



Law Council
OF AUSTRALIA

Review of ASIO's Questioning and Detention Powers

Parliamentary Joint Committee on Intelligence and Security

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
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- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee in the preparation of this submission.

Question on Notice

1. The Law Council of Australia attended a hearing of the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) *Review of ASIO's Questioning and Detention Powers* on 9 August 2017.
2. In response to questions from the Shadow Attorney-General, the Hon Mark Dreyfus QC MP, and the Hon Anthony Byrne MP, and evidence provided to the Committee by the Attorney-General's Department and the Australian Security Intelligence Organisation (**ASIO**), the Law Council has prepared this supplementary submission to further inform the Committee's consideration of the relevant powers.
3. The Shadow Attorney-General asked the following question at the hearing:

You've just raised the slightly limited nature of the use immunity provisions that we see in the ACIC model at the moment. The ASIO Act, as it stands, only has a prohibition on use following questioning. Do you think that, if some variant of the ACIC model is to be adopted for ASIO questioning, there needs to be a somewhat more refined set of provisions dealing with derivative use immunity or third-party immunity?

...

...

Just on that, if there were something that the Law Council felt might assist the committee as to this particular question on derivative use immunity, we'd be very appreciative.¹

4. The Hon Anthony Byrne MP asked the following question at the hearing:

Can I just invite you to contemplate what recommendations? I know you are saying that you wouldn't support detention, but could you contemplate a series of safeguards that you would suggest in the potential situation where detention was going to be used?²

5. The Law Council's answer to these questions are provided below. Additionally, this submission discusses proposals to:
 - broaden the scope of ASIO's questioning power;
 - questioning of minors;
 - rights of review; and
 - person search power.

¹ Evidence to the Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 9 August 2017, 5 (Mr Dreyfus).

² Ibid 7 (Mr Byrne).

Law Council answer to questions on notice

Derivative use immunity and ASIO's compulsory questioning power

6. The Law Council supports a review of the abrogation of self-incrimination in Commonwealth laws, as recommended by the Australian Law Reform Commission, which considers whether the abrogation in more than 40 Commonwealth laws has been sufficiently justified and what type of immunity is appropriate.³ The review could also consider whether, and in what circumstances, the compulsory examination of persons subject to charge, about the subject matter of the charge, and the publications of transcripts of examinations to prosecutors, is justified.⁴ Any abrogation of the privilege against self-incrimination in the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), including the immunity offered, should be part of this broader review.
7. In the absence of such a broad review, the Law Council provides the following comments.
8. Currently, the ASIO Act questioning warrant regime provides for a direct use immunity rather than a derivative use immunity. That is, information given to ASIO cannot be used as evidence in subsequent legal proceedings, but may be used to obtain further evidence which may be used. A derivative use immunity would not allow the information to be used to obtain further evidence.
9. Generally, the rationale for the application of a derivative use immunity is the recognition that the abrogation of the privilege against self-incrimination requires protection of personal freedom, privacy, dignity and the prevention of the abuse of power.⁵
10. The Law Council considers that the exercise of coercive information gathering powers should be regarded as exceptional because of the intrusive impact on individual rights, particularly where the privilege against self-incrimination is abrogated as is the case under ASIO's compulsory questioning power regime. For this reason, the Law Council generally recommends that limits be placed on the use and derivative use that can be made of information or material seized under coercive powers. In this respect, subsection 128(7) of the *Evidence Act 1995* (Cth) for example provides that in any proceeding in an Australian court: evidence given by a person in respect of which a certificate under the section is given; and evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence; cannot be used against the person (other than to a criminal proceeding in respect of the falsity of the evidence).
11. However, the Law Council acknowledges that the first independent National Security Legislation Monitor (**INSLM**), Bret Walker SC, concluded that the questioning powers in the ASIO Act, including the provision of the use immunity rather than a derivative use immunity, were appropriate notwithstanding the abolition of the privilege against self-incrimination.⁶ This assessment was provided after a consideration of case law

³ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (March 2016) [11.7].

⁴ Ibid.

⁵ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (October 2009) 444.

⁶ INSLM, *Annual Report* (2012) 91-92.

that suggested a different view from that reached by the INSLM and on the basis of the following:

In reaching the tentative assessment that Art 14(3)(g) of ICCPR is not breached by the lack of a derivative use immunity, some weight has been given to the practical difficulty of ascertaining when derivative use can be seen to have been made of compelled answers. If derivative use were prohibited, as some very respectable views insist it should be, an important if adjectival issue in trials of terrorist offences would frequently arise that does not presently concern the courts. That issue would involve tracing the arguable consequences of investigators knowing the content of a suspect's compelled answers into all the later ramifications of the investigation. If the answers produced a better and more intelligent focus on a previously neglected area for inquiry, is everything later discovered in that area the illicit product of derivative use? Does the forced inculcation by one suspect of another render the later voluntary confession of that other suspect inadmissible against the first, as the illicit product of derivative use of him or her being designated as a source of such evidence by the first suspect, now the accused?⁷

12. However, the first INSLM recommended that the questioning warrant provisions should be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial.⁸
13. The second INSLM, the Hon Roger Gyles AO QC, noted that:

*There is no so-called 'derivative immunity'. That seems reasonable **as long as the information is kept at the intelligence level**. ASIO collects intelligence and any information obtained assists that process. A person does not need to be involved in any terrorist activity to be the subject of a warrant. However, information obtained, when added to other information, may reveal terrorist activity by the subject or some other person or persons.⁹ [emphasis added]*

14. The Law Council supports the above views of the first INSLM and second INSLM for reasons outlined in their reports. If a direct use immunity only is provided, then strict limitations on disclosure provisions are required otherwise the purpose of keeping the information at an intelligence level would be defeated.
15. The Law Council would be pleased to assist in the development of draft legislation pertaining to an appropriate model for ASIO's questioning and detention powers, including appropriate immunity provisions.

Safeguards for detention

16. The Law Council considers that the tests, processes and safeguards for detention must be transparently clear so that those that administer and are subject to them are aware of their legal rights and obligations. This also assists oversight to ensure that the application of the powers are justified and subject to appropriate scrutiny and oversight.

⁷ Ibid 87-89.

⁸ Ibid 96, recommendation IV/7.

⁹ INSLM, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) [9.43].

Judicial oversight

17. The Law Council reiterates its longstanding position that ASIO's questioning and detention power should be repealed on the basis that it has not been demonstrated to be necessary or proportionate (as also found by the first two INSLMs).
18. However, should the Committee determine that it is necessary for ASIO to retain a detention power contrary to the Law Council's primary position, the Law Council considers it appropriate that a superior court judge authorise the issuing of the warrant or examination summons. Deprivation of liberty is a serious matter and the power to detain someone in the absence of that person being suspected of committing an offence is an extraordinary one. Judicial oversight is thus an essential and important safeguard. In terms of urgency, report back provisions may be considered as an option. That is to say, an urgent warrant could be obtained and then within 24 hours or 48 hours there could be a requirement to report back.
19. In this context, the Law Council notes that section 31 of the *Australian Crime Commission Act 2002* (Cth) (**the ACC Act**) allows a judge of the Federal Court or of the Supreme Court of a State or Territory to issue a warrant for arrest of a witness for example where a person in relation to whom a summons has been issued is likely to abscond or is otherwise likely to attempt to evade a summons. The warrant is executed by a member of the Australian Federal Police or the Police Force of a State or Territory or by any person to whom it is addressed.
20. A similar provision (appropriately adapted) could be considered in the ASIO compulsory questioning framework, should a detention power remain.

Access to lawyers

21. An examinee should have a general right to independent legal representation under any revised ASIO questioning and detention power regime. The Law Council considers that any person compelled to answer questions pursuant to a summons or warrant must be entitled to access an independent lawyer at all stages of the questioning process without that communication being monitored or otherwise restricted. Such access is necessary to ensure the person subject to the summons can exercise their right to challenge the legality of the detention, the conditions of detention and any ill-treatment occurring during the questioning and/or detention process. All communications between a lawyer and his or client should be recognised as confidential and adequate facilities should be provided to ensure the confidentiality of communications between lawyer and client.
22. Preventing contact with a particular lawyer should only occur in a very limited prescribed set of circumstances to ensure that procedural fairness and a witnesses' right to choose their legal representative is not unduly eroded. The prescribed set of circumstances should include where:
 - The lawyer is subject to the security intelligence investigation in question or an associated security intelligence investigation;
 - The Court (in the case of a detention power) or the examiner (in the case of the a questioning power) has reasonable grounds to suspect that:
 - The lawyer is working on behalf of a foreign power or an entity with intent prejudicial to Australia's security; or

- There is a likely risk that the lawyer will advise other individuals of interest; or
- There is a likely risk that a record or thing that the person may be requested in accordance with the summons to produce may be destroyed, damaged or altered.

Additional safeguards

23. In addition, the below safeguards should be in place should a detention power be retained. These safeguards may not be exhaustive.

- Time to be calculated from arrival or arrest, whichever is earlier.
- The Court must be satisfied that there are reasonable grounds for believing that detention is necessary for example to prevent the person absconding or tipping-off others.
- Court must be satisfied that there are reasonable grounds for believing that further detention is justified.
- A maximum limit must be placed on detention and renewed periods of detention. The appropriate maximum limit should be determined after close consultation with the INSLM and Inspector-General of Intelligence and Security (IGIS).
- As soon as the grounds for detention of a person no longer exist, they must be immediately released.
- Detainees must be treated in accordance with Guidelines which are overseen by the IGIS. These Guidelines should be established to ensure Australia's compliance with international obligations, including Australia's pending ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.
- All matters must be recorded in relation to the detention.
- There must be periodic review of the detention of the person to ensure that the grounds for detention remain.
- The person must be informed that they have the right to inform someone of the detention such as a solicitor and to read the relevant codes of practice which apply.
- If a person is a juvenile (a person under the age of 18), then the appropriate adult such as a parent or guardian must be informed of the grounds of the juvenile's detention and whereabouts, and ask the adult to come to the place of detention and see the person. This should also apply for persons with a cognitive disability. Additional safeguards should be provided for children (as outlined below).
- Should there be security concerns with respect to a particular lawyer, parent, guardian or informed person, provision should be made to have a court appointed person present and available to the person under detention and another lawyer of the person's choosing should be made available.

- Safeguards should be developed for when a detainee is an Aboriginal person or a Torres Strait Islander after close consultation with Aboriginal and Torres Strait Islander stakeholders.
- Detainees must be permitted to sit during questioning and adequate breaks must be given for meals, refreshments and unbroken sleep.
- The IGIS should retain the ability to observe the exercise of ASIO's questioning and detention powers and appropriate reporting to the IGIS of the exercise of those powers should be required.
- Appropriate public reporting to the Parliament should occur on the number of cases in which the detention power was exercised and the period of detention.

Additional matters

Broadening the scope of questioning

24. ASIO has proposed that its questioning power, which is currently limited to questioning in relation to terrorism offences, be amended to allow questioning across ASIO's full security remit (including espionage, acts of foreign interference, sabotage, promotion of communal violence, politically motivated violence, attacks on Australia's defence system, etc.).¹⁰
25. While the Law Council would not oppose an expansion of compulsory questioning beyond the current 'terrorism offence' requirement to other matters raised in section 4 of the ASIO Act, it would not support a weakening of the threshold test. That is, the threshold for the issuance of a summons should not be 'is reasonable in the circumstances'¹¹ as per the Australian Criminal Intelligence Commission (**ACIC**) model. Rather, the threshold test should as a minimum be that the issuance of the summons 'will substantially assist the collection of intelligence that is important in relation to 'security'' as defined in section 4 of the ASIO Act.¹² An expansion to matters of security would appear to have potential utility in assisting ASIO to address areas of potential significant concern for Australia such as countering espionage and foreign interference. The Law Council would support an exemption from prosecution for those that cooperate in the questioning process.

Questioning of minors

26. ASIO has requested that the minimum age of a person subject to ASIO questioning be lowered from 16 years to 14 years. This request must also be considered in light of ASIO's request to retain a detention power.
27. Courts and Government have a special interest in ensuring the welfare of children. Persons aged 14 are children and as such they are owed a duty over and above that of adult persons. Any amendments to the lowering of the age threshold must adequately protect the rights of the child under the United Nations *Convention on the*

¹⁰ ASIO, Submission No 8 to the Joint Standing Committee on Intelligence and Security, Parliament of Australia, *Review of ASIO's questioning and detention powers*, 9 May 2017, 12-13.

¹¹ *ACC Act 2002* (Cth) s 28(1)(c).

¹² The current criterion for requesting and issuing a questioning warrant requires ASIO to show that 'the warrant... will substantially assist the collection of intelligence that is important in relation to a terrorism offence' – ASIO Act ss 34D(4)(a), 34E(1)(b), 34F(4)(a), 34G(1)(b).

Rights of the Child (CRC),¹³ which Australia has ratified.¹⁴ This means Australia has a duty to ensure children enjoy the rights set out in the CRC.

28. If the need for the regime to be applied to questioning of persons 14 years or older (as opposed to the current 16 years) is clearly demonstrated and accepted by the Committee, then additional safeguards should be introduced.
29. The child's best interests should be a primary consideration in the Attorney-General's determination of whether to issue a questioning summons or the Court's authorisation of a detention power.¹⁵ The concept of the 'best interests of the child' should be a primary consideration and the content of the expression (suited or modified to this context) should be adequately provided.
30. Where questioning may not be in the best interests of the child, the Attorney-General/Court should be required to be satisfied that the order is necessary for one of the limited purposes, such as, substantially assisting in the collection of intelligence relevant to security. The person's age must be given to the Attorney or the Court.
31. A child must have access to parents/guardians and their own independent legal representative properly funded by the Government given the extraordinary nature of the powers sought to be invoked against the child.

Rights of review

32. There is currently no statutory right to judicial review of an administrative decision or conduct for the purpose of making an administrative decision under the ASIO Act, which is in need of review. Such decisions are excluded from the operation of Schedule 1 of the *Administrative Decisions Review Act 1977* (Cth) (**ADJR Act**).
33. Administrative review is only available through the original jurisdiction of the Federal Court and High Court under subsection 19(2) and 23 of the *Federal Court of Australia Act 1976* (Cth) and paragraph 75(v) of the Commonwealth Constitution and section 39(B) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).
34. A note to section 34J of the ASIO Act sign-posts the options for judicial review:

*For example, the person may be able to apply to the Federal Court of Australia under subsection 39B(1) of the Judiciary Act 1903, or the High Court of Australia under paragraph 75(v) of the Constitution, for a remedy in relation to the warrant or the treatment of the person in connection with the warrant.*¹⁶

35. In principle it seems anomalous that judicial review under the ADJR Act is excluded in relation to decisions which could at least *prima facie* be the subject of applications to the High Court under section 75(v) of the Australian *Constitution* or to the Federal Court under section 39B of the Judiciary Act.

¹³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁴ Australia ratified the CRC on 17 December 1990.

¹⁵ Note that currently a questioning warrant can only be issued against a person aged 16 to 18 if the Attorney-General (not the Issuing authority) 'is satisfied on reasonable grounds that:... it is likely the person will commit, is committing or has committed a terrorism offence' – ASIO Act ss 34ZE(4)(a) and (b).

¹⁶ This note was inserted following a recommendation by the Joint Committee on ASIO, ASIS & DSD, Parliament of Australia, *ASIO's Questioning and Detention Powers* (November 2005) (recommendation 8).

36. However, the issue is best considered as part of an overall review of the exemption of ASIO decisions, as suggested by the former Administrative Review Council. In 2012 the Administrative Review Council recommended that the exemption from the ADJR Act of all decisions under the ASIO Act in paragraph (d) of Schedule 1 of the ADJR Act should be reviewed.¹⁷
37. The Law Council also notes that the ACIC is also accountable to the courts for the lawful and appropriate use of its coercive powers. It is only decisions under section 34B (Federal Court or Supreme Court to deal with contempt) or 34D (conduct of contempt proceedings) of the ACC Act which are excluded from review.¹⁸ However, reasons for a decision under the ACC Act may not be obtained where they are in connection with intelligence operations or investigations of State offences that have a federal aspect.¹⁹
38. Monitoring of ASIO's functions by the IGIS is also critical.

Person search power:

39. ASIO has proposed that law enforcement officers be able to search the body of a person for dangerous items upon that person's presentation at the location of ASIO questioning.²⁰
40. The Law Council would not oppose affording police the power to search the subject of questioning when the subject present at the premises where questioning is to occur, provided that there is a demonstrated need for such a power and the power is subject to appropriate limitations and safeguards.
41. If the Committee is satisfied as to the need for such a power, the Law Council suggests that the power to search should be triggered where there are reasonable grounds to suspect that the subject of questioning has an item on their person that may present a danger to another person or be prejudicial to security. Such a threshold would be consistent for example with section 3ZF of the Crimes Act (power to search). A power to search should also be subject to oversight by the IGIS and reporting obligations.

¹⁷ Administrative Review Council, *Federal Judicial Review in Australia* (September 2012) 206, recommendation B6.

¹⁸ ADJR Act Schedule 1 (wa).

¹⁹ Ibid Schedule 2 (ea).

²⁰ ASIO, Submission No 8.4 to the Joint Standing Committee on Intelligence and Security, Parliament of Australia, *Review of ASIO's questioning and detention powers*, 8 June 2017, 1-2.