14] whether directed from, or committed within, Australia or not (***minor questioning matter***);[15]

(c) the extension of the subject matter for questioning from terrorism offences to also include matters in relation to the protection of the Commonwealth and the States and Territories from espionage, politically motivated violence, or acts of foreign interference, whether directed from, or committed within, Australia or not (***adult questioning matter***);[16]

(d) the removal of the requirement that a request by the Director-General for the issue of a warrant be made in writing, and authorising a request to be made orally where the Director General reasonably believes that the delay caused by making a written request may be prejudicial to security,[17] and a written record of the oral request must be made no later than 48 hours after the oral request;[18]

(e) the power to issue a warrant is no longer vested in a judge, but lies with the Attorney General;[19] and

(f) there is no longer a presumption that a "prescribed authority" will be a retired judge. The persons who may be appointed as a "prescribed authority" before whom questioning takes place has been extended to include the President of the Administrative Appeals Tribunal (who, it should be noted, will be a Federal Court Judge[20]) or a Deputy President of the Administrative Appeals Tribunal (who need not be a judge[21]) and who has been enrolled as a legal practitioner for more than 5 years, or a legal practitioner with a current practising certificate of 10 years' standing.[22] These persons may be appointed as a prescribed authority whether or not there is a sufficient number of retired judges available to perform this function.

Detention powers

20. The current regime for the request for and issue of detention warrants is similar to that in relation to questioning warrants.

21. The Attorney-General may consent to the making of a request for a detention warrant where there are reasonable grounds for believing that issuing the warrant will substantially assist the

[14] Under ASIO Act, s 4 "*politically motivated violence*" is defined so as to include terrorism offences, but is much broader than "terrorism offences" as defined in the Criminal Code.
[15] Bill, ss 34A (definition of "*adult questioning matter*"), 34BB.
[16] Bill, ss 34B (definition of "*minor questioning matter*"), 34BA.
[17] Bill, s 34B(2)(b).
[18] Bill, s 34B(6).
[19] Bill, ss 34BA, 34BB.
[20] *Administrative Appeals Act 1975* (Cth), s7(1).
[21] *Administrative Appeals Tribunal Act 1975* (Cth), s 7(2)(b) and (c).
[22] Bill, s 34AD.

collection of intelligence that is important in relation to a terrorism offence, that relying on other methods of collecting that intelligence would be ineffective and that, if the person is not immediately detained, the person may alert someone involved in a terrorism offence, may not appear for questioning, or may destroy or damage relevant records or things.[23]

22. The detention warrant authorises a specified person to be taken into custody immediately by a police officer, to be brought before a prescribed authority immediately for questioning under the warrant, and to be detained.[24] Under a detention warrant, the person is detained until either the questioning has ceased, the maximum questioning period is reached, or 168 hours (7 days) has passed from the time the person was brought before the prescribed authority, whichever is the earliest.[25]

23. The Bill proposes to abolish the detention warrant regime. Instead, a questioning warrant may, in addition to questioning, authorise the apprehension of the person by a police officer in order to immediately bring them before the prescribed authority for questioning under the warrant.[26] The criteria for authorising apprehension in the questioning warrant is similar to that under the existing detention warrant regime.[27]

24. In addition to an authorisation to apprehend under a questioning warrant, a police officer may also apprehend a person who is required to immediately appear before a prescribed authority and who makes a representation that they intend to alert someone involved in an activity prejudicial to security that the activity is being investigated, may not appear before the prescribed authority, or may destroy, damage or alter records or things the person has been, or may be, requested in accordance with the warrant to produce (or cause another person to do so).

Use of tracking devices without a warrant

25. Presently, under the ASIO Act, ASIO may use tracking devices to track a person without a warrant if the person consents to that use.[28] Otherwise, for the use of such a device a warrant must be issued by the Attorney-General.[29]

26. The Bill introduces a new Subdivision DA which would enable the use of tracking devices without a warrant issued by the Attorney-General. Instead, the proposed amendments authorise the use of tracking devices so long as there has been internal authorisation provided by the

[23] ASIO Act s 34F.
[24] ASIO Act, s 34G(3).
[25] ASIO Act, s 34G(4).
[26] Bill, ss 34BE, 34C.
[27] Bill, s 34BE(2)
[28] Section 26E.
[29] Subdivision D.

Director-General, or an ASIO employee or affiliate holding the equivalent position of Senior Executive Service level or higher.[30]

C. CONSTITUTIONAL ISSUES

27. We consider there to be three key constitutional issues raised by the Bill:
    (a) the validity of executive detention authorised by the Bill;
    (b) the impact of compulsory questioning of individuals who have been charged, or a charge is imminent; and
    (c) the restriction on lawyers.
28. We note that the current regime raises similar constitutional issues. The constitutional issues with executive detention under the current regime were canvassed before the Senate Legal and Constitutional References Committee on the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*.[31] The questioning and detention model received significant criticism, including from Professor George Williams, Dr Stephen Donaghue (now Solicitor-General of Australia), and Phillip Boulten SC. While the Bill does not propose to extend the questioning and detention model, similar constitutional issues nonetheless arise by the inclusion of an express power of apprehension as part of a questioning warrant.

29. The Senate Legal and Constitutional References Committee also noted concerns with restrictions on access to legal representation in the 2002 amendments.[32] The Committee made a number of recommendations to safeguard access to legal representation which were not implemented at the time and have not been taken up in the proposed amendments.[33]

30. The slightly different issue raised by compulsory questioning of persons charged with an offence (which we discuss below) arises under the current regime, as the ASIO Act does not currently expressly permit such questioning.

(a) Executive detention

31. It has long been recognised as a consequence of the separation of powers doctrine that:

> It would be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why is that putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive

[30] Bill, Schedule 2, cl 1, inserting in s 22 new definition of "authorising officer".
[31] Published December 2002, Chapter 7.
[32] Chapter 6.
[33] Recommendations 9 to 14.

> in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[34]

32. Thus, in considering the constitutional validity of legislation authorising executive detention, the focus of High Court authorities since *Lim* has been on characterising detention as penal or punitive and protective or preventive.[35] However, Gageler J has observed "any form of detention is penal or punitive unless justified as otherwise".[36]

33. In determining constitutional validity, the purpose of the Act authorising detention is a relevant consideration – "a law that authorises detention will not offend the separation of powers doctrine as long as its purpose is non-punitive".[37] However, if the imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.[38] In this regard, it has been held that the failure to meet the following two conditions will render the detention incapable of escaping characterisation as punitive:[39]

(a) the duration of the detention must be reasonably capable of being seen as necessary to effect the (non-punitive) purpose identified in the statute;[40] and

(b) the duration of any form of detention must be capable of being determined at any time and from time to time, otherwise the lawfulness of the detention could not be determined and enforced by the Courts.[41] We note, however, that this condition does not require the precise time and date of release from detention to be capable of being ascertained, only that the event by reference to which detention will conclude can be identified.

[34] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ. The

exceptional cases were non-judicial involuntary detention for committal to custody awaiting trial, mental illness, infectious disease, powers of the Parliament to punish for contempt and military tribunals to punish for breach of discipline: at 28.

[35] See, e.g. *Kruger v Commonwealth* (1997) 190 CLR 1 at 61-62 per Dawson J (McHugh J agreeing at 144), 84 per Toohey J, 109-111 per Gaudron J, at 161-162 per Gummow J.

[36] *North Australian Aboriginal Justice Agency Ltd v Northern Territory of Australia* (2015) 256 CLR 569 at [98] per Gageler J.

[37] *Re Woolley; ex parte Applicants M276/2003* (2004) 225 CLR 1 at [77] per McHugh J.

[38] *Lim* at 71 per McHugh J; *Re Woolley* at [78] per McHugh J.

[39] *North Australian Aboriginal Justice Agency Ltd v Northern Territory of Australia* (2015) 256 CLR 569 at [98] per Gageler J.

[40] In *Lim*, Brennan, Deane and Dawson JJ held, at 33, "the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered". In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, Crennan, Bell and Gageler JJ held at [139] that "the necessity referred to in *Lim* is not that the detention itself be necessary for the purposes of the identified administrative processes but that the period of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified".

[41] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [29] per French CJ, Hayne, Crennan, Kiefel and Keane JJ.

Constitutional validity – detention for questioning

34. In our view, there is considerable uncertainty about the constitutional validity of the detention for questioning regime, for the following reasons.

35. It may be accepted that the purpose or object of the Bill's questioning regime is non-punitive. The ASIO Act establishes ASIO as an intelligence gathering agency in respect of security matters.[42] The Act expressly excludes from the function of ASIO carrying out or enforcing security measures for the Commonwealth.[43] The purpose of the questioning warrants is directed to the collection of intelligence in relation to security matters.[44] A warrant may only be issued if the Attorney-General is satisfied that, among other things, there are reasonable grounds for believing that the warrant will "substantially assist the collection of intelligence that is important" in relation to the questioning matter.[45] On a proper construction, the object of the provisions is neither punitive nor penal.

36. Accepting then that the purpose or object of the detention for questioning regime is non-punitive, the issue then becomes whether the detention is reasonably capable of being seen as necessary to effect that (non-punitive) purpose.

37. The provisions suggest time-related restraints that link the continuation and conclusion of detention to the grounds upon which the warrant was requested and issued, namely, that there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important to the questioning matter, and that having regard to the efficacy of other methods of collecting the intelligence it is reasonable for the warrant to be issued.[46]

Permission for extensions of the period of questioning are similarly tied to the intelligence gathering exercise. The permitted questioning period can be extended to 16 hours and again to 24 hours where there are reasonable grounds for believing that the extension will "substantially assist" in the collection of intelligence that is "important" to the questioning matter.[47] Where there is a need for an interpreter, the questioning period may be extended from 24 hours to 32 hours and then 40 hours on the same basis.[48] It thus seeks to avoid an excess of purpose on its face.

[42] ASIO Act, s 17(1).
[43] ASIO Act, s 17(2).
[44] ASIO Act, s 4 (definition of "*security*" includes protection from espionage, politically motivated violence, acts of foreign interference); Bill, s 34A (definition of "adult questioning matter", "minor questioning matter"). [45] Bill, ss 34BA(1)(b), 34BB(1)(c).
[46] Bill, s 34DJ.
[47] Bill, s 34DJ.
[48] Bill, s 34DK.

38. Notwithstanding this, the actual application of the provisions in a particular case may nonetheless have the potential to offend Chapter III for being punitive in character by failing to be reasonably capable of being seen as necessary for a legitimate non-punitive purpose. In this regard, we note that while the period for which a person is permitted to be questioned is limited, this questioning does not need to occur in one block, and the questioning can be deferred by direction of the prescribed authority[49] during the period of validity of the warrant, which is 28 days.[50] Furthermore, there is nothing to prevent the issue of successive warrants.[51]

39. We also note that the power to extend the period of questioning, on its face tied to the intelligence gathering purpose, is nonetheless problematic because of the limited opportunity in practice to challenge the extension. The person carrying out the questioning may request an extension to the questioning period in the absence of the subject of the warrant or their lawyer.[52] A lawyer acting for the person the subject of the warrant has limited information about the purpose of the questioning,[53] and does not need to be told the purpose of the request for the extension. They have no opportunity to address, or make submissions on, any developments from questioning subsequent to the initial issue of the warrant.

40. In addition, there are significant restraints upon the capacity of a lawyer to provide legal representation during the questioning period. While a person is being questioned, the lawyer's ability to advise and obtain instructions from the subject is dependent on the prescribed authority providing the subject a reasonable opportunity for the lawyer to advise.[54] The lawyer's role during questioning is also limited to requesting clarification of an ambiguous

question or requesting a break to provide advice.[55] It is only during a break in questioning that the lawyer may request the prescribed authority for an opportunity to address on a matter.[56] The prescribed authority may approve or refuse such a request at its absolute discretion.[57]

41. Further, the lawyer may be removed from the place of questioning where the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning.[58] It is not clear what may constitute conduct that is "unduly disrupting". The example provided in the Explanatory

[49] Bill, s 34DE(1)(e).
[50] Bill, s 34BF(4).
[51] Bill, s 34BF(5).
[52] Bill, s 34DJ(6).
[53] Save for the information contained in the warrant, which may contain deletions that the Director-General considers necessary to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs, or the privacy of individuals: Bill, s 34FE(4).
[54] Bill, ss 34FF(2), (3).
[55] Bill, s 34FF(3)
[56] Bill, s 34FF(4).
[57] Bill, s 34FF(5).
[58] Bill, s 34FF(6).

Memorandum is where a lawyer repeatedly interrupts questioning in a way that prevents or hinders questions being asked or answered.[59] The intention, as identified in the Explanatory Memorandum, is to permit the prescribed authority to remove a lawyer in those instances to ensure that unnecessary delays of questioning can be prevented – that questioning is "not frustrated and can continue in circumstances where it is being used to obtain critical and time sensitive national security information".[60] The difficulty with this is that the section empowering the prescribed authority to direct the removal of the lawyer does not require the prescribed authority to consider whether the information being obtained is critical and time sensitive national security information. That this would not always be the case is heightened by the breadth of the matters that may be the subject of a questioning warrant.

42. The ability of the person the subject of the warrant to test the reasonableness of the continuing intelligence-gathering purpose of the detention is also severely compromised. While the provisions require the person the subject of the warrant to be told about their right to approach a federal court for a remedy relating to the warrant,[61] the absence of knowledge of the reasons for such an extension make it difficult to see how in practice such a right could be exercised at all, or in a timely manner. The Bill allows the making of regulations that prohibit or regulate access to information by lawyers acting for a person in connection with proceedings for a remedy relating to the questioning warrant.[62] The current regulations prohibit the prescribed authority from giving permission to a legal adviser to communicate to anyone else information that is

obtained during questioning.[63] Similarly, the regulations limit the legal adviser's entitlement to access "security information".[64]

43. Where another lawyer is not able to appear within a reasonable time (as determined by the prescribed authority), the questioning may take place in the absence of a lawyer.[65]

44. Moreover, while a lawyer has a right to request a copy of the warrant, the warrant may be provided to the lawyer with deletions that the Director-General considers necessary to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals.[66] Those grounds are broad and far-reaching and

[59] Explanatory Memorandum, [477].
[60] Explanatory Memorandum, [478].
[61] Bill, ss 34BH(2)(h), 24DC(3)(b)
[62] Bill, s 34FH
[63] *Australian Security Intelligence Regulation 2016*, cl 7 (which will continue in effect by virtue of the savings provisions: see Bill, cl 16(1).
[64] *Australian Security Intelligence Regulation 2016*, cl 8 (which will continue in effect by virtue of the savings provisions: see Bill, cl 16(2).
[65] Bill, s 34FF(7).
[66] Bill, s 34FE.

would limit the information the lawyer has to properly advise. As noted above, a lawyer's access to information is also limited by the regulations.[67]

45. These restrictions on the lawyer's ability to address the prescribed authority, to speak to their client, advise and obtain instructions, to be privy to the questioning at all, to have necessary and relevant information about the warrant, or to have notice of any applications for extensions of time, and the onerous non-disclosure obligations imposed on them, significantly undermine the ability of a lawyer to assess whether there is a basis for urgent relief from the court to determine the detention and act accordingly.

46. Further, the subject of the warrant does not have the ability to contact the court themselves to seek urgent relief while detained for questioning.[68] This has particular significance where the subject is before the prescribed authority without a lawyer being present, and is prevented from doing so because the prescribed authority considers the subject has had a reasonable opportunity to contact a lawyer.[69]

47. It may also be noted that many of the decisions made to issue the warrant or to make directions in the course of questioning are conferrals of power without express limitation or specified criteria to be considered. The exercise of power conferred in that way is exceptionally difficult to

successfully challenge, noting the Bill does not provide any express avenue for merits review and a person would be left only with judicial review under the *Judiciary Act 1903* or s 75(v) of the Constitution.

48. In these circumstances, while the subject has a formal right to approach a federal court for relief in relation to their detention pursuant to the warrant, the effect of the restrictions on the subject while in detention may well render that right incapable of exercise.

49. Finally, the use that may now be made, directly and derivatively, of information obtained during the intelligence-gathering exercise for the purposes of prosecuting the person the subject of the warrant in criminal proceedings pendent or anticipated at the time of the request and issue for the warrant (which we discuss in more detail below) further undermines the ability to characterise the provisions as reasonably capable of being seen as necessary to give effect to a non-punitive purpose, or at least may do so in their practical operation in a particular case.

[67] Bill, s 34FH; *Australian Security Intelligence Regulation 2016*, cl 8 (which will continue in effect by virtue of the savings provisions: see Bill, cl 16(2).
[68] Note, it is possible a direction could be made by the prescribed authority under s 34DE(1). Contrast with s 34DI, where the subject of the warrant must be given facilities to make a complaint to the relevant complaints authorities, but does not include a court.
[69] Bill, s 34F(3).

50. It is also worth noting other legislative regimes that might be considered to have a similar non punitive purpose but which are far less draconian in their operation.

51. For example, under the *Crimes Act 1914* (Cth), a person who has been arrested for a terrorism offence may be detained for a period of 4 hours for the purpose of investigating the offence.[70] That period may be extended to a maximum of 20 hours, with the request for extension of time being made by written application to a magistrate.[71] The person arrested, or their legal representative, is entitled to make representations to the magistrate about the application to extend time.[72] The factors the magistrate must be satisfied of are detailed in the Act and include that the further detention is "necessary" to complete the investigation into the offence or another terrorism offence.[73]

52. That 4 hours is considered appropriate where there is an actual suspected terrorism offence suggests that the proposed initial questioning period of 8 hours, coupled with the availability of extensions upon satisfaction of far less demanding criteria, may be a disproportionate means to the legitimate intelligence-gathering end.

53. For those reasons, in our view there may be considerable uncertainty as to the constitutional

validity of the proposed questioning regime, at least in its application to a particular case.

Authorised apprehension – constitutional validity

54. The object of the provisions authorising apprehension are plainly for the purpose of bringing a person before the prescribed authority for questioning. In the three circumstances in which the Bill authorises apprehension, the apprehension is expressly stated to be "in order to immediately bring the subject before the prescribed authority for questioning under the warrant".[74] Leaving to one side the authority to apprehend a person where they have failed to appear in accordance with the warrant, the purpose of detaining the subject in order to bring the subject immediately before questioning is further narrowed as it arises only where:

(a) the Attorney-General is "satisfied that it is reasonable and necessary in the circumstances" that an immediate appearance by the person is required; and

[70] Section 23DB; where the person is Aboriginal or Torres Strait Islander, the period is 2 hours. In the more general criminal context, see, e.g. Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2009* (NSW), which provides for detention after arrest for the purposes of investigation for a "reasonable period", but no longer than 6 hours, which may be extended to a maximum of 12 hours, with the Act identifying specific criteria that must be taken into account in determining the period of detention.
[71] Section 23DE.
[72] Section 23DE(7).
[73] Section 23DE(2)(b).
[74] Bill, s 34BE(2), 34C.

(b) the Attorney-General is satisfied there are reasonable grounds for believing the person will, or when a person is served with notice of the warrant the person makes a representation that they intend to:

(i) alert a person involved in an activity prejudicial to security that the activity is being investigated; or

(ii) not appear before the prescribed authority; or

(iii) destroy, damage or alter, or cause another person to destroy, damage or alter a record or other thing the subject has been or may be requested under the warrant to produce.[75]

55. That is, the purpose of the detention in those circumstances is to protect the intelligence-gathering process. However, it is arguable that detention is punitive because the duration of detention is not reasonably necessary for that purpose.

56. On its face it appears that the period of detention is short – from when a person is apprehended to

when they are brought before the prescribed authority for questioning. However, in practice, this could be a significant amount of time. For example, an individual may be apprehended late at night,[76] and a prescribed authority not available until the following day. There is no safeguard provision specifying the maximum period of time a person may be detained in order to bring them before the prescribed authority. This incursion on liberty is magnified because it is done in secret. It is also magnified because of the practical limitations on the capacity of an apprehended person to challenge their detention.

57. It is arguable that such detention is not in a practical sense capable of being determined by a court at any time and from time to time. The person is prohibited from contacting any person aside from a lawyer, a minor's representative, and the specified complaints bodies.[77] Again noting the difficulties that may arise if a person is apprehended late at night, the person may not be able to make contact with a lawyer. There is no provision for the person to be provided an appointed lawyer during this period of detention, noting there is such provision for the questioning period where there is an immediate appearance requirement.[78] Further, there is no provision enabling the person to themselves contact the court to obtain urgent relief.[79] In those circumstances, the

[75] Bill, ss 34BE(2), 34C(2).
[76] See s 34CA: a police officer may enter premises, using such force as is necessary and reasonable, at any time of day or night to search for or apprehend the subject.
[77] Bill, s 34CB.
[78] Bill, s 34FB(2).
[79] See, s 34CB.

practical effect of these provisions is that the period of detention is not capable of being determined by a court at any time.

58. The provisions here attempt to mirror the approach under the *New South Wales Crime Commission Act 2012* (NSW). However, under that Act, there are additional measures in place before a warrant for arrest will be issued to physically compel the attendance of the person before the Commission as a witness. The Commissioner must be satisfied by evidence on oath or affirmation that the person has made a representation that they do not intend to appear at the hearing, and it is in the public interest that the person be compelled to do so to avoid serious prejudice to the conduct of the investigation.[80] There is no separate authority for a police officer to detain such a person without a warrant.

59. Similarly, under the *Australian Crime Commission Act 2002* (Cth), a warrant for arrest of a witness is only available by issue from a judge of the Federal Court or a Supreme Court, satisfied by evidence on oath that there are reasonable grounds to believe that the person may

not appear or may abscond or evade service of the summons. Once apprehended, the person is brought before a judge, who then determines whether the person should be placed on bail, detained to ensure their appearance as a witness, or released.[81]

60. For those reasons, in our view there may be some doubt as to the constitutional validity of the apprehension powers, or at least some of them.

(b) <u>Post-Charge Questioning Warrants and the Abrogation of the privilege against self incrimination</u>

61. Post-charge compulsory questioning and use of post-charge questioning material by prosecutors or investigating authorities, raises serious issues as to the administration of justice in the Australian legal system. In *X7 v Australian Crime Commission* (2013) 248 CLR 92*,* Hayne and Bell JJ, in the majority, held (emphasis in original):

> [70] … Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.
>
> [71] Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in *any* way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the

[80] Section 38.
[81] Section 31.

> prosecution evidence, is radically altered. An alteration of that kind is not made by a statute cast in general terms. If an alteration of that kind is to be made, it must be made by express words or necessary intendment.

62. Similarly, at [124] their Honours said:

> Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self‑incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at

trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge.

63. In *Lee v New South Wales Crime Commission (No 1)*,[82] it was held that the *Criminal Assets Recovery Act 1990* (NSW) authorised compulsory examinations even where the subject matter of those examinations overlapped with the subject matter of charges already laid against the examinees. Only French CJ at [54] and Kiefel J at [163] (with whom Bell J agreed) referred to the view expressed by Hayne and Bell JJ in *X7* with apparent approval. In contrast, Crennan J at [141] and Gageler and Keane JJ at [340] regarded the power to restrict the disclosure of the contents of examinations prevented a real risk of interfering with the administration of justice. Their Honours rejected the proposition that a "practical restraint" on a defendant raising a case contradicting the version of facts given by the defendant under examination would amount to "the deprivation of a legitimate forensic choice" such as to prejudice the fair trial of the defendant: [323]-[324]. In *Strickland v Director of Public Prosecutions (Cth)*,[83] Gageler J at [142] clarified his observations in *Lee (No 1)* as not being contradicted by Hayne and Bell JJ in *X7*, but rather his Honour was concerned to illustrate the more general point that not every deprivation of a forensic choice which would otherwise be available to a criminal defendant from whom testimony has been involuntarily extracted is properly to be characterised as giving rise to substantial unfairness, and that, the consequences may differ depending on the nature and extent in any given case.

64. Hayne J in *Lee (No 1)* observed that the relevant legislation did not preclude indirect use of answers in examinations being made in subsequent criminal trials. In this context his Honour

[82] (2013) 251 CLR 196.
[83] [2018] HCA 53.

stated that "the answers the accused has been compelled to give … deprive the accused of forensic choices that otherwise would be legitimately open at trial to test the case which the prosecution advances": [79]. This statement related to the prospect of the answers given at an examination being disclosed to prosecuting authorities and then being indirectly used to obtain further information.

65. Whatever may be the correct position in respect of a regime of compulsory questioning where the information obtained cannot be used either directly or derivatively in the criminal prosecution of the subject of the warrant (about which there are differing views, as described above) there seems to be no doubt that allowing the direct use of such information, and probably the indirect use of such information, is ordinarily regarded as antithetical to the due administration of justice.

66. As outlined above, a questioning warrant issued under the proposed compulsory questioning regime would:

(a) authorise ASIO to question adults and children at least 14 years old[84] who have been charged or where the charge is imminent, about the subject matter of those proceedings;[85] and

(b) require the subject of the questioning warrant to give any information or produce any record or other thing as requested by ASIO in accordance with the warrant. The failure of a person to comply with ASIO's requests is punishable by imprisonment for 5 years, and the subject of the questioning warrant would not be excused from answering those questions on the ground that it might tend to incriminate them in relation to an offence.[86]

67. In other words, the Bill expressly abrogates a person's privilege against self-incrimination in the context of the compulsory questioning regime.

68. What is said or produced by a person under compulsory questioning is not admissible in evidence against the person in a criminal proceeding, except in limited kinds of proceedings.[87] However, a Court may, on application or on its own initiative, order that questioning material or derivative material (anything obtained directly or indirectly from questioning material) be disclosed to prosecutors where the Court is satisfied that the disclosure is "in the interests of justice".[88] This is a very wide discretion and not easily subject to review.[89]

[84] References to "child" in this advice should be understood as child over 14 years old, unless otherwise specified.
[85] Where those charges may be relevant to intelligence that is important in relation to an adult questioning matter, or a minor questioning matter, as the case may be; Bill, ss 34BA(1)(d), 34BB(1)(e), 34BD(1)(b), (4). [86] Bill, ss 34GD(3), (5), (7).
[87] For certain offences under the ASIO Act: s 34GD(6)(c)-(f).
[88] Bill, s 34EC(1).
[89] See, e.g., *Rich v Attorney General of New South Wales* [2013] NSWCA 419 at [20].

69. The language proposed by the Bill is, in our view, sufficiently explicit that as a matter of statutory construction, post-charge questioning is authorised by the Bill.

70. The broader issue is whether Parliament is empowered to authorise such an incursion into the judicial process. Chapter III of the Constitution restricts the power of Parliament to interfere with the due process in courts.[90] In particular, s 80 of the Constitution requires that any "trial on indictment" for any offence against any law of the Commonwealth shall be "by jury". What that requires, and whether it restricts the ability of Parliament to legislate for secret and compulsory examinations of an accused person about the subject matter of the pending charge has not been

authoritatively determined by the High Court.[91] The issue was expressly left unanswered by the majority in *X7*.[92]

71. At a more general level, Ch III of the Constitution requires that judicial power be exercised in accordance with judicial process and consistent with the essential character of a court.[93] The consequence is that, by Ch III, a person has a right not to be tried unfairly.[94] A law which undermines the institutional integrity of a Ch III court by requiring or authorising it to exercise power in a non-judicial manner, or by removing from it powers that are inherently judicial, will be invalid.

72. As observed in *X7*, the abrogation of the right to self-incrimination would radically alter the criminal justice system and infringe upon essential rights in the adversarial criminal system that ensure fairness in the criminal process. The common law privilege against self-incrimination is a substantive common law right, not just a rule of evidence.[95] It is a "fundamental… bulwark of liberty".[96]

[90] *Dietrich v The Queen* (1992) 177 CLR 292 at 362-363.
[91] *X7* at 133 [92] per Hayne and Bell JJ. Note French CJ and Crennan J, dissenting, rejected the argument that privilege against self-incrimination is a necessary part of trial by jury under s 80 of the Constitution, at [64]. Their Honours relied on *Sorby* (1983) 152 CLR 281 and *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330. However, in *Sorby*, the plaintiffs had not been charged, and there was no judicial power being exercised in relation to them. This was a factor that was taken into account in determining the question of what was guaranteed by Ch III and s 80: at 298 per Gibbs CJ. Mason, Wilson and Dawson JJ relied on *Huddart, Parker & Co Pty Ltd v Moorehead*: at 308-309. However, in *Huddart,* some of the members of the majority proceeded on the basis that the privilege against self-incrimination was a rule of evidence: Griffith CJ at 358, Isaacs J at 386. In *X7*, the majority expressly recognised that the privilege against self-incrimination is not simply a rule of evidence, but a basic and substantive common law right: Hayne and Bell JJ at [104]. [92] *X7* at 133 [92]. In *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53, Kiefel, Bell and Nettle JJ observed at [101] that the common law right to silence is "not constitutionally entrenched", relying by way of comparison on the comments by Gibbs CJ and Mason, Wilson and Dawson JJ in *Sorby*.
[93] *Lim* at 27 per Brennan, Deane and Dawson JJ.
[94] *X7* at 116 [37] per French CJ and Crennan J, dissenting.
[95] *X7* at 136-137 [104] per Hayne and Bell JJ.
[96] *X7* at 136-137 [104] per Hayne and Bell JJ.

73. The abrogation of the privilege against self-incrimination also offends the fundamental principle of criminal proceedings (that the prosecution is to prove the guilt of an accused person),[97] and the companion rule (that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof and the accused cannot be required to testify). [98] These principles reflect the balance struck between the power of the State to prosecute and the position of an individual who stands accused[99] to ensure a trial is not unfair.

74. Even though, as noted above, the Bill provides certain limits on the use that may be made of the information compulsorily obtained from a questioning warrant,[100] the accusatorial criminal justice process would still be radically altered. We have extracted the observations of Hayne and Bell JJ in *X7* at [124] above. In a similar vein French CJ and Crennan J (albeit in dissent in the result) observed:

> [54] Given the onus on the prosecution to prove an offence, and the non-compellability of an accused, in the absence of a factor such as the independent sourcing of evidence it is not possible to reconcile a fair trial with reliance on evidence against a person at trial which derives from compulsorily obtained material establishing that person's guilt, or disclosing defences.

75. Thus, the secret and compulsory examination of an accused person about the subject matter of the pending charge, as proposed under the Bill, would fundamentally alter the very nature of the criminal justice system, such that any criminal trial where the suspect has been compulsorily questioned arguably could not be regarded as fair.

76. In the ordinary course, the court hearing the criminal proceedings would stay the proceedings because a fair trial could not be ensured, thereby preserving the constitutionally-entrenched integrity of the administration of justice by the courts. However, proposed s 34EC(4) provides that criminal proceedings would not be unfair "merely because the person has been the subject of a questioning warrant". On one view, the unfairness recognised by the courts is a result not of the fact that the person has been the subject of a questioning warrant but the fact that they have been compelled to answer questions under the warrant. On that view, s 34EC(4) may not have any effect upon the function of the courts in supervising the administration of justice and granting a stay in appropriate cases. If, however, it is given what appears to be its intended effect (ie to abrogate the effect of the observations from *X7* described above) then in our view s 34EC(4)

impermissibly undermines a Ch III court from properly performing its judicial function to determine for itself whether or not a hearing is "unfair". Although in dissent, as observed by Gordon J in *Strickland* at [202]: "Accused persons have a right to a "not unfair" trial and it is the courts that decide what is fair, or not fair."[101]

77. In this way, s 34EC(4) would be open to challenge as being unconstitutional. However, if the

[97] *Lee v The Queen* (2014) 253 CLR 455 at 467 per the Court; *X7* at 119-120 per French CJ and Crennan J.
[98] *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 at 55 (the Court); *Lee v The Queen* (2014) 253 CLR 455 at 466-467 per the Court.
[99] *Lee v The Queen* (2014) 253 CLR 455 at 466-467 per the Court.
[100] Bill, Subdivision E.

ability of a Ch III court to stay a proceeding because it was unfair was unaffected, in our view it is likely that the provisions abrogating the right against self-incrimination would withstand a constitutional challenge. This result is foreshadowed by s 34EC(5), which provides for the severability of s 34EC(4).

78. It is worth noting that the constitutional validity of similar provisions of the *Proceeds of Crime Act 2002* (Cth) (**POCA**) which authorise compulsory examinations of persons subject to current criminal charges has been upheld by the New South Wales Court of Appeal in *Commissioner of the Australian Federal Police v Elzein* (2017) 93 NSWLR 700. The Court considered s 319 of the POCA which providesthat POCA proceedings (this does not include the criminal proceedings in respect of the underlying offence) may not be stayed simply on the ground that criminal proceedings have been instituted. The Court held that this was not constitutionally invalid as a substantial interference with the fairness of a criminal trial.

79. *Elzein* may be distinguished, however. Unlike POCA, under the Bill it is the court's ability to stay the relevant criminal proceedings that is being interfered with. The restriction under the Bill is the opposite of the provision in the POCA, that is, a criminal trial is dictated as not unfair simply because the person has been compulsorily questioned. Further, the Court relied on significant characteristics of the compulsory examination scheme under the POCA which do not exist under the Bill. This includes that the POCA is concerned with depriving persons of proceeds of crime, orders for examinations are orders made by a court, and the disclosure of information obtained in compulsory examinations is prohibited while criminal proceedings are pending or in the course of being heard. Thus, *Elzein* does not detract from our opinion expressed above.

80. Finally, we note that the expansion of the compulsory questioning powers to a person charged is directly contrary to the recommendations of Bret Walker SC in the Independent National Security Legislation Monitor Annual Report 2012. Walker SC recommended that the provisions should be amended to make clear that a person who has been charged with a criminal offence *cannot* be subjected to questioning until the end of their criminal trial.[102]

81. The concerns with this abrogation of fundamental rights and radical change to the nature of the Australian criminal justice system are further heightened given the other key elements of the

[101] See also her Honour's observations at [208].
[102] Recommendation IV/7, p 96.

compulsory questioning regime – the issue of a warrant is no longer by an independent and impartial judge, a person has restricted access to legal representation during compulsory

questioning, children as young as 14 years old may be subject to questioning, and the subject matter which may justify a questioning warrant has been significantly expanded.

82. For those reasons, in our view there is considerable doubt as to the constitutional validity of the provisions of the Bill that seek to abrogate the capacity of a court to stay criminal proceedings on the grounds that the accused person has been compulsorily questioned pursuant to a questioning warrant, and in particular where such information has been disclosed to and used by prosecuting authorities. It is strongly arguable that those provisions impermissibly interfere with the administration of justice in a manner that is inconsistent with the integrity of the courts preserved by Chapter III of the Constitution.

(c) Right to legal representation

83. As outlined above, a person's access to a lawyer and the role a lawyer may play during questioning is limited:

(a) in certain circumstances, an adult may be prevented from contacting a lawyer;

(b) in certain circumstances, an adult may be questioned without a lawyer;

(c) where a lawyer is present during questioning, their role is limited to requesting clarification of ambiguous questions and requesting breaks in questioning to provide advice to the person;

(d) there is no right or entitlement for the lawyer to address the prescribed authority on matters during questioning, though the lawyer may request an opportunity to address the prescribed authority, and the decision whether or not to grant that request is at the prescribed authority's absolute discretion and is not guided by any criteria in the legislation;

(e) the lawyer may be removed from the place of questioning if the prescribed authority considers them to be unduly disruptive to the questioning;

(f) extensions to the permitted period for questioning may be made in the person and their lawyer's absence, such that the decision to extend the questioning period may be made without the prescribed authority hearing from the subject or on the subject's behalf; and

(g) the lawyer's right to access information relating to the warrant may be limited.

84. While these provisions remove and/or limit the ability of a lawyer to assist a person being subject to questioning, it is unlikely these provisions are unconstitutional.

85. The Constitution does not guarantee a general right to legal representation, and in particular, there is no constitutional right to legal representation before a body such as the prescribed authority performing an investigative function. The questioning process is not a judicial process, the prescribed authority is not performing a judicial function, and so considerations that may have arisen under Ch III of the Constitution do not directly arise in the present context.[103]

86. Nonetheless, legal representation is ordinarily an important part of procedural fairness in any legal process, and it is in the public interest that persons be allowed legal representation.[104] Whether or not the exercise of the statutory power to question pursuant to the warrant is conditioned on an obligation to afford the person procedural fairness, and what procedural fairness in that context requires, is determined by the construction of the statute.[105] Not every inquiry or investigation has to be conducted in a manner that ensures procedural fairness.[106] The rules of procedural fairness may be excluded by express words or words of necessary intendment.[107]

87. The Bill provides an express right for the person to have legal representation during questioning and equally expressly defines the scope of that right. The language in the Bill is sufficiently clear to modify the right to a lawyer as an incident of procedural fairness.

88. We note that the approach is generally consistent with other compulsory questioning regimes. Indeed, where other legislative frameworks have not provided expressly for the questioning authority to exclude certain legal representatives from acting, the Full Federal Court found that as a consequence of the purpose of the Act and the mandate of the questioning authority, the questioning authority had an implied power to do so.[108]

[103] Even if this was a judicial process before a Ch III court, there is no Constitutional right to legal representation before a Ch III court. Rather, the issue is whether lack of legal representation may mean an accused is unable to receive a fair trial: see, *Dietrich v The Queen* (1992) 177 CLR 292. [104] See e.g. *Baker v Campbell* (1983) 154 CLR 52 at 114.

[105] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [12]-[15]; *Annetts v McCann* (1990) 170 CLR 596 at 598.

[106] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at [22] per Mason CJ, Dawson and Toohey JJ. For example, in *SA v New South Wales Crime Commission* [2016] NSWSC 506, Rothman J held that on a proper construction of the *Crime Commission Act 2012* (NSW), the Commission was under an obligation of procedural fairness in dealing with the requirement to give evidence, with the consequence that the Commission was obliged to afford the party a reasonable opportunity to present any objection that a party may have had to the giving of particular evidence.

[107] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [12]-[15]; *Annetts v McCann* (1990) 170 CLR 596 at 598.

[108] *National Crime Authority v A, B and D* (1988) 78 ALR 707.

D. OTHER ISSUES

(a) Rights of the Child

89. The Bill authorises the secret and compulsory questioning of children as young as 14 years old. This does not directly give rise to a constitutional issue. However, these provisions are inconsistent with Australia's treaty obligations under the Convention on the Rights of the Child (**CRC**) which Australia ratified in December 1990. This is in two key ways.

90. **First**, art 3(1) of the CRC provides that in all actions concerning children, including those undertaken by administrative authorities or legislative bodies, "the best interests of the child shall be a primary consideration". However, the regime proposed by the Bill does not require the Attorney-General to take into account the best interests of the child as a "primary consideration" when deciding to issue the warrant. For the reasons below, the practical effect of the Bill may be that the best interests of the child are a subsidiary consideration at a cursory or superficial level.

91. We acknowledge that the Attorney-General is required to take into account the best interests of the child as one of the considerations.[109] However, this is not an obligation to take into account the best interests as a "primary consideration".

92. Further, in considering the best interests of the child, s 34BB(3) sets out certain matters that must be taken into account, including the child's age, maturity, sex and background, physical and mental health, benefit of the child having meaningful relationship with family and friends, and their right to receive an education and practise religion. Notably, in addition to those matters, the United Nations Committee on the Rights of Children has determined that the assessment of the best interests of a child requires consideration of the care, protection and safety of the child, and the existence of a situation of vulnerability such as disability or developmental delay, belonging to a minority group, being a refugee or asylum seeker, or being a victim of abuse.[110] The Bill does not include any reference to those considerations.

93. Moreover, the Attorney-General must only take into account the matters identified in s 34BB(3) to the extent they are known to the Attorney-General.[111] The Director-General is required to provide information on those matters to the Attorney-General as part of the request for the warrant.[112] However, the Director-General is only required to provide that information if it is known to the Director-General at the time of making the request. There is no obligation on the

[109] Bill, s 34BB(2).
[110] General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, UN Doc CRC/C/GC/14 (29 May 2013) at [52]-[79].
[111] Bill, s 34BB(4).

[112] Bill, s 34B(4)(f).

Director-General to make inquiries about matters relevant to the best interests of the child, and no obligation on the Attorney-General make enquiries about those matters where none are provided.

94. There is therefore a real likelihood that at least in some cases the only information the Attorney General has when deciding to issue the warrant is the child's age and sex. No meaningful assessment of whether a questioning warrant would be in the best interests of the child could be made on those factors alone. This is particularly so where the warrant could authorise the child's immediate apprehension, the child would not have the right to contact family or friends (aside from one identified representative), the child is the subject of investigation,[113] and the child may be detained for a significant period of time, where there is no provision in the Bill to ensure the child has access to food and water.[114]

95. In this respect, the failure of the Bill to require the Attorney-General to take into account the best interests of the child as a *primary* consideration has broader implications on the fundamental understanding of Australian civilised society, separate from being a contravention of the CRC. As observed by Gaudron J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 304 in the context of a migration decision which would separate a parent from his child:

> … there are particular obligations to the child citizen in need of protection. So much was recognised as the duty of kings, which gave rise to the *parens patriae* jurisdiction of the courts. No less is required of the government and the courts of a civilised democratic society.
>
> In my view, it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect the child's individual welfare, particularly decisions which affect children as dramatically and as fundamentally as those involved in this case . And it may be that, if there is a right of that kind, a decision-maker is required, at least in some circumstances to initiate appropriate inquiries…
>
> Quite apart from the Convention or its ratification, any reasonable person who considered the matter would, in my view, assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare. Further, they would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker. They would make that assumption or have that expectation because of the special vulnerability of children, particularly where the break-up of the family unit is, or may be, involved, and because of

[113] See discussion below. A minor questioning warrant may only be issued where the child is believed to have likely engaged in, is likely engaged in, or is likely to engage in prejudicial activities of politically motivated violence: s 34BB(1)(b).
[114] Note, there is the general catch-all safeguard provision in s 34AG that the subject of a warrant must be treated with humanity and respect for human dignity, and not subjected to torture or cruel, inhuman or degrading treatment.

their expectation that a civilised society would be alert to its responsibilities to children who are, or may be, in need of protection.

96. ***Second***, art 37 of the CRC provides that "no child shall be deprived of his or her liberty unlawfully or arbitrarily", and 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 also provides that every child deprived of liberty shall have the right to maintain contact with their family, save in exceptional circumstances, and shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty.

97. As addressed above, the threshold criteria for authorising apprehension[115] are not particularly rigorous. The provisions authorising apprehension certainly do not include any restriction that the apprehension of a child only be used as a measure of last resort. Even where apprehension is authorised because there has been a failure to appear before the prescribed authority for questioning, it is not clear that apprehension would be the only means of ensuring a child's appearance. This is particularly so if there has not been any indication that the child intends to abscond or alert others of the investigation.

98. The concerns with the lack of legal representation and the ability to challenge the legality of the detention are addressed above and would support a conclusion that the obligations in the CRC are being contravened.

E. IMPACT ON RIGHTS AND FREEDOMS OF MEDIA AND PRESS

99. Given the breadth of the subject-matter for which a questioning warrant may be issued, it is easily foreseeable that a questioning warrant may be issued to a journalist. A journalist would then be obliged to provide information pursuant to the warrant, where the failure to do so would be a criminal offence punishable by 5 years imprisonment.[116] Despite well-recognised professional and ethical obligations of a journalist to maintain anonymity and confidentiality of a source,[117] if so questioned under a warrant, a journalist would be required to disclose the identity of a confidential source. There is no exception or exclusion provided for in the Bill that enables a

[115] The immediate appearance requirement, being a pre-condition for apprehension in certain circumstances, may be imposed where it is "reasonable and necessary": s 34BE(1); s 34BE(2) (apprehension authorised in the warrant by the Attorney-General), s 34C(2) (apprehension not authorised by the warrant but on certain representations being made at the time of giving notice of the warrant), s 34C(3) (apprehension for failure to appear).
[116] Bill, s 34GD(3).
[117] See, e.g. Media, Entertainment & Arts Alliance, *Journalist Code of Ethics*, cl 3; Australian Press Council, *Statement of Privacy Principles*, Privacy Principle 5.

journalist to object to answer a question on the basis that it would reveal a confidential source, also known as journalist privilege.[118]

100. The absence of any such protection for journalist privilege from the Bill is not unusual. At common law, journalists and media do not enjoy a public interest immunity from being required to disclose their sources of information where such disclosure is necessary in the interests of justice, and particularly no such immunity applies to commissions of inquiry.[119] Indeed, legislative schemes for similar investigative agencies expressly provide that a person is not excused from giving information on the basis of public interest, which includes journalist privilege.[120]

101. However, it is also well-recognised that the free flow of information is a vital ingredient to the investigative journalism which is an important feature of our society. There is public interest and benefit for society in having discussion and evaluation of affairs that is informed, and that information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information.[121]

102. The Constitution impliedly guarantees a freedom of political communication on government and political matters.[122] This arises from the system of representative government "directly chosen by the people" as required under ss 7 and 24 of Constitution – the Constitution must protect the freedom of communication of political or governmental matters to "enable the people to exercise a free and informed choice as electors".[123]

103. However, that freedom is not an absolute freedom but a qualified limitation on legislative power.[124] The freedom may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government under the Constitution, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.[125] The principles applicable to whether a law exceeds the implied

limitation are as follows:[126]

1. *Does the law effectively burden the freedom in its terms, operation or effect?*

[118] See, e.g., *Evidence Act 1995* (Cth), s 126K.
[119] *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 354-355.
[120] See, e.g., *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 80(5); *Australian Crime Commission Act 2002* (Cth), 30.
[121] *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 353-354.
[122] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[123] *Lange* at 560.
[124] *McCloy v New South Wales* (2015) 257 CLR 178 at [2] per French CJ, Kiefel, Bell and Keane JJ. [125] *McCloy v New South Wales* (2015) 257 CLR 178 at [2] per French CJ, Kiefel, Bell and Keane JJ. [126] *McCloy v New South Wales* (2015) 257 CLR 178 at [2] per French CJ, Kiefel, Bell and Keane JJ; *Brown v Tasmania* (2017) 261 CLR 328.

2. *If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?*

3. *If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?*

104. While the Bill does not prohibit political communication, it is arguable that the law does burden the freedom of political communication in its operation and effect.[127] As noted above, the scope of what may be an adult questioning matter is exceptionally broad. There may therefore be a chilling effect on the willingness of people to speak to journalists about issues of political significance, including security matters and foreign relations. Accordingly, there may be a decrease in media coverage and reporting on those matters thereby inhibiting public debate on matters of political significance. A law that "diminishes the extent"[128] of political communication or has "a material effect on the totality of political communication"[129] or "hinders the exercise of free communication" is a law that effectively burdens the freedom of political communication.[130]

105. The next step in the analysis is whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The Bill and ss 34BD and 34GD(3) are not directed at limiting political discourse or restricting communications. As observed earlier, the Bill and more generally, ASIO's functions, are directed to intelligence gathering with the ultimate purpose of protecting

the Commonwealth, States and Territories. The Bill is, in that way, supportive of the principles

of representative government, seeking to protect the Commonwealth from acts that may threaten the constitutionally guaranteed democratic form of government.

106. However, the question is then whether the Bill is reasonably appropriate and adapted to advancing that object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This involves inquiries as to whether the law is: (i) suitable – as having a rational connection to its purpose; (ii) necessary –

in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and (iii) adequate in its balance – requiring a value judgment, consistently with the limits of the judicial function,

[127] See, *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240 at [62]-[67] per Basten J.
[128] *Monis v R* (2013) 249 CLR 92 at [343] per Crennan, Kiefel and Bell JJ.
[129] *Wotton v State of Queensland* (2012) 246 CLR 1 at [78] per Kiefel J.
[130] *Comcare v Banerji* (2019) 93 ALJR 900 at [29] per Kiefel CJ, Bell, Keane and Nettle JJ.

describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[131]

107. It is arguable that the regime provided for in the Bill is either not necessary, or is disproportionate. Are there equally effective means of achieving the legislative object with a less restrictive effect on the freedom that are obvious and compelling?[132] It might be argued that the Bill could provide a regime that permits a journalist to object to answering a question that would disclose the identity of a confidential source, that objection determined by the prescribed authority by reference to specified criteria including the importance of that information to the intelligence gathering function being performed, the risk of harm posed to the public if the information was not provided, whether other means are available to obtain that information, and the public interest in maintaining confidentiality of a journalist's source. Additionally, provision could be made allowing for the journalist to apply to a court for a review of the decision by the prescribed authority.[133]

108. It is difficult in the abstract to determine one way or another whether the proposed amendments contravene the implied constitutional guarantee of freedom of communication. It is conceivable, however, that in a particular case the scheme proposed by the Bill may operate so as to exceed the implied constitutional guarantee.

F. ISSUES WITH THE DRAFTING

109. There are three matters worth raising that suggest lack of clarity in the drafting.

110. The first arises in the context of a minor questioning warrant. A minor questioning warrant may only be issued if the Attorney-General is satisfied, inter alia, that there are reasonable grounds for believing that the child "has likely engaged in, is likely engaged in, or is likely to engage in" activities prejudicial to the protection of the Commonwealth, States and Territories from political motivated violence.[134] This requirement reflects an intention to limit the issue of minor questioning warrants to children who are themselves personally engaged in the prescribed prejudicial activity.[135] As stated in the Explanatory Memorandum, this "ensures" that minors can only be questioned where the child is "the target of an investigation in relation to politically motivated violence".[136] This approach is consistent with the findings of the 2018 report of the

[131] *McCloy v New South Wales* (2015) 257 CLR 178 at [2] per French CJ, Kiefel, Bell and Keane JJ. [132] To use the language in *McCloy v New South Wales* (2015) 257 CLR 178 at [81] per French CJ, Kiefel, Bell and Keane JJ.
[133] See, e.g. *Crime Commission Act 2012* (NSW), Div 6.
[134] Bill, s 34BB.
[135] No such requirement exists for the issue of an adult questioning warrant: s 34BA.
[136] Explanatory Memorandum at [27], see also, [153], [154].

Parliamentary Joint Committee on Intelligence and Security on ASIO's questioning and detention powers, that "any compulsory questioning of minors must be limited to those who are themselves the subject of investigation".[137]

111. However, in issuing the warrant, the Attorney-General must also be satisfied that there are reasonable grounds to believe that the warrant would substantially assist in the collection of intelligence that is important in relation to **a** minor questioning matter.[138] This threshold criterion does not require consideration of whether the warrant would assist in collection of intelligence of the same matter that the child is believed to be engaged in, but rather, *any* matter of politically motivated violence.

112. Further, once issued, the matters that the warrant authorises questioning about are not limited only to the prejudicial activities the child has been or is likely engaged in. The warrant requires the child to give information or produce a record or other thing "that is, or may be, relevant to intelligence that is important in relation to **a** minor questioning matter".[139]

113. The consequence is that a child may then be questioned about matters of which they themselves are not personally engaged in and of which they are not the target of an investigation. This could include questioning about matters their parents or friends may be involved in, or even matters that have remote connection with the child's own conduct.

114. Accordingly, the effect of this drafting does not reflect the intention expressed in the Explanatory Memorandum to limit the use of questioning warrants to where the child is the "target" of an investigation. Replacing the word "*a*" with "*the"* in the provisions highlighted above would be consistent with the legislative intent identified in the Explanatory Memorandum. That this has not been done in the Bill suggests inadvertence in the course of drafting rather than a deliberate drafting choice.

115. The second issue also arises in the context of a minor questioning warrant. A child may be questioned in the presence of a "minor's representative", being their parent or guardian or a person who is able to represent their interests.[140] However, where there is an immediate appearance requirement and the minor's representative is not available, the lawyer will be taken to be the minor's representative.[141] This will also be the case even if there is not an immediate appearance requirement and the prescribed authority considers a reasonable time has passed to

[137] [3.155].
[138] Bill, s 34BB(1)(c).
[139] Bill, s 34BD(1)(b)(ii) (emphasis added).
[140] Bill, s 34AA.
[141] Bill, s 34FD(2).

enable the minor's representative to appear.[142] Depending on the circumstances, the lawyer may be the child's lawyer of choice, or an appointed lawyer.[143]

116. The difficulty with these provisions is that it may place a solicitor in a position of conflict or under inconsistent obligations. A solicitor is obliged to follow their client's lawful, proper and competent instructions.[144] In doing so, that may conflict with what may be the child's best interests. It is not clear how a solicitor may properly act in those circumstances. Further, it is doubtful whether the solicitor, who is unlikely to have met the child before the questioning (especially where the solicitor is an appointed lawyer), will be able to fulfil any support role. The right of a child to have a minor's representative present during questioning is a rather hollow one.

117. The third issue arises in s 34FI, which provides that the Division does not affect the law relating to legal professional privilege. This suggests that if a lawyer was the subject of a warrant, the lawyer would be able to refuse to answer a question on the basis of legal professional privilege.

G. However, the drafting is not consistent with the approach in other similar legislation. For example, under the *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 79, 80(5); *Australian Crime Commission Act 2002* (Cth), s 21D; *Crime Commission Act 2012* (NSW), ss 39(4), (5), a

lawyer may refuse to answer questions on the basis of legal professional privilege, but may be directed to provide details of the client to whom advice was given.

H. TRACKING DEVICES

118. Under the ASIO Act, the use of tracking devices without the consent of the person being tracked may only be authorised by the Attorney-General.[145] The amendments proposed by the Bill expands the authorisation scheme such that the use of tracking devices without the consent of the person being tracked may be authorised internally by an "authorising officer", being:

(a) the Director-General; or

(b) an ASIO employee who holds a Senior Executive Service level position or higher; or

(c) a contractor or consultant of ASIO who holds a Senior Executive Service level position (or equivalent) or higher.[146]

[142] Bill, s 34FD(3).
[143] Bill, ss 34FC, 34FD.
[144] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, rule 8. [145] Section 26.
[146] Bill, Sch 2, cl 1, insertion to s 22.

119. A warrant that has been internally authorised may be in force for a maximum period of 90 days.[147]

120. The criteria to be met to authorise the use of a tracking device has also been altered. Under the ASIO Act, the Attorney-General is only permitted to issue a warrant to use a tracking device if the Attorney-General is satisfied that the person is engaged in or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in activities prejudicial to security, and the use of the device would assist ASIO in carrying out its function of obtaining intelligence relevant to security.[148] Similarly, if the device is to be used on a premises, the Attorney-General must be satisfied that the premises is used or frequented by a person engaged in or reasonably suspected of being engaged in prejudicial activities.[149]

121. However, under the Bill, there is no requirement that the person being tracked be involved in prejudicial activity. The authorising officer only needs to be satisfied that there are reasonable grounds that the authorisation will, or is likely to, substantially assist the collection of intelligence in respect of the security matter for which the tracking device is sought.[150]

122. These amendments do not raise any direct constitutional issue. However, there are implications for the rule of law in Australia.

123. The use of a tracking device without the person's knowledge or consent is a serious incursion into a person's privacy. This incursion into an individual's rights is ameliorated in the current form of the ASIO Act, however, by the restriction that only the Attorney-General may authorise such action, and the threshold for authorising that action requires that the person being tracked is directly involved in a matter prejudicial to national security.

124. While the Attorney-General is a member of Cabinet, the Attorney-General is also the first law officer of the Commonwealth, with obligations that extend beyond the ordinary political responsibilities of a minister. The Attorney-General has a special responsibility for the rule of law, the integrity of the legal system and the administration of justice.[151] By convention, the exercise of the Attorney-General's prerogative powers must be done independently and not influenced by government policy or party political considerations.[152] While the exercise of power under the ASIO Act is not a prerogative power, at the least, as the first law officer of the

[147] Where it is authorised by the Attorney-General it is in force for a maximum period of 6 months: ASIO Act, s 26A(3).
[148] Section 26(3)(a).
[149] Section 26(3)(b).
[150] Bill, s 26G.
[151] See *Clampett v Attorney-General (Cth)* (2009) 181 FCR 473 at [71]-[80] per Black CJ. For broader discussion on the role of the Attorney-General, King, LJ, "The Attorney-General, Politics and the Judiciary" (2000) 29 UWAL Rev 155 at 169-170.
[152] See, Plehwe, R, "The Attorney-General and Cabinet: Some Australian Precedents" (1980) 11 FLR 1.

Commonwealth responsible for the rule of law and the integrity of the legal system, a degree of comfort must be assumed by the Attorney-General exercising the powers independently and only consistently with the rule of law.

125. The Bill now proposes that such an infringement on individual rights may be made by an ASIO employee, contractor or consultant, in respect of individuals who may have no involvement in matters concerning national security. An ASIO employee, contractor or consultant does not have the same conventions of independence, or special responsibility for the maintenance of the rule of law as the Attorney-General. Further, that the warrant may be authorised simply where it may be important for the gathering of intelligence, without reference to the person being involved in any matter prejudicial to security, leaves too much discretion in the acts of individual employees, in circumstances lacking transparency and accountability, and whose decisions are not readily reviewable by the individual concerned who will ordinarily be

unaware that they are being tracked.[153]

126. This may have particular implications for journalists and the media. Where a tracking device is used without their knowledge or consent to track their whereabouts, it may enable ASIO (and thus any agency to whom intelligence may be disseminated) to identify a journalist's confidential source. Given the range of matters that fall within the scope of matters that are "important in relation to security", this could have the consequence that the identity of a whistleblower who has spoken to a journalist is uncovered.

127. It is of further concern that the information may then be provided to other agencies.[154]

128. We note the Law Council of Australia has provided comprehensive submissions to the Parliamentary Joint Committee on Intelligence and Security on the deficiencies of the specific provisions proposed under the proposed tracking device scheme.[155] We agree with those submissions.

I. IMPLICATIONS FOR CIVIL SOCIETY ORGANISATIONS

129. There is a likelihood that civil society organisations and the individuals working with or associated with them may be the subject of questioning warrants or tracking devices because of their involvement with the civil society organisation. This may have a chilling effect on the

[153] Bill, s 34AAB provides for the Director-General to report to the Attorney-General on the use of tracking devices internally authorised, including any non-compliance with conditions or restrictions of the authorisation. [154] ASIO Act, ss 18, 19, 19A.
[155] Law Council of Australia, Submissions on the *Australian Security Intelligence Organisation Amendment Bill 2020* dated 3 July 2020, pp. 102-122

number of individuals participating in civil society organisations, or undermine the work of civil society organisations in the Australian community.

130. As noted above, the Bill extends the scope of matters in respect of which a person may be compulsorily questioned in secret beyond terrorism offences. Of particular relevance is the expansion of questioning warrants to be issued where it may substantially assist in the collection of intelligence that is important in relation to "acts of foreign interference". This is defined broadly in s 4 of the ASIO Act as follows:

> **"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 the purpose of affecting political or governmental processes; or
(iii) are otherwise detrimental to the interests of Australia; or

(b) involve a threat to any person.

"foreign power" means:

(a) a foreign government;
(b) an entity that is directed or controlled by a foreign government or governments; or
(c) a foreign political organisation.

131. Civil society organisations advocate for varying interests in the Australian community. Civil society organisations may collaborate with or receive support from a foreign political organisation that shares a common interest or objective, in their advocacy campaigns. The phrases "affecting political or governmental processes" and "otherwise detrimental to the interests of Australia" are so broad as to capture any range of matters that may challenge or question government decisions, policies or institutions. Somewhat innocuous examples may be civil society organisations who advocated to legalise same-sex marriage or those who advocate for refugee rights. It is not clear what work is to be done by the notion of activities being "clandestine or deceptive" and no doubt conducting activities in a clandestine way, or with some element of deception, is a tool in the armoury of some civil society organisations (environmental advocacy is a good example). There is a real possibility, therefore, that some of the work of civil society organisations may be caught by the definition of "acts of foreign interference" although it would not necessarily be regarded as nefarious or improper. It seems clear that some of the activities of environmental organisations or human rights organisations (which may readily

answer the description of "foreign political organisation") fall within the definition of acts of foreign interference.

132. The breadth of the powers pose a significant risk of detriment to the operation of civil society organisations who contribute to the Australian democratic society by advocating for various interest groups, challenging government policy and decision, and holding government to account. This is utterly inconsistent with the values of a robust and modern democratic society. It raises potential issues relating to freedom of political communication. Significant safeguards are needed to ensure the power is not misused.[156]

133. In the same way, civil society organisations may be subject to internally authorised tracking devices. The significance of this is that where a civil society organisation, as its own separate legal person (e.g. where it is incorporated), is a person subject to an internally authorised use of a tracking device, each of the individuals associated with that civil society organisation may then also be subjected to the use of a tracking device within the purview of that internal authorisation.[157] The exposure to such a risk may be a disincentive for individuals to participate or associate themselves with a civil society organisation. This again has the potential to stultify their operations, and the important contribution they make to a democratic society.

J. CONCLUSION

134. We have outlined our concerns about the proposed amendments to the ASIO Act, those concerns being summarised in paragraph 3 above.

135. If our instructing solicitor has any further questions, or requires clarification of any matters in this advice, we are happy to address those in conference.

[redacted]

[redacted]

Dominic Villa SC Diana Tang

New Chambers New Chambers [redacted]

[156] Bill, Subdivision H provides for reporting and complaints procedures for questioning warrants. [157] Bill, Schedule 2, s 26J, and *Acts Interpretation Act 1901* (Cth), s 2C, references to person includes body corporate.