

26 June 2020

Mr Andrew Hastie MP
Chair, Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600
By email: pjcis@aph.gov.au

Dear Chair,

Australian Security Intelligence Organisation Amendment Bill 2020

The Australian Security Intelligence Organisation Amendment Bill 2020 (**the Bill**) raises a range of human rights issues relevant to the Committee's review into the Bill's effectiveness. As Australia's leading child rights organisation, Save the Children's submission focuses on the Bill's implications for children's rights. Our comments are limited to one aspect of the Bill: its proposed extension of the Australian Security Intelligence Organisation's (**ASIO**) compulsory questioning powers to children as young as 14.

The Bill creates significant risk of breaching children's rights

Children have a right to liberty and security of person and freedom from arbitrary arrest, detention or imprisonment. Children must not be detained arbitrarily and should only be detained as a last resort and for the shortest appropriate time. Article 37 of the Convention on the Rights of the Child, along with other international human rights treaties applying to Australia, guarantees these rights and relevantly binds the Australian government.¹ Further commentary on Article 37 is provided in the recently concluded General Comment No. 24 on children's rights in the child justice system, which reflects concerns with the persistent use of deprivation of liberty of children.² The Convention on the Rights of the Child also recognises that children have a right to their best interests being a primary consideration in all matters concerning them.³

The Bill directly impinges on these fundamental rights. It would allow ASIO to compulsorily question children as young as 14, including the power to obtain a warrant for police to immediately apprehend and search children, using force if necessary. This effectively amounts to an extraordinary power to detain children. The Bill also threatens children's basic rights in the child justice system, including the right to a fair trial.⁴

Save the Children acknowledges that individual rights and freedoms may sometimes clash with other rights, or with the public interest in maintaining the health, safety and national security of Australians. As such, it is recognised that there are reasonable limits even to fundamental rights. However, given these powers are highly intrusive, in our view they must be subject to stringent safeguards, especially for children. They can only be justified in extraordinary circumstances, if ever. Given that very little evidence is provided justifying

¹ Australia has maintained a reservation to Article 37(c) – specifically, the obligation to detain children separately from adults. It is bound by the other parts of Article 37, which prohibits arbitrary detention, and by Article 9 of the International Covenant on Civil and Political Rights, which provides for the right to liberty and security of person in general.

² Committee on the Rights of the Child, 'General Comment No. 24 (2019) on children's rights in the child justice system', CRC/C/GC/24, 18 September 2019.

³ Article 3.

⁴ These rights are guaranteed by Article 40 of the Convention on the Rights of the Child and Articles 9 and 14 of the International Covenant on Civil and Political Rights.

these measures,⁵ noting that only one case of concern of a child aged under 16 is referred to in the Explanatory Memorandum,⁶ we do not believe that the case for such an extraordinary measure is made.

Save the Children notes that even the current application of ASIO's compulsory powers to children aged 16 and above raises significant concerns, let alone a lower age of 14. As far back as 2002, the Parliamentary Joint Committee on ASIO, ASIS and DSD (this Committee's predecessor) concluded that it was 'a major concern' that children could be subject to the relevant provisions and recommended that questioning and detention by ASIO of people under the age of 18 not be allowed.⁷

The extension of counter-terrorism legislation to children is also out of step with international standards. The United Nations Global Study on Children Deprived of Liberty has recently, following an extensive global review, recommended that children be excluded from counter-terrorism and security legislation and instead handled exclusively within child justice systems, including the full suite of procedural and other safeguards that ordinarily apply to children in the justice system.⁸ It is also noted that the United Nations Committee on the Rights of the Child has urged States parties to adopt preventive interventions to tackle social factors and root causes, as well as social reintegration measures, when implementing Security Council resolutions related to counter-terrorism.⁹

Save the Children also notes this Committee's 2018 report on its review of ASIO's questioning and detention powers. That report recommended 'essential' additional oversight and safeguards if the minimum age was lowered to 14, including that apprehension of minors should not be available¹⁰ – a recommendation not adopted in the Bill.

In these circumstances, Save the Children's view is that the Bill would constitute a breach of children's rights and contravention of Australia's human rights obligations.

The Bill's serious implications for children's rights require full and robust analysis

Save the Children recognises that the Bill includes specific safeguards relating to children, including maintaining existing safeguards in the *Australian Security Intelligence Organisation Act 1979 (the Act)* and introducing new safeguards. These include:

- a questioning warrant can only be issued where there are reasonable grounds for believing that the child themselves has likely engaged in, is likely engaged in, or is likely to engage in the activities under investigation;¹¹

⁵ See for example the discussion in Chapter 1, Australian Law Reform Commission, 'Traditional Rights And Freedoms—Encroachments By Commonwealth Laws (ALRC Interim Report 127)', 31 July 2015. Available at: <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/1-the-inquiry-in-context/justifying-limits-on-rights-and-freedoms/>.

⁶ See paragraph 27 of the Explanatory Memorandum for the Australian Security Intelligence Organisation Amendment Bill 2020.

⁷ *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, tabled 5 June 2002, [3.82]–[3.84].

⁸ Nowak, M., 2019, *The United Nations Global Study on Children Deprived of Liberty*, ch 14, available from <https://omnibook.com/Global-Study-2019>.

⁹ Paragraph 88, Committee on the Rights of the Child, 'General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence', CRC/C/GC/20, 6 December 2016. Paragraph 101, Committee on the Rights of the Child, 'General Comment No. 24 (2019) on children's rights in the child justice system', CRC/C/GC/24, 18 September 2019.

¹⁰ PJCS, *ASIO's questioning and detention powers*, March 2018, [3.149]–[3.155].

¹¹ Clause 34BB(1)(b) of the Bill, which is relevantly similar to the current s 34ZE(4) of the *Australian Security Intelligence Organisation Act 1979 (Act)*. By contrast, questioning warrants for adults can be issued where there are reasonable grounds for believing that the warrant will substantially assist the collection of important relevant intelligence: cl 34BA(1)(b).

- in deciding whether to issue a questioning warrant, the Attorney-General must consider the best interests of the child;¹²
- children can contact a 'minor's representative' such as a parent or guardian at any time after being notified of a questioning warrant;¹³
- children can generally only be questioned in the presence of a minor's representative,¹⁴ and can only be questioned in the presence of a lawyer;¹⁵
- children can only be questioned for periods of 2 hours or less, separated by breaks;¹⁶ and
- children must be told that they can request a minor's representative be present during questioning,¹⁷ and that they can only be questioned in the presence of a minor's representative¹⁸ and a lawyer.¹⁹

However, the Bill severely limits children's rights and its safeguards are not comprehensive. For example, the Bill contains no requirement for children's best interests to be a primary consideration throughout the warrant and questioning process. It only requires the child's best interests to be considered when deciding whether to issue a warrant, and even then there is no requirement for the child's best interests to be a primary consideration.

The Bill must also be seen in the context of the significant expansion of coercive anti-terrorism powers over the last two decades, and resultant erosion of important human rights and freedoms in Australia.²⁰ As noted above, this Bill is being introduced in a context where there were already significant concerns that children's rights are being infringed. It is timely to consider afresh whether these powers are reasonable, necessary and proportionate, rather than extending them still further, to 14 and 15 year old children.

The Bill should be subject to comprehensive human rights review

With public attention focused on COVID-19, it is important to ensure that sufficient time and attention is granted towards legislative proposals that involve significant child rights implications. This Bill requires full and robust scrutiny and public discussion of whether its provisions strike an appropriate balance between the crucial purposes of securing community safety and maintaining fundamental rights and freedoms. This should include consideration of whether other measures may be more effective, proportionate and appropriate in pursuing these aims.

Parliament, its committees, and the public, must have the opportunity to fully consider these significant issues, informed by all relevant and appropriate advice and information. Only then can the necessity and proportionality of the Bill's highly intrusive measures be properly assessed.

Save the Children recognises that sensitive matters relating to national security will often not be suitable for public disclosure, and that confidential and sensitive information is likely to form part of any justification for the Bill. However, based on the information that is currently publicly available – including in the Bill's accompanying material, ASIO's and the Department of Home Affairs' submissions to this

¹² Clause 34BB(2)-(4) – new safeguard.

¹³ Clause 34F(1)(b) – similar to the current s 34ZE(6)(a), which instead permits children to make contact at any time when they are in custody or detention. Children also have a right to contact a lawyer at the same time, as do adults: cl 34F(1)(a).

¹⁴ Clauses 34BD(2)(a), 34FD, 34FG – similar to the current s 34ZE(6)(b), (7) and (8) but with some additional provisions.

¹⁵ Clauses 34FA(1), 34FC, 34FF – new safeguard.

¹⁶ Clause 34BD(2)(b) – maintains existing requirement in current s 34ZE(6)(b)(ii).

¹⁷ Clauses 34BH(2)(e)(i), 34DD(2)(c) – maintains existing requirement in current s 34ZE(8)(a)(i).

¹⁸ Clause 34BH(2)(e)(ii) – no explicit requirement in current Act.

¹⁹ Clause 34DD(2)(a) – new safeguard.

²⁰ See, eg, Burton, L., McGarrity, N. and Williams, G., 2012, 'The extraordinary questioning and detention powers of the Australian Security Intelligence Organisation', *Melbourne University Law Review* 36: 415-69; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, United Nations, 1 December 2017, [15-[16].

Committee's current review of the Bill,²¹ and ASIO's and the Attorney-General's Department's submissions to this Committee's 2018 review of ASIO's questioning and detention powers²² – we do not believe that the case for the Bill's significant curtailment of children's human rights has been made.

Accordingly, Save the Children recommends that:

1. The Bill and relevant provisions of the Act should be referred to the Parliamentary Joint Committee on Human Rights (**PJCHR**) for comprehensive inquiry and report on the human rights implications and consistency with Australia's human rights obligations, especially regarding the Convention on the Rights of the Child. This inquiry should be in addition to PJCHR's ordinary processes for examining Bills for compatibility with human rights which are currently underway.
2. Consideration should be given to additional scrutiny and advice by the Independent National Security Legislation Monitor (**INSLM**), including referral by this Committee.²³ The INSLM has previously considered matters raised by this Committee on referral from the (then) Prime Minister²⁴ and matters affecting children.²⁵ It is noted that the INSLM must have regard to human rights obligations,²⁶ which would include the Convention on the Rights of the Child.
3. In conjunction with consideration of additional scrutiny, the sunset period proposed in subsection 34JF of the Bill should be significantly reduced. The Bill proposes that the compulsory questioning framework will sunset after 10 years, which given the extraordinary powers granted and fundamental rights affected is too long. The sunset period should be amended to a period of not more than five years.
4. At a minimum, the Bill should not proceed until this Committee, PJCHR and Parliament have had the opportunity to consider the Minister's responses to the significant questions, including with respect to child rights, raised by PJCHR in its human rights scrutiny report dated 17 June 2020²⁷ and by the Standing Committee for the Scrutiny of Bills in its scrutiny digest dated 10 June 2020.²⁸

ASIO's current questioning and detention powers are due to sunset in September 2020. If the Government considers it necessary to maintain ASIO's current powers while PJCHR undertakes its inquiry (along with any INSLM review), this could be achieved by extending ASIO's current questioning powers for 12 months. Consideration could be given to allowing ASIO's current detention powers to sunset as scheduled in September, given that the Bill already proposes to repeal those powers without replacement.

²¹ Available from this Committee's website.

²² Available from https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report.

²³ Section 7A, *Independent National Security Legislation Monitor Act 2010*.

²⁴ For example, Independent National Security Legislation Monitor, 'Certain Matters Regarding the Impact of Amendments to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014', 2 May 2016. Available at: <https://www.inslm.gov.au/reviews-reports/certain-matters-regarding-impact-amendments-counter-terrorism-legislation-amendment>.

²⁵ For example, Independent National Security Legislation Monitor, 'The prosecution and sentencing of children for terrorism', 2 April 2019. Available at: <https://www.inslm.gov.au/reviews-reports/prosecution-and-sentencing-children-terrorism>.

²⁶ Section 8, *Independent National Security Legislation Monitor Act 2010*.

²⁷ PJCHR, *Human rights scrutiny report: Report 7 of 2020*, 17 June 2020, [2.60]-[2.69].

²⁸ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny digest 7 of 2020*, 10 June 2020, [1.1]-[1.53].



Thank you for considering our views on this important matter. If we can provide further detail, or to discuss anything in this submission, please do not hesitate to contact myself, [REDACTED] our Head of Policy [REDACTED] or [REDACTED] our Australian Social Policy and Advocacy Adviser [REDACTED]

Kind regards,



Paul Ronalds
CEO
Save the Children Australia

