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Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
CANBERRA ACT 2600

Dear Chair

On 11 November 2020, the Inspector-General of Intelligence and Security (IGIS) was invited to make a supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee)'s inquiry into the Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill).

The invitation from the Committee followed the public hearing the Committee held with ASIO on 30 October 2020 on the issue of 'the Attorney-General holding the responsibility to issue questioning warrants and the alternate proposal of a 'double lock' authorisation mechanism for the issuing of questioning warrants'. At that hearing, it was noted that the exercise of coercive powers by a number of other agencies, including the Inspector-General of Intelligence and Security, are not subject to a 'double lock' mechanism.

In my view, the powers available to the Inspector-General under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) are different in both legal and practical scope from ASIO's existing questioning framework and the amended framework that is proposed under the Bill.

The Inspector-General is an independent statutory office holder with responsibility for reviewing the activities of intelligence agencies for legality, propriety and compliance with human rights. ASIO is an intelligence agency with broad functions including obtaining, correlating, evaluating and communicating intelligence relevant to security.

The Inspector-General has powers to compel the provision of information and documents in support of his or her functions. The scope of the Inspector-General's powers, however, is limited to the Inspector-General's inquiry functions in section 8 of the IGIS Act. In practice, the class of persons who can assist the Inspector-General with an inquiry will generally be limited to persons who are or have been employed by, or have brought a complaint against, an intelligence agency. As such, the exercise of the Inspector-General's information gathering powers has significantly less potential to impinge upon the rights of individuals than ASIO's questioning warrant framework.

Notably, unlike the questioning framework in the Bill, there is no power in the IGIS Act for a person subject to the Inspector-General's information gathering powers to be apprehended or searched, or for their travel documents or other items to be seized. Nor are there any specific restrictions on a person's ability to obtain legal representation or to communicate with other persons about their involvement in an inquiry. Further, the maximum penalty for an individual's non-compliance with a requirement to provide information or documents to the Inspector-General is significantly lower than that for non-compliance with a questioning warrant.


Consistent with our office's previous submission to the Committee, I do not express a view on whether ASIO's questioning warrants should continue to be issued by a judicial issuing authority, which is a policy matter. The issuing of warrants by the Attorney-General without the approval of an external issuing authority, as proposed by the Bill, would be consistent with other existing warrants available to ASIO.¹

However, as noted previously by the former Inspector-General, the Hon Margaret Stone AO FAAL, the removal of the role of an independent judicial or quasi-judicial issuing authority departs from the trend towards increased requirements for external authorisation in other Five Eyes jurisdictions. I understand that intelligence agencies in other Five Eyes jurisdictions are required to obtain external authorisation (either judicial or another form) in relation to intrusive powers available to them.² To my knowledge, however, no other intelligence agency in a Five Eyes jurisdiction has coercive questioning powers comparable to those in the existing *Australian Security Intelligence Act 1979* or those proposed in the Bill.

To assist the Committee, I have attached a brief table comparing the IGIS Act powers and the ASIO questioning model proposed in the Bill.

I trust this information will assist the Committee. I would be happy to discuss any of these matters further with the Committee, should you require.

Yours sincerely



Jake Blight
Acting Inspector-General

November 2020

¹ However, I note that the removal of the external issuing authority differs from the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 currently before the Parliament to provide for international production orders relating to ASIO to be issued by a nominated member of the Security Division of the Administrative Appeals Tribunal, with the Attorney-General's consent.

² For example, the United Kingdom's *Investigatory Powers Act 2016* requires intrusive powers to be approved by the responsible Minister and an independent Judicial Commissioner. New Zealand's *Intelligence and Security Act 2017* requires intelligence warrants to be approved by the responsible Minister and an independent Commissioner of Intelligence Warrants. Canada's *Canadian Security Intelligence Service Act 1985* requires warrants to be approved by both a judge and the responsible Minister, and its *National Security Act 2017* requires certain other intelligence agency activities that have been authorised by a Minister to be approved by an independent Intelligence Commissioner before they can begin. In the United States, the *Foreign Intelligence Surveillance Act 1978* requires warrants to be issued by the Foreign Intelligence Surveillance Court, following approval by the Attorney-General.



	IGIS Act – section 18 – power to require information and documents	ASIO Amendment Bill 2020 – proposed questioning framework
Issued by	Inspector-General of Intelligence and Security.	Attorney-General, on application of Director-General of Security.
Purpose	To support the Inspector-General’s inquiry functions in section 8 of the IGIS Act. These functions relate to assisting Ministers and the Parliament in oversight of the legality and propriety of intelligence agency activities.	To support ASIO’s functions in section 17 of the ASIO Act, including to obtain, correlate and evaluate intelligence relevant to security, insofar as those functions relate to an ‘adult questioning matter’ (in relation to persons aged over 18) or a ‘minor questioning matter’ (in relation to persons aged between 14 and 18). Adult questioning matters concern espionage, politically motivated violence and acts of foreign interference. Minor questioning matters concern politically motivated violence.
Power to question minors?	Not expressly prohibited by the IGIS Act, but the Act was likely not intended to allow for compulsory questioning of children and it is unclear how common law would apply (the matter is very unlikely to arise in practice due to the nature of IGIS’s functions).	Yes. The Bill specifically allows direct questioning of minors aged 14 to 18 years in the presence of their representative, where a ‘minor questioning warrant’ is in place.
Post-charge questioning?	Not provided for in the IGIS Act. It is very likely that the Act would be read subject to common law restrictions on compulsory post-charge questioning.	Yes. Warrants may be issued for questioning post-charge or post-confiscation application if the Attorney-General is satisfied that ‘it is necessary, for the purposes of collecting the intelligence, for the warrant to be issued even though the person has been charged or the confiscation proceeding has commenced; or that charge or proceeding is imminent’.
Apprehension powers?	No.	Yes. Subject to conditions, where a person is subject to an immediate appearance requirement they may be apprehended by a police officer in order to be immediately brought before a prescribed authority for questioning.

Search, frisk search and seizure powers?	No.	Yes. A person who is apprehended may be subject to an ordinary or a frisk search by a police officer, and certain items may be seized. Persons entering questioning places may also be searched by a police officer for dangerous items or communications devices.
Entry to premises	Yes. However, this power is limited to places occupied by a Commonwealth agency, after notifying the agency head.	Yes. A police officer may enter any premises, using such force as is necessary and reasonable in the circumstances, for the purpose of searching for, or apprehending, a subject.
Use of force?	No.	Yes. A police officer may enter a premises, using such force as is necessary and reasonable in the circumstances, for the purpose of searching for, or apprehending, a subject. A police officer may also use such force as is necessary and reasonable in apprehending the subject, preventing their escape, or conducting an ordinary or frisk search.
Restrictions on contacting other persons?	No. However, given their sensitivity and classified nature, the Inspector-General's inquiries must be held in private and in such a manner as the Inspector-General thinks fit.	Yes. An apprehended person is not permitted to contact any person while they are apprehended, except where permitted under the legislation, the warrant or a direction from a prescribed authority.
Restrictions on contacting lawyers?	No. However, given their sensitivity and classified nature, the Inspector-General's inquiries must be held in private and in such a manner as the Inspector-General thinks fit.	Yes. A subject may contact a lawyer for the purpose of obtaining legal advice, but may be prevented from contacting a particular lawyer and may be questioned in the absence of a lawyer of their choice. The lawyer must not intervene in questioning and may be removed if unduly disruptive.
Restrictions on persons leaving Australia without permission?	No.	Yes. A person subject to a warrant, or warrant request, must not leave Australia without written permission.

Requirement to surrender travel documents?	No.	Yes. The Director-General of Security may require a person subject to a warrant or warrant request to surrender their passports and travel documents.
Offences for failing to appear or to give information or documents?	Yes. Offence with a maximum penalty of imprisonment for 6 months or a fine of 10 penalty units (equivalent to \$2220).	Yes. Offences with a maximum penalty of imprisonment for 5 years.
Specific offences for unauthorised disclosure of information?	No.	Yes. Specific offences with maximum penalties of imprisonment for 5 years for unauthorised disclosure of operational information or information relating to the warrant.
Power to communicate information obtained	Information obtained may be used to support the Inspector-General's findings and recommendations in reports made to the agency head and responsible Minister. Use of information in proceedings against the person (except proceedings related to compliance with the powers) is expressly prohibited.	Information obtained may be used and communicated (subject to any directions in relation to confidentiality made by a prescribed authority) to support the full range of ASIO's functions, including the furnishing of security assessments which may result in prescribed administrative action against a person (such as cancellation of a person's visa, passport or Australian citizenship). Subject to limitations in the Bill, derivative material may also be used in the prosecution of a subject.