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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600
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Dear Secretary,

Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Australian Security Intelligence Organisation Amendment Bill 2020 - Concerns Regarding the Provisions for Compulsory Questioning of Minors

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions in Australia. NLA thanks the Parliamentary Joint Committee on Intelligence and Security (the Committee) for the opportunity to provide feedback to the Review of the Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill).

NLA acknowledges that law enforcement and intelligence agencies require appropriate powers to respond effectively to national security threats and they should be properly supported to do so. However, we highlight that extraordinary and intrusive powers must be justified, with appropriate safeguards and subject to oversight.

NLA is particularly concerned with the coercive powers to apprehend and question children aged fourteen years and older. NLA does not support these powers as they are currently framed and does not support the extension of the regime to children aged between 14 and 16. It has not been demonstrated that the Australian Security Intelligence Organisation (ASIO) needs these questioning powers, existing powers are already available to state and federal police to question a child who themselves is suspected of involvement in terrorism offences. Of concern is that the proposed ASIO powers are not subject to adequate oversight or safeguards.

The current power is executed on the basis of a "*Minor Questioning Warrant"* which may be issued by the Attorney-General. The exercise of these powers should be subject to oversight by a member of the Judiciary, providing an appropriate check on the Executive. If ministerial approval is retained, there should be a mechanism for independent oversight of the application before the Warrant is issued. A public interest monitor may fulfil this role by providing an independent and impartial consideration of the application in lieu of judicial

consideration. For example, the Victorian Public Interest Monitor is notified and may make representations to a senior police officer considering the exercise of preventative detention powers under the *Terrorism (Community Protection) Act 2003* (Vic) (TCPA).

The Bill significantly expands the circumstances in which a Minor Questioning Warrant may be issued, beyond terrorism, to *politically motivated violence.* The breadth of the existing definition of *politically motivated violence* in the ASIO Act will enable the issuing of a warrant in relation to non-terrorism related matters, on the basis of peripheral involvement or involvement in matters of legitimate public debate and protest. This may have unintended outcomes, and does not clearly justify the use of coercive powers. We note that the Committee has previously limited its support for the questioning of minors to terrorism.

We are also concerned with the scope of provisions that infringe the privilege against self-incrimination; provisions that limit access to information that may allow a warrant to be challenged; and provisions regarding secrecy.

Should the Committee support ASIO's apprehension and questioning powers, particularly their extension to children, stronger safeguards and protective mechanisms must be put in place. Children subjected to such powers are highly vulnerable and could face significant and lasting consequences if their welfare and rights are not protected. Minimum safeguards for children should be: not allowing the apprehension of minors; strengthening the basis for personal searches; reducing the length of questioning periods; constraining the power to remove the lawyer or limit the lawyer's role in questioning; requiring a support person for the child where the child's parent or guardian or other non-lawyer representative is not present; and strengthening the consideration of their bests interests.

While the best interests of the child must be taken into account in issuing a warrant, this is only "to the extent that the matters are known". This limitation may have unintended consequences, such as creating an incentive to not make enquiries about whether the minor has been diagnosed with a mental health condition or has a disability. The best interests of the child should be given primacy, which may require a positive obligation on the agency seeking the warrant to examine the individual's characteristics.

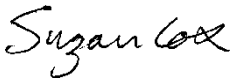
Notification to the relevant jurisdiction's Commissioner for Children and Young People (CCYP) and Ombudsman will further safeguard the appropriate treatment and care of children apprehended and questioned under these powers. For example, the Victorian TCPA requires the Victorian Ombudsman and Victorian CCYP to be notified when a person is detained under that Act, and gives the CCYP functions to monitor the treatment of a detained child and promote their interests, and provide advice to the Attorney-General, relevant ministers or the Chief Commissioner about a child's treatment while detained.

Notification to an oversight integrity body that has the power to monitor the execution of the Minor Questioning Warrants will provide accountability over the use of secret powers.

Finally, NLA highlights that the operational and practical implications of the powers have not been fully considered. Properly funded independent legal representation will play an essential role in upholding the rights of children and supporting their welfare. The Bill

requires that a lawyer be present for questioning of minors, but provides little detail regarding procedures for the appointment of legal representatives. Children can be apprehended at any time during the day or night. It is unclear whether they may then be held, immediately re-apprehended (or effectively detained) if there is a delay in appointing a legal representative. Establishing an after-hours legal service for young people would facilitate quick availability of a lawyer at any time of the day or night. Victoria Legal Aid is funded to provide such a services under the relevant Victorian scheme.

Yours sincerely,



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Director with the NLA Criminal Law Network
Director, Northern Territory Legal Aid Commission