

9 July 2020

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

By email: picis@aph.gov.au

Dear Chair

Inquiry into the Australian Security Intelligence Organisation Amendment Bill 2020

Thank you for inviting the Law Council of Australia to appear before the Committee on 10 July. In advance of that appearance, the Law Council would like to provide some additional information to the Committee about issuing authorities for questioning warrants.

The Law Council's submission (at pages 41-44 and recommendation 15) supports the adoption of a 'double lock' model of authorisation for ASIO's questioning warrants, modelled on the provisions of the *Investigatory Powers Act 2016* (UK) for electronic surveillance warrants for intelligence and law enforcement agencies.

In short, the Attorney-General would be responsible for making the primary decision on the issuing of a warrant, but the warrant would not take effect until a Judge of the Federal Court of Australia or a superior court of a State or Territory (who is appointed in their personal capacity) has reviewed and confirmed the issuing decision.

To assist the Committee's examination of this issue, I enclose a summary table outlining the relevant provisions of the IPA and the Law Council's proposed amendments to the Bill.

My colleagues and I look forward to appearing before the Committee tomorrow. In the meantime, please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or natasha.molt@lawcouncil.asn.au should you wish to discuss this matter.

Yours sincerely



Pauline Wright
President

Proposed ‘double-lock’ authorisation mechanism

The Law Council has recommended that the Bill is amended to include a ‘double lock’ authorisation mechanism for the issuing of questioning warrants (**QWs**), based on requirements of the *Investigatory Powers Act 2016* (UK) (**IPA**) for the authorisation of electronic surveillance and technical collection warrants (for example, telecommunications interception and metadata access). This table compares the key provisions of the IPA (illustratively using the provisions on telecommunications interception warrants) with the Law Council’s recommendation 15 (pages 41-44).

Element	Investigatory Powers Act 2016 (UK) (eg, ss 23-25: interception warrants)	Law Council recommendation for ‘double-lock’ authorisation of ASIO QWs (rec 15, pp. 41-44)
Power to issue (primary decision-maker).	Conferred on Secretary of State for Home Office on application of an ‘intercepting authority’. (That is, intelligence agencies and specified law enforcement agencies, including police): ss 18-19 .	Conferred on the Commonwealth Attorney-General, on a request made by the Director-General of Security.
‘Double-lock’ reviewing authority	Judicial Commissioner of the Investigatory Powers Commission (IPC). (That is, a Judge of the Supreme Court): ss 23 and 227 .	A Judge of the Federal Court or a State or Territory superior court, who is appointed in their personal capacity.
Applicable test for double lock review	A Judicial Commissioner must review the Secretary of State’s conclusions on the following matters (the issuing criteria for the warrant, per ss 20 and 2): <ul style="list-style-type: none"> whether the warrant is necessary on ‘relevant grounds’ (which include national security); and whether the conduct that would be authorised by the warrant is proportionate to what is sought to be achieved by that conduct. The Judicial Commissioner must apply the same principles as would be applied by a court on a judicial review application: ss 23(1)-(3) .	The reviewing judge must review the Attorney-General’s decision to issue the warrant, and consider whether the issuing decision was reasonably open on the facts and grounds placed before the Attorney-General. The reviewing judge must apply the same principles as would be applied by a court on an application for statutory judicial review under the <i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth). ¹ Note: this should be read with the Law Council’s recommendations 17-19 (issuing criteria should include necessity, proportionality and consideration of multiple powers and oppression)
Reasons for double-lock review decision	If a Judicial Commissioner does not approve the issuing of the warrant (that is, they do not uphold the issuing decision on their review) they must give the Secretary of State written reasons for the refusal: s 23(4) .	If the reviewing judge does not uphold the issuing of the warrant on their review, they must give written reasons to the Attorney-General if they refuse to confirm the issuing decision.
Review of double lock review decision	The Secretary of State may ask the Investigatory Powers Commissioner (a Supreme Court judge who is the head of the IPC) to reconsider an application that a Judicial Commissioner has refused: s 23(5) .	Not proposed. Australia has no equivalent body to the IPC. The decision of the reviewing judicial officer would be final, however, ASIO could make a new warrant request.
Urgent cases	The warrant takes effect when issued by the Secretary of State. The Secretary of State must inform the Judicial Commissioner of the issuing of the warrant. The Judicial Commissioner must decide whether to approve the issuing decision within three days. If the Judicial Commissioner refuses to approve the issuing decision, the warrant ceases to have effect: s 24 . The Judicial Commissioner may make directions requiring the destruction of material obtained under warrant, or impose conditions on its use or retention: s 25 .	The reviewing judge must complete a review of the issuing decision within three days (or another, shorter period of time). If they do not uphold the issuing of the warrant, the warrant is cancelled. The judge may order the destruction of the intelligence or impose conditions on its retention.

¹ The grounds of review are prescribed in ss 5(1) and 6(1) and cover decisions or conduct that are: a breach of the rules of natural justice; failure to observe legal procedures; absence of jurisdiction; decision not authorised by the enactment under which it was purportedly made; improper exercise of power (eg, irrelevant considerations, bad faith or unreasonableness); error of law; fraud; no evidence; or a decision contrary to law.

